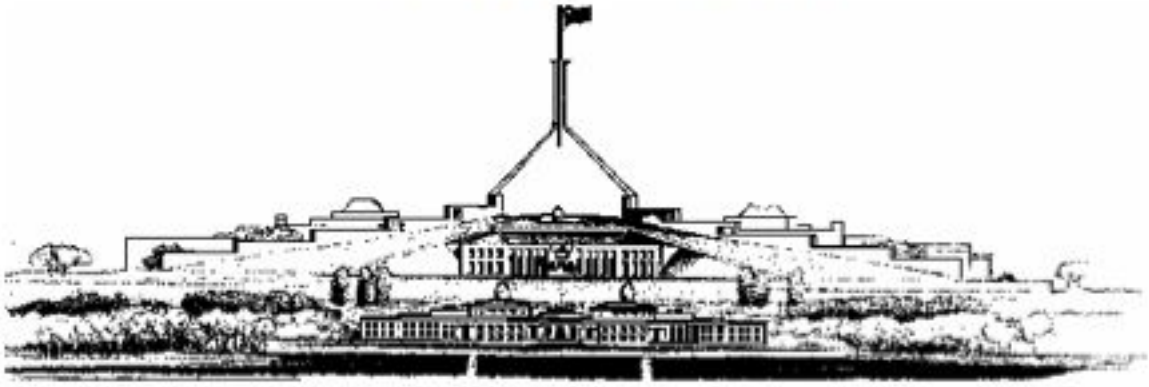
COMMONWEALTH OF AUSTRALIA

PARLIAMENTARY DEBATES



THE SENATE

BILLS

Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010

In Committee

SPEECH

Thursday, 18 August 2011

BY AUTHORITY OF THE SENATE

SPEECH

Date	Thursday, 18 August 2011	**Source**	Senate
Page	4797	**Proof**	No
Questioner		**Responder**	
Speaker	Brandis, Sen George	**Question No.**	

Senator BRANDIS (Queensland—Deputy Leader of the Opposition in the Senate) (11:15): On behalf of the opposition, I indicate that the opposition agrees with the amendment to exclude Norfolk Island from the operation of the bill for reasons that I outlined in my speech on the second reading. We do not agree with the extension of the operation of the bill to the Northern Territory because we do not agree with the principle of the bill at all for the reasons I explained.

Question agreed to.

Senator BRANDIS: We have opposition amendments that are about to be circulated, and I apologise that they have not been circulated already, but I will just foreshadow what they are. The effect of the amendments would be to add the words, at the end of the principal operative provision of the bill, 'if the enactment is inconsistent with a law of the Commonwealth' and to add the further sentence, 'Without limiting the application of this subsection, the Assembly may not enact any law that is inconsistent with the Marriage Act 1961.'

The purpose of the opposition's committee stage amendments is to do two things. First of all, it corrects an anomaly that would appear in the bill were it to be carried in its current form—that is, as honourable senators should know, under the combined effects of sections 51 and 109 of the Constitution the states may not legislate in areas reserved for the legislative power of the Commonwealth if there is an inconsistency between a Commonwealth law passed under one of the section 51 heads of power and a state law. That inconsistency can arise in one of two principal ways. There may be a direct inconsistency—for example, if there were to be a Commonwealth law passed under a section 51 head of power which provided to a certain effect and a state law on the same topic which provided to the opposite effect. As honourable senators should know, that is the plainest case of inconsistency under section 109 of the Constitution, and as a result of the operation of that provision the state law would be struck down.

But very commonly a state law is found to be inconsistent with a Commonwealth law not because of a direct inconsistency but because the Commonwealth law—to use the phrase that the High Court uses—covers the field. So if, for example, the Commonwealth were to pass a law under a section 51 head of power which was intended to be comprehensive in relation to that particular topic, then an inconsistent state law, or a state law which sought to regulate the same topic in a manner at variance from the manner in which the Commonwealth law sought to regulate the topic, would also be struck down under section 109 because the Commonwealth law would be considered to cover the field. We in the coalition consider that the Marriage Act is such a law, although I acknowledge that that proposition is controversial and that some, including Professor George Williams, have opined that that is not the case, particularly in relation to same-sex marriage.

If this bill were to be passed in its existing form, without the qualification the opposition seeks to introduce, we would have the unusual situation that the territories would have broader legislative powers than the states because section 109 of the Constitution applies to state laws, not to territory laws. So the device of this amendment is to apply the same test to territory laws as section 109 of the Constitution imposes upon state laws. There is a controversy about the reach of the Marriage Act 1961 and, in particular, the reach of the 2004 amendments to the Marriage Act introduced by the Howard government—with the support at the time of the Labor Party, I might say—which introduced section 88EA into the Marriage Act which prohibited same-sex marriage. The qualifying words of the opposition's amendments, which are really inserted out of abundant caution, are to make it perfectly clear that an inconsistency between a territory law in relation to marriage and the Marriage Act will result in the Marriage Act prevailing. The better view, in my respectful opinion, is, as I said earlier, that the Commonwealth Marriage Act covers the field in relation to marriage, and that is the view of most constitutional lawyers. There is a minority view that it does not. In order to deal with the possibility—argued for, for example, by Professor George Williams—that the Marriage Act does not effectively prohibit same-sex marriage, these additional words are introduced to ensure that no territory law may be inconsistent with any provision of the

Marriage Act, including in particular, though it is not set out specifically, section 88EA. That is the reason for the opposition amendments.