Sexual and Violent Offences Legislation Amendment Bill 2008

Further to the comments made by Mr Ken Archer, of Counsel, on 14 August 2008 on the legality of provisions in the *Sexual and Violent Offences Legislation Amendment Bill 2008* (the Bill), CLA has sought further advice from its lawyer members on the interaction between the provisions of the Bill and the *Evidence Act 1995* (Cth) (hereafter the EA). CLA provides the following legal advice:

1. A number of the provisions of the Bill are directly inconsistent with provisions in the EA. For example, the Bill will create a new section 40S to the *Evidence (Miscellaneous Provisions) Act 1991* which will allow pre-recorded evidence to be presented to the Court as a victim's evidence in chief at a hearing. This is directly inconsistent with the EA. Under the EA, the pre-recorded evidence would be "first hand hearsay" within the meaning of 62, and inadmissible under section 66 unless the person takes the stand.

2. CLA understands that the Government is of the view that, in light of ss 8(4) of the EA, the ACT is free to make any evidence laws it sees fit.

3. ss 4(1) of the EA provides that:

> (1) This Act applies in relation to all proceedings in a federal court or an ACT court, including proceedings that:
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> (a) relate to bail; or
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> (b) are interlocutory proceedings or proceedings of a similar kind; or
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> (c) are heard in chambers; or
>
> (d) subject to subsection (2), relate to sentencing.

4. ss 8(4) of the EA provides that:

> (4) Until the day fixed by Proclamation under subsection 4(6), this Act does not affect the operation of the following:
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> (a) provisions of the Evidence Act 1971 of the Australian Capital Territory that are specified in the regulations;
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> (b) any other Act of the Australian Capital Territory;
>
> (c) an Ordinance of the Australian Capital Territory;
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> (d) an Imperial Act or State Act in force in the Australian Capital Territory;
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> (e) regulations that:
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> (i) are made under an Act or Ordinance of the Australian Capital Territory or under an Imperial Act or State Act in force in the Australian Capital Territory; and
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> (ii) are in force on the commencement of this section.

5. On its face, ss 8(4) appears to provide that a Territory law is not effected by the operation of the EA. The Government argues that as the amendments to the *Evidence (Miscellaneous Provisions) Act 1991* are a Territory law, they are not affected by the EA, and are hence entirely valid an enforceable.

6. With respect, this view is wrong, and is at odds with High Court jurisprudence on provisions similar to ss 8(4) of the EA contained in other Commonwealth legislation.

7. Section 109 of the Australian Constitution provides that:

> When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

8. Similarly, section 28 of the *Australian Capital Territory (Self-Government) Act 1988* provides that:

> (1) A provision of an enactment has no effect to the extent that it is inconsistent with a law defined by subsection (2), but such a provision shall be taken to be consistent with such a law to the extent that it is capable of operating concurrently with that law.
>
> (2) In this section:
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> ***law*** means:
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> (a) a law in force in the Territory (other than an enactment or a subordinate law); or
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> (b) an order or determination, or any other instrument of a legislative character, made under a law falling within paragraph (a).

9. As a preliminary matter, it is first necessary to ascertain whether the Commonwealth intended to "cover the field" in terms of evidence law that applies in the Territory. ss4(1) clearly suggests that it has. We think it can be fairly surmised that in enacting ss 8(4), the Commonwealth evinced an intention to "cover the field" in terms of the evidence law which could apply in the Territory. Connolly J reached the same conclusion in *Simonfi v Fimmel* [1999] ACTSC 131, when he observed that:

> It seems to me that it must follow from this that the Commonwealth has evinced an intention, to borrow terminology more commonly associated with the test for inconsistency under s 109 of the Constitution, to cover the field …

10. Relevant to this advice is ss 75(1) of the *Trade Practices Act 1974* (Cth), which provides that:

> (1) Except as provided by subsection (2), this Part is not intended to exclude or limit the concurrent operation of any law of a State or Territory.

11. ss75(1) is expressed in very similar terms to ss8(4) of the EA, and appears, on its face, to be preserving the operation of all State and Territory laws.

12. The meaning of ss75(1) was considered by the High Court in *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation* (1977) 137 CLR 545. The Court discussed the ways in which a state law may be inconsistent with a Commonwealth law under section 109 of the Constitution. The Court observed that a State or Territory law may be inconsistent because it is impossible to reconcile the two laws; i.e. to follow one would be a breach of the other, or to give effect to one law would mean that the other would be meaningless, or its purpose would not be given effect to.

13. The Court also observed that a State or Territory law would be incompatible because it deals with an issue that has been "covered" by the Commonwealth. In other words, the

Commonwealth has evinced an intention to "cover the field", and the State or Territory law falls within that field.

14. In the second case, there need not be any direct contradiction between the two enactments for them to nonetheless be inconsistent.

15. In that case, Mason J observed that:

> a Commonwealth law may provide that it is not intended to make exhaustive or exclusive provision with respect to the subject with which it deals, thereby enabling State laws, not inconsistent with Commonwealth law, to have an operation.

He went on to observe that:

> It is of course by now well established that a provision in a Commonwealth statute evincing an intention that the statute is not intended to cover the field cannot avoid or eliminate a case of direct inconsistency or collision, of the kind which arises, for example, when Commonwealth and State laws make contradictory provision upon the same topic, making it impossible for both laws to be obeyed

16. Applying these principles to ss 75(1) (which, as mentioned above, is almost identical to ss8(4) of the EA), the Court held that:

> It is against this background of settled constitutional interpretation that s. 75 is to be construed. In the light of what has already been said, the terms of s. 75 (1) are open to the objection that they refer to the concurrent operation of State laws; they do not speak of the extent of the intended operation of the Commonwealth law. None the less, there is to be gathered from the sub-section a very clear expression of intention that the Trade Practices Act is not an exhaustive enactment on the topics with which it deals and that it is not intended to operate to the exclusion of State laws on those topics. **As such it does <u>not</u> avoid any instance of direct inconsistency which may occur between the Trade Practices Act and the two South Australian Acts**, but in accordance with all that I have said, it eliminates any suggestion of inconsistency otherwise arising. (at p564)

17. As alluded to by Blackshields and Williams observe, the Court's stipulation that the Commonwealth "cannot avoid or eliminate a case of direct inconsistency" means that in a case of direct inconsistency (such as occurs here), s 109 of the Constitution will operate of its own force, and no statutory assertion to the contrary can prevent it from doing so. (see Blackshields and Williams, *Australian Constitutional Law and Theory: Commentary and Materials,* Federation Press, 2002, p 390.)

18. Put differently, we see the Court in *R v Credit Tribunal* as saying that the Commonwealth Parliament, having expressed a general intention to cover the field in an area of law, can 'qualify' that intention, essentially stating that it only intends to cover the field to the extent that it is not interfering with the enactment of a State or Territory.

In other words, the field is not covered to the extent that a Commonwealth and State or Territory law can stand 'side by side'. However, that said, no expression of intent by the Commonwealth Parliament to limit the extent to which has covered the field can prevent a provision being found inconsistent on the basis that it is directly inconsistent with a Commonwealth provision.

19. On the authorities we have seen, it would appear that *R v Credit Tribunal* remains good law, and the principles set out in that case have not been altered in subsequent cases by the High Court. The High Court observed that same doctrine of inconsistency that applies between a Commonwealth and State laws also applies between a Commonwealth and Territory law: see *University of Wollongong v Metwally* (1984) 158 CLR 447; *Webster v McIntosh* (1980) 32 ALR 603.

20. In light of these principles on inconsistency discussed above, and given that that Commonwealth has "covered the field" of ACT evidence law, it is clear that, without ss 8(4), any law passed by the ACT Legislative Assembly would be found inconsistent with the EA on the basis that it is a law in a field which the Commonwealth has covered.

21. However, through the enactment of ss 8(4), the Commonwealth has qualified the extent to which it has intended to cover the field of evidence law in the ACT. It provides that the EA is not exhaustive. It expresses an intention that a Territory evidence law is not to be found inconsistent on the basis that it is "in the field" of evidence law which the Commonwealth has covered, and that provisions in the EA and ACT laws dealing with evidence can stand 'side by side'. But as explained in *R v Credit Tribunal*, once having covered the field, even though it may be limiting the extent to which that field is covered, the Commonwealth can only legislate to remove inconsistencies which are not directly inconsistent. ss 8(4) does not, and cannot, save provisions which are directly inconsistent with the EA.

22. As such, we think that it is arguable that the following provisions in the Bill which will amend the *Evidence (Miscellaneous Provisions) Act 1991* will be found to be invalid on the basis that they directly contradict provisions in the EA:
    - New section 40F;
    - New section 40J;
    - New section 40Q;
    - New Section 40S;
    - New Section 40T;
    - New Section 40V

23. Similarly, the amendments to section 90AA of the *Magistrates Court Act 1930* maybe found invalid on the basis of direct inconsistency with the EA.

Civil Liberties Australia

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