SUBMISSION TO SENATE COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

REFERENCE: THE AUSTRALIAN CAPITAL TERRITORY (SELF-GOVERNMENT) AMENDMENT (DISALLOWANCE AND AMENDMENT POWER OF THE COMMONWEALTH) BILL 2010

I. Introduction

The submission is provided in response to an invitation received from the Senate Legal and Constitutional Affairs Committee to lodge a submission in relation to its reference to inquire and report into the *Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill* 2010 (Cth) ('the Self-Government Amendment Bill'). The Bill was introduced as a private Senator's Bill by the Leader of the Australian Greens Party, Senator Bob Brown. The Bill seeks to amend the *Australian Capital Territory (Self-Government) Act 1988* in order to repeal the provision which enables the Governor-General to disallow or recommend amendments to any Act made by the Australian Capital Territory Legislative Assembly. [1] Senator Brown has given notice of further amendments which would have the effect of making make similar changes to the *Northern Territory (Self-Government) Act 1978* and the *Norfolk Island Act 1979.* The stated object of the Bill and the amendments is to give exclusive legislative authority for the three territories to their local legislatures.[2]

2. My expertise in this area is derived from my role as a constitutional consultant and my former role as a university lecturer in constitutional law. I have had a long standing interest in the arrangements for self – government in the Australian Capital Territory which culminated in the enactment of the *Australian Capital Territory Self-Government Act* 1988 (Cth) ('the Self-Government Act'). [3]

3. In this submission I wish to:

(1) address the legal and constitutional implications of the Self-Government Amendment Bill; and

(2) express my personal views about the necessity for and desirability of the Federal Parliament enacting the same Bill. Although those views are expressed only in my capacity as a private citizen, they are informed by the constitutional and legal implications referred to above in sub-para 3(1).

II. Summary

4. The contents of this submission may be summarized as follows.

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[1] Clause 3.
[2] Clause 4.

[3] "The Arrangements for Self-government for the Australian Capital Territory: A Partial Road to Republicanism in the Seat of Government" (1992) 3 *Public Law Review* 5.

(a) In my view that the Federal Parliament is ultimately responsible for the welfare and government of the Territories including of course the Territory which contains the Seat of Government. But in discharging that responsibility the Federal Parliament should also, in my view, recognize, so far as is possible and consistent with the same responsibility, the importance of according to people who live in the Territories the same civil and political rights as are enjoyed by the people who live in the States. (See paras 7 - 9.)

(b) Ordinarily it is accepted that it would be contrary to the principles of representative government to concede to Ministers the powers to disallow or suspend the operation of laws enacted by the elected representatives of the people. (see para 11)

(c) The issue posed by the Self-Government Amendment Bill is whether the subordinate relationship enjoyed by the legislatures of the self-governing Territories such as the ACT justifies the continued operation of the unlimited power of the Commonwealth Government to disallow the operation of Territory legislation. In particular is such a power necessary to enable the Federal Parliament to discharge its ultimate responsibility to provide for the government and welfare of Commonwealth Territories? (See paras 10 and 12.)

(e) A number of points are made regarding the effect of removing the disallowance power on the ability of the Federal Parliament to discharge its responsibility for providing for the government and welfare of the ACT (see para 16).

(f) In particular the removal of the disallowance power would not affect the unlimited power of the Federal Parliament to override Territory legislation or the inability of Territory legislatures to pass laws that are directly inconsistent with legislation passed by the Federal Parliament. (See paras 16 and 17.)

(g) A case in point regarding the inability to enact inconsistent legislation is the inability of a Territory legislature to pass a law which is directly inconsistent with the Federal *Marriage Act* 1961 (Cth) (See sub-par 16 (*fourth* point).)

(h)The voting strength of the Greens Australia party to either oppose or support the enactment of any overriding legislation in the Senate will not be any greater or weaker after 1 July 2011 than the voting strength it possess to support a motion in either House to disallow the instrument of the disallowance of a Territory law. (See para 16 (*sixth* point).)

(i) There are additional restrictions on the legislative authority of the ACT Legislative Assembly which, in my view, almost entirely remove the need for prompt action to protect Commonwealth interests where the enactment of overriding Federal Legislation would otherwise be time consuming and unsatisfactory. (See para 18.)

(j) However if it was thought that there was still a need for such prompt action in regard to the potential application or effect of ACT laws on the other arms of the national government such as the High Court and public statutory authorities, this could be prevented by the Federal Parliament imposing additional restrictions on Territory legislative power which were narrowly targeted to that purpose. (See para 19)

(k)It may be thought by some that the solution to the difficulties involved with the adoption of the solution mentioned in the preceding sub-paragraph may well be to retain the power of the Commonwealth Government to disallow Territory laws and continue to rely on the power of either House of the Federal Parliament to disallow the disallowance of Territory law as a safeguard against any abuse. (See para 20)

(l) There may also be merit in considering if the disallowance power is removed whether the inability of the ACT Legislative Assembly to pass laws that are *directly* inconsistent with Federal legislation should be widened to encompass laws that are *indirectly* inconsistent with Federal legislation as is the case with State legislation under s 109. (See para 21.)

(m) The personal view I have formed as a private citizen is that subject to certain qualifications and having regard to the legal and constitutional considerations outlined in this submission, the continued operation of the disallowance power is both unnecessary and undesirable in relation to legislation enacted by the ACT Legislative Assembly. The qualifications to that view are outlined in sub-paras (i), (j) and (k). (See paras 23 and 24.)

(n)For the reason given in para 22, I have refrained from considering whether the continued operation of the disallowance power in the Northern Territory and Norfolk Island is unnecessary or undesirable. (See paras 22 and 25.)

(o)If the Self-Government Amendment Bill is to be passed it would be advisable for the terms of cl 4(b) of the Bill to be modified to take account of this point made in n 23 of this submission in order to avoid any unnecessary doubt about the continued operation of the power of the Governor-General in Council to make Ordinances on matters excluded from the authority of the ACT Legislative Assembly. (See para 18 n 23)

III. Background

5. If enacted, the Self-Government Amendment Bill would remove the power of the Commonwealth Government to disallow legislation enacted by the Australian Capital Territory Legislative Assembly. That power is contained in s 35 of the ACT Self-Government Act which provides as follows:

“Disallowance of enactments

(1) In this section:

"enactment" includes a part of an enactment.

(2) Subject to this section, the Governor-General may, by legislative instrument, disallow an enactment within 6 months after it is made.

…

(4) The Governor-General may, within 6 months after an enactment is made, recommend to the Assembly any amendments of the enactment, or of any other enactment, that the Governor-General considers to be desirable as a result of considering the enactment.

(5) Where the Governor-General so recommends any amendments, the time within which the Governor-General may disallow the enactment is extended for 6 months after the date of the recommendation.

(6) Upon publication in the *Commonwealth Gazette* of notice of the disallowance of an enactment, the disallowance has, subject to subsection (7), the same effect as a repeal of the enactment.

(7) If a provision of a disallowed enactment amended or repealed an enactment that was in force immediately before the commencement of that provision, the disallowance revives the previous enactment from the date of publication of the notice of disallowance as if the disallowed provision had not been made.

(8) For the purposes of this section, an enactment shall be taken to be made when it is notified in the *Territory Gazette* under this Part.

6. Although it is not apparent from the provisions set out above in the preceding paragraph, the "legislative instrument" that is required to be used to disallow legislation passed by the ACT Legislative Assembly probably remained a legislative instrument which was and continues to be itself capable of being disallowed by either House of the Federal Parliament under s 42 of the *Legislative Instruments Act* 2003 (Cth). [4] The existence of this power may be relied on as a safeguard against the abuse of the power to disallow ACT laws.

7. The disallowance power operates in addition to the acknowledged power of the Federal Parliament under s 122 of the Constitution to override the enactment of any legislation passed by the ACT Legislative Assembly. Section 122 authorises the Federal Parliament "to make laws for the government of any territory".

8. As was stated in Quick and Garran "[i]n legislating for territories, the Federal Parliament will possess the combined powers of the National and of the State Governments". [5] This means in my view that the Federal Parliament is ultimately responsible for the welfare and government of the Territories including of course the Territory which contains the Seat of Government. In discharging that responsibility it is accepted that the Federal Parliament may

[4] See also the provisions of s 56 of the same Act. This is so despite changes made in 2006 which repealed the provisions of sub-s 35(3) of the Self-Government Act which previously dealt with the same disallowance power. I am grateful to Dy Spooner of the Parliamentary Library and Dr Patrick O'Neil an officer of the Senate Select Committee on Constitutional and Legal Affairs and Dy Spooner of the Parliamentary Library for drawing my attention to this important point.

[5] *The Annotated Constitution of the Australian Commonwealth* (1900) at p 972.

provide for the widest powers of self – government in those Territories [6] so long as those powers fall short of abdicating the Federal Parliament's power to recall or alter them. [7] It also accounts for the subordinate relationship enjoyed by Territory legislatures which are in a necessarily different position to their counterparts in the States.

9. In discharging the ultimate responsibility mentioned the Federal Parliament should in my view also recognize, so far as is possible and consistent with the same responsibility, the importance of according to people who live in the Territories the same civil and political rights as are enjoyed by the people who live in the States. That consideration led to the adoption in 1977 of a proposal to grant voters in a Territory who are entitled to vote for the election of members of the House of Representatives the right to vote in constitutional referendums under s 128 of the Constitution. [8] It also informed recommendations made by constitutional review bodies to extend the application of the few constitutional guarantees which exist in the Australian Constitution to the Territories of the Commonwealth. [9]

10. Consistently with the grant of self-government the Federal Parliament has the power to override and prevent the enactment of any legislation passed by the legislature of a self-governing territory including the power of the Commonwealth Government to disallow such legislation. The essential issue which arises from the enactment of the Self-Government Amendment Bill is whether as a matter of policy it is necessary or desirable for the Commonwealth Government to retain the power to disallow given the acknowledged existence of the power of the Federal Parliament to override the enactment of laws passed by the elected representatives of a legislature of a self-governing Territory.

11. Ordinarily it is accepted that it would be contrary to the principles of representative government to concede to Ministers the powers to disallow or suspend the operation of laws enacted by the elected representatives of the people. There is powerful and compelling history in our constitutional heritage to support such a principle with the enactment of Article 1 of the English *Bill of Rights* 1689 s 1. However disallowance powers were created in relation to the Australasian colonies to ensure British colonial oversight when Australia was part of the British Empire. Those powers were terminated with the enactment of s 8 the *Australia Act* 1986 (Cth) and (UK) but - as surprising as it may seem in modern times - not in relation to the Federal Parliament. It requires a constitutional amendment to ss 58-60 of the Australian Constitution to remove such remnants of British colonial control in relation to that Parliament. As the Australian Constitutional Commission had occasion to observe when it recommended the making of such amendments, the continued operation of s 59 in particular poses" a danger to parliamentary government and democratic institutions" because it "enables a Federal Government to advise the Queen to disallow a law that is unable to have repealed by the Parliament of the Commonwealth" .[10]

12. By analogy similar instruments of control were adopted in regard to the law making powers of the legislatures of self – governing Territories of the Commonwealth. The issue

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[6] *Berwick Ltd v Gray* (1976) 133 CLR 603 , 607 per Mason J with whose reasons for judgment Barwick CJ, McTiernan, Jacobs and Murphy JJ agreed..

[7] *Capital Duplicators Pty Ltd v Australian Capital Territory* (No1) (1993) 177 CLR 248 at pp 264-5 per Mason CJ, Dawson and McHugh JJ (not affected by their dissent).

[8] *Constitution Alteration (Referendums)* 1977.

[9] See Australian Constitutional Commission: Final Report (1988) vol 1 paras 9.701 – 9.833 at pp 592-617

[10] Final Report 1988 vol 1 at p 83 para 2.170.

with the ACT is whether their continued operation is still necessary or desirable given the present day operation of self – government in the ACT.

IV. Constitutional and legal implications

13. It is possible that the power to disallow for the ACT was created for the reasons advanced by the *Task Force on Implementation of ACT Self-Government.* [11]. The Task Force made the following observations:

"The Scope of Commonwealth Power to Protect Its Interests":

> 5.10 A separate issue is the mechanisms by which the Commonwealth may exercise its overriding legislative authority in the ACT For example, the Commonwealth may wish to do this because a law of the ACT impinges upon the status of Canberra as the national capital, or there may be a change in the perception of Commonwealth / Territory roles.
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> 5.11 As the Constitution stands, section 122 will always enable the Commonwealth to enact legislation in respect of the ACT. As subordinate legislation, laws made by the ACT legislature will be subject to the overriding effect of Commonwealth Acts: if ACT laws are inconsistent with such Acts, they will be invalid at least to the extent of such inconsistency.
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> 5.12 Exclusive reliance on this legislative power would be time consuming and unsatisfactory if prompt action by the Commonwealth is necessary. **It is recommended therefore, that the Commonwealth have power, subject to specified limitations to disallow laws of the ACT or to propose amendments to such laws**" [12]

14. Without referring to the above observations, in the Minister's second reading speech,it was stated in reference to the disallowance powers in the Northern Territory and the ACT :

> "Protections such as those are essential in the national capital. They are of course instruments of last resort and it is the Government's intention to resolve any potential conflict with the ACT by consultation and negotiation." [13]

15. Be that as it may it remains to be seen whether the disallowance power is actually necessary or otherwise desirable to protect the Commonwealth interests identified by the Minster and the Task Force.

16. Before addressing the latter issue it is desirable to make the following points regarding the effect of removing the disallowance power on the ability of the Federal Parliament to discharge its responsibility for providing for the government and welfare of the ACT.

> *First*, to reiterate and elaborate a point made earlier, the Federal Parliament has unlimited power to enact legislation which overrides Territory legislation. [14] This may

[11] In its *Report* dated May 1984 (Parliamentary Paper No 139 / 1984)
[12] At p 28.
[13] Parliamentary Debates (*House of Representatives*) 19 October 1988 at p 1922

be contrasted with its power to override State legislation which is limited to the competence of the Federal Parliaments to pass laws with respect to the States.

Secondly, Territory legislation is incapable of operating if it is inconsistent with Federal legislation whether it is enacted before or after the enactment of the Territory legislation. [15]

Thirdly, in the case of legislation enacted by the ACT Legislative Assembly "inconsistency" is limited by reason of s 28 of the Self-Government Act [16]to legislation which is incapable of operating concurrently with the provisions of Federal legislation. In other words it is limited to what is sometimes referred to as "direct" inconsistency so as not to extend to" indirect" inconsistency where the only inconsistency which exists is derived from the Federal Parliament having covered the same field of legislation. [17] In that regard ACT legislation is in an advantageous position when compared with State legislation which is invalid through inconsistency by reason of s 109 of the Constitution. (I am not aware of the reason for this disparity.)

Fourthly, I have had occasion to deal in the past with an example of inconsistency between a Federal Act and a State law which provided for same sex marriage in the face of the *Marriage Act* 1961 (Cth) - at least since the passage of amendments to that Act in 2004 which were designed to prevent the recognition of such marriages. Opinions differ on whether the Federal Parliament can and has made unlawful for the States (and the Territories) to use of the term "marriage" to describe same sex marriages and civil unions celebrated by persons of the same sex if the Federal

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[14] *Teori Tau v. The Commonwealth* (1969) 119 CLR 564, 570 ("The grant of legislative power by s. 122 is plenary in quality and unlimited and unqualified in point of subject matter.") The point for which this authority is cited is not affected by the subsequent overruling of this case on the application of Con s51(xxxi) in the Territories. See also *Capital Duplicators Ltd v Australian Capital Territory (No 1)* (1992) 177 CLR 248, 269 *per* Brennan, Deane and Toohey JJ.

[15] See *Federal Capital Commission v Laristan Building and Investment Co Pty Ltd* (1929) 42 CLR 582, 587-8; *Commonwealth v Newcrest Mining* (1995) 58 FCR 167, 179-80 and the authorities cited at 179. See also *Northern Territory v GPAO* (1999) 196 CLR 553, 577-8, 580-1 per Gleeson CJ and Gummow . and Geoffrey Lindell, "Grappling with inconsistency between Commonwealth and State legislation and the link with statutory interpretation" (2005) 8 *Constitutional Law and Policy Review* 25, 26-7.

[16]" **Inconsistency with other laws**

(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:

"law" means:

(a) a law in force in the Territory (other than an enactment or a subordinate law); or

(b) an order or determination, or any other instrument of a legislative character, made under a law falling within paragraph (a)."

[17] See generally Lindell above n 3 at 10-11 and above n 15 at 27-30

Parliament lacks the power to recognize same sex marriages, although I am of the view that it can provide that it is unlawful to use the term marriage to describe civil unions even if it cannot recognize same-sex marriages.[18]

Fifthly while it is true that the power of disallowance was used to prevent the operation of certain ACT laws which were designed to provide for the recognition of civil unions between same-sex partners, the inability of the ACT and the NT legislatures to enact laws to provide for euthanasia was secured by Federal Act of Parliament. [19] It is not out of place to observe that the disallowance of the civil unions legislation was based on an alleged inconsistency with the Federal Marriage Act. In that regard there is much to be said for the argument that any alleged inconsistency should in principle have been decided by the courts and not the executive branch of government since under our system of government the courts usually have the final say on the determination of questions of law.

Sixthly, the voting strength of the Greens Australia party to either oppose or support the enactment of any overriding legislation in the Senate will not be any greater or weaker after 1 July 2009 than the voting strength it possess to support a motion in either House to disallow the instrument of the disallowance of a Territory law. This point is made in view of the assertions reported in the media that the removal of the power to disallow ACT laws would greatly strengthen the influence of that party in preserving the operation of controversial Territory laws enacted after the same date. [20]

Seventhly unlike the position with other Territories, it is possible that the ACT may be incapable of shedding itself of its subordinate relationship with the Commonwealth Parliament and Government by seeking Statehood since it is the Territory which contains the Seat of Government. [21]

17. The foregoing considerations points to the existence of more than adequate legislative powers of the Federal Parliament to assert its legislative authority over the enactment of Territory laws - even if they are made by legislatures that are composed of the elected representatives of the people of those Territories. It remains to consider whether despite what is said above the disallowance powers are still needed in addition to the power of the Federal Power to enact overriding legislation because of what the Minister and the Task Force had to say. In particular is such a power still necessary to protect "Commonwealth interests" because the pursuit of Federal legislation would be "time consuming and unsatisfactory where prompt action was necessary"?

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[18] See Geoffrey Lindell, "State legislative power to enact same-sex marriage legislation, and the effect of the *Marriage Act* 1961 (Cth) as amended by the *Marriage Amendment Act* 2004 (Cth)" (2006) 9 *Constitutional Law and Policy Review* 25 esp at pp 25, 27-31 (Questions 2 and 3) and cf George Williams, "Advice regarding the proposed *Same-Sex Marriage Act*" 21. Although my advice only dealt with inconsistency with State laws the same considerations are likely to apply to a Territory laws since the kind of inconsistency relied was direct and not indirect: see at pp 31-31 of my advice.

[19] Now contained in the Self –Government Act sub-s 23 (1A) and (1B) and the *Northern Territory (Self-Government) Act* 1978 (Cth) s 50A.

[20] Chris Merritt, "Bill to inflates' influence", *The Australian,* 3 March 2011. <http://www.theaustralian.com.au/national-affairs/bill-to-inflate-greens-influence/story-fn59niix-1226014967273>

[21] *Capital Duplicators* (No1) (1992) 177 CLR 248, 267, 273.

18. As was mentioned in my article on self - government for the ACT s 27 of the Self Government Act already provides that Territory laws are incapable of binding the Crown in right of the Commonwealth except as provided by Federal regulations. [22] This may be of particular significance in relation to concerns about Territory legislation which seeks to, or has the effect of, applying to the operation of Commonwealth Federal Departments of State. In addition the Act creates a number of significant restrictions on Territory legislative power including the ability, again by Federal regulations, to enable the Commonwealth to retain exclusive control over those matters. [23] Furthermore by reason of s 29 of the Self – Government Act laws made by the Legislative Assembly apparently apply to the Federal Houses of Parliament, the members of those Houses and to the Parliamentary precinct unless and until either House of Parliament passes a resolution that such a law should not apply: [24] While all these qualifications to the scope of Territory legislative powers may not perhaps entirely remove the need to take prompt action to protect Commonwealth interests - whatever they may be, in my view they almost do so. For those reasons I have formed the view that the removal of the disallowance power will almost entirely remove the need for prompt action to protect Commonwealth interests where the enactment of overriding Federal Legislation would otherwise be in the words of the Task Force "time consuming and unsatisfactory".

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[22] Lindell above n 3 at 11-12. Those provisions state: "Except as provided by the regulations, an enactment does not bind the Crown in right of the Commonwealth." An "enactment" is defined in s 3 of the Self-Government Act to include laws made by the Legislative Assembly.

[23] Lindell above n 3 at 12-13 in sub-s 23(1) of the Self-Government Act. **For that purpose the Governor-General in Council retained the power to make Ordinances for the peace order and good government of the Territory in relation to areas excluded from the legislative authority of the ACT Legislative Assembly: *Seat of Government Administration Act* 1910 (Cth) s 21(1) as amended. The continued operation of this power would be contradicted by one of the stated objects of the Self-Government Bill which is to "ensure that the Legislative Assembly for the ACT has exclusive authority and responsibility for making laws for the ACT". It would be advisable for the terms of cl 4(b) to be modified to take account of this point in order to avoid any unnecessary doubt.**

[24] *Capital Duplicators (No 1)* (1992) 177 CLR 248, 268 per Brennan , Deane and Toohey JJ. This follows from the provisions of the Self-Government Act s 29 which state:

"Avoidance of application of enactments to Parliament

(1) In this section:

"enactment" includes a part of an enactment.

"Parliamentary precincts" means the precincts defined by subsection 3(1) of the *Parliamentary Precincts Act 1988* .

(2) If either House of the Parliament passes a resolution declaring that an enactment made after the commencing day does not apply:

(a) to that House;

(b) to the members of that House; or

(c) in the Parliamentary precincts;

the resolution has effect according to its tenor and the enactment does not apply accordingly.

(3) A resolution under subsection (2):

(a) does not have effect in respect of the application of an enactment on a day before the day on which the resolution is passed; and

(b) has effect, to the extent that the enactment ceases to apply, as if the enactment were repealed by another enactment.

The ability of either House to negate the application of an ACT law to a House or its members would still require a calling together of the relevant House to enable such a resolution to be passed if the ACT law was passed when either House was not sitting.

19. At the same time it is acknowledged that there may be difficult questions as to the legal authority of the ACT Legislative Assembly to make laws that apply to or have some practical impact upon other organs of national government apart from the Executive Government of the Commonwealth proper and the Houses of the Federal Parliament and their members. [25] Those organs may be the High Court and Commonwealth public statutory authorities. As was indicated in the *Capital Duplicators Case (No 1):*

> "It would be surprising if laws made by an independent legislature for the seat of government of the Commonwealth, or executive action taken pursuant to those laws, could affect the performance of any function of the government of the Commonwealth, any facility used in the performance of such a function or any otherwise lawful provision - legislative or executive - which the organs of that government wished to make for the performance of any of its functions." [26]

These considerations point to a serious doubt about the capacity of the Legislative Assembly to pass laws that would impinge upon the national organs of government except as explicitly authorized under the Self-Government. But if, nevertheless, it is still thought that there should be a mechanism to take urgent action to protect Commonwealth interests so as to minimize the resolution in the courts of such difficult questions and doubts, one solution that may be worth considering is to authorize the Federal Parliament to impose additional restrictions on Territory legislative power. This could be done by extending the present powers of the Commonwealth Government to make regulations for that limited purpose when and as the need arises. [27] The point about such a restriction however is that it would need to be narrowly defined to protect the national institutions of government and would not extend to the general merits and policy of legislation enacted by the Legislative Assembly. The regulation making power should itself be subject to the usual disallowance powers of both Houses of Parliament.

20. That said it may be difficult to define in advance what are the "Commonwealth interests" to be protected and furthermore the validity of any regulations made to limit the scope of the Territorial legislative authority may have to be ultimately decided in the courts if the solution canvassed in the preceding paragraph was to be adopted. Disallowance avoids that contingency by preventing the operation of a Territory law *from and at the outset* without any reference to the need to characterize the nature or subject matter of the law being disallowed. It might therefore be thought by some that the solution to the difficulties mentioned is to retain the power of the Commonwealth Government to disallow Territory laws and continue to rely on the power of either House of the Federal Parliament to disallow the disallowance of Territory law as a safeguard against any abuse. Be that as it may be acknowledged that the existence of the latter safeguard significantly weakens the case for removing the power to disallow ACT laws.

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[25] Even as regards the application of ACT laws to the Houses of Parliament and their members see the possible problems that may arise as a result of the *Parliamentary Privileges Act* 1987 (Cth) s 15 which makes the application of such laws subject to the parliamentary privileges referred to in s 49 of the Australian Constitution.
[26] (1992) 177 CLR 248, 273 per Brennan, Deane and Toohey JJ.
[27] Self-Government Act sub- s 23(2). which state that "The regulations may omit any of the paragraphs in subsection (1) or reduce the scope of any of those paragraphs". The paragraphs in sub-s (1) list the matters from the Legislative Assembly's power to make laws.

21. Finally as regards the ACT, it is also worth mentioning that I think there would be merit in considering whether, if the disallowance power is removed for ACT legislation, the limitation placed on its authority to enact inconsistent legislation should be widened to bring the position of the ACT into line with the position of the States under s 109. In other words the limitation should extend to the inability to enact any form of inconsistent legislation with federal legislation so as to include *both direct and indirect* inconsistency.

22. Given the short time available to me to prepare this submission, no attempt has been made to deal with the position of Norfolk Island or the Northern Territory since my special expertise in this area is limited to the ACT. I suspect that many of the considerations outlined above and especially those in para 16 will I think be equally applicable to the position in those Territories. However I have not had the time to examine in detail to examine whether there exist alternative mechanisms to provide for the protection of Commonwealth interests in those Territories which would make it possible to dispense with the disallowance powers for those Territories.

V. Personal view

23. Taking into account the legal and constitutional considerations I have outlined above, the view I have reached as a private citizen is that I am not persuaded by the case for retaining the disallowance power in relation to the enactment of Territory legislation in the ACT. I believe that citizens in the ACT should wherever possible enjoy the same rights as other citizens in Australia to be free from Ministerial interference in the enactment of legislation passed by their elected representatives.

24. That said I would be prepared to accept the suggestions made in para 19 if, contrary to what I am inclined to think, it is thought that the removal of the disallowance power will leave open the need to take prompt action to protect genuine Commonwealth interests defined in a narrow sense when the enactment of overriding legislation by the Federal Parliament would be too time consuming or otherwise unsatisfactory. It will be recalled that the suggestion discussed in para 19 would confer upon the Commonwealth Government power to make regulations to further limit the capacity of the ACT Legislative Assembly to pass laws that impinge upon Commonwealth interests defined in a narrow sense. The alternative solution in para 20 for dealing with the power to protect Commonwealth interest essentially involves retaining the present power to disallow Territory laws as long as it is made subject to the overriding powers of either House to disallow the instrument used by the Commonwealth Government to disallow laws enacted by the Legislative Assembly. I also support the suggestion made in para 21 which is to widen the inability of the Legislative Assembly to enact legislation that is inconsistent with Federal Legislation. The limitation would then encompass what was referred to as *indirect* inconsistency where it is desired to prevent Territory legislation operating in a field comprehensively covered by the Federal Parliament.

25. Although I lean in favour of the same direction as regards the Northern and Norfolk Island I refrain from expressing a concluded opinion in respect of those Territories for the reason given in para 22 above.

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