

1985

THE PARLIAMENT OF THE COMMONWEALTH
OF AUSTRALIA

HOUSE OF REPRESENTATIVES

AUSTRALIA BILL 1986
AUSTRALIA (REQUEST AND CONSENT) BILL 1985

EXPLANATORY MEMORANDUM

(Circulated by Authority of the Honourable Lionel Bowen

Deputy Prime Minister and Attorney-General)

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GENERAL OUTLINE

The purpose of the Australia Bill 1986 and the Australia (Request and Consent) Bill 1985 is to sever the remaining constitutional links between Australia and the United Kingdom.

2. The provisions of the Bills have been agreed to by Her Majesty the Queen, the Commonwealth Government, all State Governments and the United Kingdom Government. The Bills are the outcome of extensive consultations that have taken place over a number of years with a view to removing the outmoded links and fetters between Australia and the Parliament, Government and judicial system of the United Kingdom. These links have long been anachronistic: they are wholly incompatible with Australia's status as an independent and sovereign nation.

3. The legislation does not seek to make any change in the position of the Queen as Queen of Australia.

4. The Australia Bill 1986 bears the date '1986' since it is intended that it should commence operation at the same time as the proposed Australia Act 1986 of the United Kingdom Parliament the terms of which are set out in the Schedule to the Australia (Request and Consent) Bill 1985.

5. The proposed Australia Acts 1986 to be enacted by the Commonwealth and United Kingdom Parliaments are in identical terms apart from minor formal differences. (The Australia Bill 1986 for the Commonwealth Parliament departs from the usual form of Commonwealth Bills in that the clauses dealing with definitions, short title and commencement are placed at the end, in the style of the proposed Act to be enacted by the United

Kingdom Parliament. This is done so that corresponding clauses will have the same number.) If there are any doubts as to the constitutional validity of the Australia Act 1986 of the Commonwealth, they will be rendered irrelevant by the United Kingdom Act.

6. In brief, the Australia Act 1986 of the Commonwealth Parliament and the Australia Act 1986 of the United Kingdom Parliament will provide that the latter Parliament shall no longer have power to make laws for Australia. They will remove restrictions under United Kingdom law on the legislative powers of the States and remove other existing or possible limitations derived from the former colonial status of the States. The proposed Australia Acts also deal with the exercise of powers and functions of the Queen in respect of the States. They will terminate all responsibilities of the United Kingdom Government in relation to State matters. They will also terminate appeals to the Privy Council from State courts. The Australia Acts will also make certain consequential amendments to the Constitution Acts of Queensland and Western Australia.

6a. The legislation has no financial implications.

AUSTRALIA BILL 1986: NOTES ON CLAUSES

Preamble

7. The preamble refers to the agreement reached at the Premiers' Conferences in 1982 and 1984 to take measures to bring constitutional arrangements affecting the Commonwealth and States into conformity with the status of the Commonwealth of Australia as a sovereign, independent and federal nation. The preamble then recites that, in pursuance of paragraph 51(xxxviii) of the Constitution, the Parliaments of all the States have requested the Parliament of the Commonwealth to enact an Act in the terms of the Bill. Section 51(xxxviii) of the Constitution confers power on the Commonwealth Parliament to make laws with respect to '(t)he exercise within the

Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia'.

Clause 1: Termination of power of United Kingdom Parliament to legislate for Australia

8. Clause 1 provides that no United Kingdom Act passed after the commencement of the Australia Act 1986 shall extend, or be deemed to extend, to the Commonwealth, to a State or to a Territory as part of the law of the Commonwealth, of the State or of the Territory. It thus achieves complete legislative independence of Australia from the United Kingdom.

Clause 2: Legislative powers of State Parliaments

9. Sub-clause 2(1) makes it clear that the State Parliaments have full power to make laws having extra-territorial operation. Sub-clause 2(2), which must be read subject to clauses 5 and 6, removes any limitations that might have existed, whether by reason of United Kingdom legislation or otherwise, upon the legislative capacities of the State Parliaments. However, sub-clause 2(2) expressly provides that nothing in that sub-section will confer upon a State any capacity that the State did not have, immediately before the commencement of the Australia Act 1986, to engage in relations with countries outside Australia. Accordingly, the Act will not make it possible for the States to establish diplomatic relations with other countries, or relations in the nature of diplomatic relations.

Clause 3: Termination of restrictions on legislative powers of State Parliaments

10. Clause 3 is modelled on section 2 of the Statute of Westminster which applies to Commonwealth legislation.

Sub-clause 3(1) provides that the Colonial Laws Validity Act 1865, by virtue of which a State cannot legislate inconsistently with United Kingdom Acts extending to the State, shall no longer apply to any State law made after the commencement of the Australia Act 1986. The provisions in section 5 of the Colonial Laws Validity Act 1865 concerning the 'manner and form' of enacting laws respecting the constitution, powers and procedure of State legislatures will be replaced by section 6 of the Australia Act 1986 (see below). Sub-clause 3(2), which must be read subject to clauses 5 and 6, provides that no law, and no provision of any law, made after the commencement of the Australia Act 1986 by a State Parliament shall be void or inoperative on the ground that it is repugnant to the law of England or to the provisions of any existing or future Act of the United Kingdom Parliament or to any order, rule or regulation made under any such Act. Sub-clause 3(2) also provides that the powers of the Parliament of a State shall include the power to repeal or amend any such United Kingdom act, order, rule or regulation in so far as it is part of the law of the State.

Clause 4: Powers of State Parliaments in relation to merchant shipping

11. Clause 4 repeals sections 735 and 736 of the Merchant Shipping Act 1894 (Imp.) in so far as they are part of the law of any State. This clause makes it unnecessary for the States to enact special legislation, pursuant to clauses 2(2) and 3 of the Australia Act 1986, to free themselves from the restrictions imposed by sections 735 and 736 of the Merchant Shipping Act, under which certain State laws on merchant shipping require the confirmation of the Queen acting on the advice of United Kingdom Ministers, or must be reserved for the signification of the Queen's pleasure. Clause 4 corresponds to section 5 of the Statute of Westminster 1931 in relation to Commonwealth Acts.

Clause 5: Preservation of the Commonwealth Constitution, the Commonwealth of Australia Constitution Act and the Statute of Westminster 1931

12. Clause 5 provides that section 2 and sub-section 3(2) will be subject to the Commonwealth of Australia Constitution Act and to the Commonwealth Constitution, and that they will not operate so as to give any force or effect to any State Act that would repeal, amend or be repugnant to the Australia Act 1986, the Commonwealth of Australia Constitution Act, the Commonwealth Constitution or the Statute of Westminster, as amended and in force from time to time. (As to amendments to the Australia Acts 1986 and the Statute of Westminster, see the notes on clause 15 below.) Accordingly, the provisions removing the restrictions on the powers of State Parliaments will not, for example, operate to free the States from restrictions and limitations under the Commonwealth Constitution.

Clause 6: Manner and form of making certain State laws

13. Clause 6 provides that a law may after the commencement of the Australia Act 1986 by a State Parliament respecting the constitution, powers or procedure of the State Parliament shall be of no force or effect unless made in the manner and form (if any) required by a law of that State Parliament (cf. section 5 of the Colonial Laws Validity Act 1865 and notes on clause 3 above).

Clause 7: Powers and functions of the Queen and Governors in respect of States

14. Sub-clause 7(1) provides that Her Majesty's representative in each State shall be the Governor. Sub-clause 7(2) provides that, subject to the exceptions about to be mentioned, all the powers and functions of the Queen in respect of a State shall henceforth be exercisable only by the Governor of the State. Sub-clauses 7(3) and (4) make exceptions

concerning the appointment, and termination of the appointment, of the Governor of a State, and the exercise of powers and functions while the Queen is personally present in a State.

15. Sub-clause 7(5) provides that the advice to the Queen in these matters in respect of a State shall be tendered by the Premier of a State - that is, tendered directly by the Premier to the Queen. It is understood and agreed by the Premiers that, in respect of the exercise of powers and functions while the Queen is personally present in a State such advice will be tendered only in accordance with mutual and prior agreement between Her Majesty and the Premier.

16. The Australia Bill does not deal with the continuation of Imperial Honours. However, pursuant to arrangements agreed upon by the Queen, the Premier of any State whose Government wishes to do so will be able to make recommendations direct to Her Majesty for awards of Imperial Honours in accordance with the prerogative orders, warrants and other instruments constituting and regulating the various awards.

Clause 8: State laws not subject to disallowance or suspension of operation

17. Clause 8 provides that, after the commencement of the Australia Act 1986, no State Act that has been assented to by the Governor of a State will be subject to disallowance by the Queen (cf. Imperial Acts of 1842 and 1850) or have its operation suspended pending the signification of the Queen's pleasure.

Clause 9: State laws not subject to withholding of assent or reservation

18. Sub-clause 9(1) nullifies any law or instrument purporting to require any State Governor to withhold assent from a Bill that has been passed in the manner and form (if any) required by a law made by the Parliament of that State.

Sub-clause 9(2) also nullifies any law or instrument purporting to require reservation of any State Bill for the signification of Her Majesty's pleasure (e.g. the Australian States Constitution Act 1907).

Clause 10: Termination of responsibility of United Kingdom Government in relation to State matters

19. Clause 10 provides that, after the commencement of the Australia Act 1986, the United Kingdom Government shall have no further responsibility for the government of any State. It thus achieves complete executive independence of Australia from the United Kingdom Government.

Clause 11: Termination of appeals to the Privy Council

20. Clause 11 terminates all appeals to the Privy Council from 'Australian courts' - defined as all Australian courts other than the High Court: see sub-clause 16(1). (Appeals to the Privy Council from the High Court and all other federal courts, and from Territory courts, have already been abolished subject only to section 74 of the Constitution, which no longer has any practical operation: Kirmani v. Captain Cook Cruises Pty Ltd (No. 2); Ex parte Attorney-General of Queensland (1984) 58 A.L.R. 108.) An exception is made by sub-clause 11(4) in the case of appeals instituted before the commencement of the Australia Act 1986, or appeals pursuant to leave granted by an Australian court or special leave granted by the Privy Council itself, on an application or petition made or presented before the commencement of the Australia Act 1986.

Clause 12: Amendment of Statute of Westminster

21. Clause 12 repeals sections 4, 9(2) and (3) and 10(2) of the Statute of Westminster 1931 in so far as they are part of the law of the Commonwealth, of a State or of a Territory. Section 4 of the Statute of Westminster provides that no United

Kingdom Act passed after the commencement of the Statute shall extend, or be deemed to extend, to a Dominion as a part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof. Section 9(3) provides that, in the case of Australia, the request and consent shall be the request and consent of the Parliament and Government of the Commonwealth. Section 4 will be superseded by section 1 of the Australia Act 1986 which will abolish completely any power of the United Kingdom Parliament to legislate for Australia (see above). Since section 9(2) of the Statute of Westminster makes an exception from section 4, and since section 10(2) provides that a Dominion Parliament may at any time revoke the adoption (inter alia) of section 4, these provisions will become otiose upon the repeal of section 4.

Clauses 13 and 14: Amendment of the Constitution Acts of Queensland and Western Australia

22. Clauses 13 and 14 make amendments to the Constitution Acts of Queensland and Western Australia by removing provisions that are no longer appropriate having regard to the termination (by clause 10 of the Australia Act 1986) of any responsibility of the United Kingdom Government and Ministers for the government of the States.

Clause 15: Method of repeal or amendment of the Australia Act 1986 or the Statute of Westminster

23. Sub-clause 15(1), to be read with the definitional provision in sub-section 15(2), provides that the Australia Act 1986 itself and the Statute of Westminster 1931, as amended and in force from time to time and in so far as they are parts of the law of the Commonwealth, of a State or of a Territory, can be repealed or amended, subject to sub-clause 15(3), only by a Commonwealth Act passed at the request or with the concurrence of all the State Parliaments. Sub-clause 15(3) makes an

exception where the repeal or amendment is made in the exercise of powers conferred on the Commonwealth Parliament by any alteration to the Constitution, made in accordance with its section 128, after the commencement of the Australia Act 1986.

Clause 16: Interpretation

24. Clause 16 contains the necessary definitions for the purposes of the Act.

Clause 17: Short title and commencement

25. Sub-clause 17(1) provides for the Act to be cited as the Australia Act 1986. Sub-clause 17(2) provides that the Act shall come into operation on a day and at a time to be fixed by Proclamation. It is intended that this time shall be the same as that appointed by the appropriate Secretary of State in the United Kingdom for the commencement of the Australia Act 1986 to be enacted by the United Kingdom Parliament (see below).

AUSTRALIA (REQUEST AND CONSENT) BILL 1985 - NOTES ON CLAUSES

Preamble

26. This preamble recites the agreement between the Prime Minister and the Premiers at the Premiers' Conferences in 1982 and 1984 to take the measures for which the legislation provides.

Clause 1: Short title

27. When enacted the Bill will be cited as the Australia (Request and Consent) Act 1985.

Clause 2: Commencement

28. The Act will come into operation on the date on which it receives the Royal Assent. However, the proposed Australia Act

1986 of the United Kingdom Parliament, in the terms set out in the Schedule to the Australia (Request and Consent) Bill, will come into operation at a time appointed by the appropriate Secretary of State of the United Kingdom. It is intended that this time should be the same as that for the commencement of the Australia Act 1986 of the Commonwealth Parliament.

Clause 3: Request and consent to United Kingdom legislation

29. This clause declares that the Parliament and Government of the Commonwealth, with the concurrence of all the States, request and consent to the enactment by the Parliament of the United Kingdom of an Act in the terms set out in the Schedule. The request and consent of the Parliament and Government of the Commonwealth is required by the Statute of Westminster 1931 except to the extent that the proposed United Kingdom Act will be a law with respect to matters within the authority of the Australian States and not within the authority of the Parliament or Government of the Commonwealth (sections 4 and 9(2) of the Statute of Westminster 1931).

The Schedule

30. This Schedule sets out the terms of the proposed Australia Act 1986 to be enacted by the United Kingdom Parliament. It is substantially identical with the terms of the Australia Bill 1986 to be enacted by the Commonwealth Parliament (see above). Accordingly the comments set out above on the respective clauses of that Bill apply equally to the proposed United Kingdom Act.
