

1984

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA
SENATE

Constitution Alteration (Interchange of Powers) Bill 1984

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General Senator
the Hon. Gareth Evans Q.C.)

OUTLINE

The Bill proposes to amend the Constitution to enable the Commonwealth to 'designate' (in effect refer) matters within the Commonwealth's exclusive powers, on which the States may wish to legislate. The Bill would also clarify aspects of the existing constitutional provision that enables the Commonwealth to legislate on matters referred to it by the States. It is envisaged that Commonwealth powers in relation to excise and Commonwealth places might be referred to the States if the constitutional amendment is made.

References of power by either the Commonwealth or the States may be made for a limited time and subject to conditions. References can be revoked at any time. However, the Commonwealth may refer power only to all of the States, not some only, and on the same basis for each.

NOTES ON CLAUSES

Clause 1 - This is a formal clause which states the short title of the Bill.

Clause 2 - Powers of State Parliaments with respect to matters designated by Commonwealth Parliament, and other matters

This clause inserts 2 new provisions in the Constitution, sections 108A and 108B, which authorize an interchange of legislative powers between the Commonwealth Parliament and State Parliaments.

New Section 108A(1) empowers the Commonwealth Parliament to designate matters, and the State Parliaments to make laws with respect to such matters. Where a matter is designated each State Parliament may pass laws with respect to that matter. It is a designation power rather than a reference power because, for technical reasons, it would not be appropriate to speak of the Commonwealth Parliament "referring" one of its powers. For example, the excise power is a power to Levy Commonwealth tax paid into the Commonwealth Treasury and not a State tax paid into the State Treasury. For practical purposes, however, it is convenient to talk of "references" and "referred powers".

Section 108A(1) also empowers State Parliaments to make laws with respect to incidental matters. This accords with the present position regarding the power of the Commonwealth Parliament to make laws on matters referred to it by State Parliaments.

New Section 108A(2) provides that a matter designated under sub-section (1) is to fall within one of 4 categories, namely -

- imposition of excise duties;
- places acquired by the Commonwealth for Commonwealth purposes;
- any other matter concerning which the Commonwealth has exclusive power to make laws; or
- the investing of a specified federal court other than the High Court with State jurisdiction of a specified kind.

New Section 108A (3) ensures that once a matter is designated by the Commonwealth Parliament, the Parliaments of the States will have the power to legislate with respect to such matters even though they may otherwise be exclusively vested in the Commonwealth Parliament under the Constitution.

The subsection also ensures that constitutional provisions that apply to the States will continue to apply to them in the exercise of their powers on a designated matter. Examples are:

- (a) section 92 - guarantee of the freedom of inter-state trade, commerce and intercourse;
- (b) section 114 - inability of the States to tax property belonging to the Commonwealth or to raise military forces;
- (c) section 115 - States may not coin money; and
- (d) section 117 - prohibition against discriminating on grounds of residence in another State.

Section 108A(4) ensures that States will be subject in the exercise of their powers on a designated matter, only to conditions set by the Commonwealth and to conditions applicable under the law in force in the State as to the "manner and form" of their legislation. Thus the "entrenched" provisions in State Constitutions and Laws, such as those relating in New South Wales to the abolition of its Upper House and in Queensland to the re-establishment of an Upper House, are preserved.

The restrictions and conditions that the sub-section excludes are those that arise out of Imperial Laws, such as section 2 of the Colonial Laws Validity Act, 1865, which provides that any colonial law which is repugnant to the provisions of an Imperial Act extending to the colony is, to the extent of the repugnancy, void. Whilst the Statute of Westminster has relieved the Commonwealth from the disability arising from this section, it still applies to the State Parliaments. The sub-section should also help to ensure that there can be no doubt that laws made by a State Parliament on a designated matter can have extra-territorial operation.

Section 108A(5) safeguards the position of the States if a designated matters happens to be so expressed as to cover matters already within

the powers of the States. There will then be no suggestion that a withdrawal of the designation will affect State laws on that matter.

Provisions Applicable to References of Matters by States and Designation of Matters by Commonwealth

New Section 108B

This section applies to both -

- (a) references of matters by the States to the Commonwealth pursuant to section 51(xxxvii) of the Constitution; and
- (b) the designation of matters by the Commonwealth so as to enable the State Parliaments to legislate with respect to those matters under section 108A(1).

In other words, it provides a framework for references either way. One of the aims of this constitutional amendment is to encourage future references of power by removing uncertainty as to the effect of the existing constitutional provision for references of power by States to the Commonwealth.

Section 108B(1) amongst other things ensures that the reference and designation of a matter -

- (i) is revocable at any time (see para. (d) of ss. (1));
- (ii) may be extended in duration (see para. (e) of ss. (1));
- (iii) can be made subject to conditions including conditions regulating the kind of laws that can be passed (see paras. (b) and

(f) of ss. (1));

(iv) may be made for a limited period of time
(see para. (c) of ss. (1));

(v) will not prevent the Parliament designating
or referring the matter from passing laws
with respect to that matter (see para.

(g) of ss. (1)).

Section 108B(2) provides that the effect of
a revocation or a termination of a reference or
designation is to render any law made under the
reference or designation ineffective from the
same date. An extension in duration of a reference
or designation will continue such a law in force
without the need to remake it.

