AUSTRALIA BILL 1986

Date introduced: 13 November 1985
House: House of Representatives
Presented by: Hon. Lionel Bowen, M.P., Attorney-General

DIGEST OF BILL

Purpose

To remove the remaining formal constitutional and legal links that exist between Australia and the United Kingdom.

Background

Unlike the United States Constitution which has force as a declaration of the People, the Australian State and Federal Constitutions have their basis in Acts of the United Kingdom (U.K.) Parliament. The various State Constitutions were introduced by Acts passed by the U.K. Parliament in the nineteenth century and this is reflected in a number of provisions that affect the State Constitutions. The U.K. Parliament retains the right to make laws that will apply to the Australian States. This power originally reflected the colonial status of the States and has remained although a similar power in respect of the Commonwealth was removed in the early part of this century. The States are also subject to the Colonial Laws Validity Act 1865 which, in theory, may be used to declare State laws invalid if they are repugnant to U.K. law. As well, the States are bound by the Merchant Shipping Act which was passed by the U.K. Parliament in 1894 to protect the right of passage for merchant shipping. Under sections 735 and 736 of this Act certain State laws on merchant shipping are subject to the Queen's approval.

The position of the Commonwealth's relationship with the U.K. Parliament has been altered by the Statute of Westminster (the Statute). This was passed by the U.K. Parliament in 1931 but did not come into effect until adopted by the Dominions (i.e. Australia, Canada, New Zealand, Ireland and South Africa). The Statute was adopted
by the Commonwealth through the Statute of Westminster Adoption Act 1942 from the commencement of the Second World War. Section 2 of the Statute declares that the Colonial Laws Validity Act 1865 does not apply to laws made by the Commonwealth while section 4 provides that the U.K. Parliament will not enact laws that apply to the Commonwealth without its consent. The latter power has been used on two occasions to bring the Cocos (Keeling) Islands and Christmas Island under Commonwealth authority.

The Queen has the power to disallow both Commonwealth and State law. The power to disallow Commonwealth laws is contained in section 59 of the Constitution which allows the Queen to annul any law within one year of the Act receiving the Governor-General's assent. This power has not been used though, in 1960, the Queen was petitioned unsuccessfully to disallow the Matrimonial Causes Act 1959. As the power is contained in the Constitution it can only be changed by referendum pursuant to section 128 of the Constitution. A number of Constitutional Conventions have recommended that section 59 be repealed.

The Queen's power to disallow State laws is contained in the Australian Constitution Act 1842, which allows the Queen to annul any Act assented to by a Governor. As well, the Queen's personal assent is required for Acts that alter a State Constitution or a Governor's salary (Australian States Constitution Act 1907).

The route for advice to the Queen on disallowance of Acts, appointment of Governors and the Governor-General and certain other minor matters differs between the Commonwealth and the States. There is now an established convention that in matters affecting the Commonwealth, the Queen will be advised by Australian Ministers.[1] However, in the case of the States, there is no such convention and the Queen acts on the advice of U.K. Ministers who in turn are advised by the relevant State Ministers.

Appeals from the High Court to the Privy Council were abolished by the Privy Council (Appeals from the High Court) Act 1975. However, before this Act could come into force it had to receive the Queen's assent, which was duly granted in accordance with section 74 of the Constitution. Although appeals from the High Court have been abolished, an appeal may still be made to the Privy Council from the State Supreme Courts. This not only results in a degree of forum shopping in appeals from State Supreme Courts but has
resulted in the Supreme Courts facing conflicting Privy Council and High Court decisions on the same point of law. This leads to great difficulties as, in theory, the Supreme Courts are bound to follow both Privy Council and High Court decisions. A former Chief Justice of the High Court, Sir Garfield Barwick, called for a resolution of this problem in 1977. This was repeated by the present Chief Justice in 1981. There have been a number of appeals to the Privy Council in recent years viz., 19 in 1980, and in the last appeal from the High Court, in which judgment was delivered in 1980, the Privy Council overturned the High Court's decision.[2] Canada and India abolished appeals to the Privy Council in 1949.

This Bill is based on sub-section 51(xxxviii) of the Constitution which allows the Commonwealth to make laws at the request of, or with the concurrence of, the States. Following agreements reached at the 1982 and 1984 Premiers' Conferences, the States have introduced identical Acts (known as the Australia Acts (Request) Act in each State) that request the Commonwealth and the U.K. to pass legislation in accordance with the identical Acts. It will be necessary for the U.K. Parliament to enact legislation as the Australian Parliaments lack the power to alter U.K. legislation that applies to Australia. The U.K. Parliament has agreed to enact legislation as detailed in the Australia (Request and Consent) Bill 1985. The Australia Bill is dated 1986 to ensure that it will have the same title as the U.K. legislation.

Outline

There is a short preamble stating the purpose of the Bill. The substantial provisions appear in clauses 1 to 15 while the interpretation, title and commencement clauses appear at the end of the Bill.

Main Provisions

The power of the U.K. Parliament to legislate for Australia is to be removed by clause 1.

Clause 2 will give the States full legislative power. However, the States will be prohibited from entering into diplomatic relationships with foreign countries.

The application of the Colonial Laws Validity Act 1865 to the States is to be terminated by clause 3 which also states that no State law is to be invalid on the grounds that it is repugnant to U.K. law.
Sections 735 and 736 of the Merchant Shipping Act 1894 will no longer apply to the States (clause 4).

Clause 7 states that the powers of the Crown are exercisable only by the Governor except where the Queen is personally present in the State or the power to appoint, or terminate the appointment of, the Governor is exercised. The clause also states that Queen is to be directly advised by the Premiers.

The Queen's power to disallow State Acts is to be removed by clause 8.

The UK Government is to have no responsibility for the government of any state after the proposed Act's commencement (clause 10).

Future appeals to the Privy Council from State Supreme Courts are to be abolished by clause 11.

The Constitutions of Queensland and Western Australia are to be amended by clauses 13 and 14 respectively, as a result of clause 10.

The proposed Act and the Statute of Westminster 1931 are only to be altered through sub-section 51(xxxviii) or section 128 of the Constitution (clause 15).

For further information, if required, contact the Law and Government Group.

23 December 1985
References

2. Port Jackson Stevedoring Pty Ltd v Salmond and Spragger (Australia) Pty Ltd (1980), 30 ALR 588.

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