

THE SENATE

SESSION 1983-84

BILLS

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Acts Interpretation Amendment Bill 1984	Read 1 ^o Explanatory Memorandum Proposed Amendments by the Attorney-General (Senator Gareth Evans) Read 3 ^o
Advance Australia Logo Protection Bill 1984	Received from House of Representatives Explanatory Memorandum
Air Navigation Amendment Bill 1984	Received from House of Representatives Explanatory Memorandum

STAGES

TITLE STAGES

of Representatives
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by the Attorney-General
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by Senator Durack
by Senator Hill

Constitution Alteration (Double Dissolution) Bill 1983 (Private Senator's Bill)	Read 1 ^o
Constitution Alteration (Electors' Initiative) Bill 1982 [1983] (Private Senator's Bill)	Read 1 ^o
Constitution Alteration (External Affairs) Bill 1984 (Private Senator's Bill)	Read 1 ^o
Constitution Alteration (Fixed Term Parliaments) Bill 1983	Read 1 ^o Explanatory Memorandum
Constitution Alteration (Inter-change of Powers) Bill 1983	Read 1 ^o Explanatory Memorandum
Constitution Alteration (Interchange of Powers) Bill 1984	Read 1 ^o Explanatory Memorandum
Constitution Alteration (Parliament) Bill 1983 (Private Senator's Bill)	Read 1 ^o Proposed Amendment by Senator Macklin Read 3 ^o
Constitution Alteration (Parliamentary Terms) Bill 1983	Read 1 ^o Explanatory Memorandum

1983-84

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA
THE SENATE

(Presented pursuant to leave granted and read 1^o, 13 June 1984)

(ATTORNEY-GENERAL, SENATOR GARETH EVANS)

A BILL

FOR

**An Act to enable the Commonwealth and the States voluntarily
to refer powers to each other**

BE IT ENACTED by the Parliament of the Commonwealth of Australia,
with the approval of the electors, as required by the Constitution, as follows:

Short title

5 1. This Act may be cited as the *Constitution Alteration (Interchange of Powers) 1984*.

2. The Constitution is altered by inserting after section 108 the following sections:

**Powers of State Parliaments with respect to matters designated by
Commonwealth Parliament**

10 "108A. (1) The Parliament of the Commonwealth may designate a matter referred to in sub-section (2) of this section as a matter in relation to which this section is to apply and, where a matter is so designated, the powers of the Parliament of each State to make laws of the State extend, subject to this section, to the making of laws with respect to that matter and with respect to
15 matters incidental to the execution of the power to make such laws.

- “(2) A matter designated under sub-section (1) of this section shall be—
- (a) the matter of the imposition of duties of excise, or a matter that is included in that matter;
 - (b) the matter of places acquired by the Commonwealth for public purposes, or a matter that is included in that matter;
 - (c) any other matter with respect to which the Parliament of the Commonwealth has exclusive power to make laws; or
 - (d) the matter of the investing of a specified federal court other than the High Court with State jurisdiction in matters of a specified kind.

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“(3) The powers of the Parliament of a State under this section are not affected by the fact that any power of the Parliament of the Commonwealth is, apart from this section, exclusive but are in all other respects subject to the provisions of this Constitution that apply to the powers of the Parliaments of the States.

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“(4) Except as provided in sub-section (3) of this section, the powers of the Parliament of a State under this section are not subject to any restrictions or conditions other than—

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- (a) those that are applicable by virtue of the terms and conditions of the designation by the Parliament of the Commonwealth of the relevant matter; and
- (b) those that are applicable from time to time under any law relating to the manner of the making, or the form, of laws of the State.

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“(5) Nothing in this section derogates from the powers that the Parliament of a State has apart from this section.

Provisions applicable to references of matters by States and designation of matters by Commonwealth

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“108B. (1) The reference of a matter by the Parliament of a State for the purposes of paragraph (xxxvii) of section 51 of this Constitution or the designation of a matter by the Parliament of the Commonwealth for the purposes of section 108A of this Constitution—

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- (a) shall be by Act of the Parliament making the reference or designation;
- (b) may be so made as to take effect at a future time or subject to a condition precedent;
- (c) may be so made as to cease to have effect, if not sooner revoked, at a fixed time or upon a particular event, or at a time to be fixed;
- (d) may be revoked at any time by the Parliament by which the reference or designation was made, but only by an Act of that Parliament that expressly revokes the reference or designation;
- (e) may be extended in duration by, or in accordance with provision made by, an Act of the Parliament by which the reference or designation was made;
- (f) may be so made as to be subject to conditions, including conditions as to the laws that may be made by virtue of the reference or designation or as to the operation of those laws; and

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- (g) does not prevent the exercise of any power by the Parliament by which the reference or designation was made.

5 “(2) Where a reference or designation referred to in this section is revoked or otherwise ceases to have effect, a law of the Commonwealth or of a State, to the extent that it is in force by virtue of the reference or designation, ceases to have effect, but where a reference or designation is extended in duration beyond the time at which it would otherwise have ceased to have effect but without other change, it shall not be taken to have ceased to have effect at that time.”.

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

7.

(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.

AUSTRALIA

HOUSE OF REPRESENTATIVES

Vol 3

BILLS

AMENDMENTS
EXPLANATORY MEMORANDA, ETC.

1st SESSION OF THE 33rd PARLIAMENT

1983-84

Sittings from 21 April 1983 to 11 October 1984
Parliament dissolved 26 October 1984

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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

Received from the Senate and read a first time, 24 August 1984

(Minister representing the Attorney-General)

A BILL

FOR

An Act to enable the Commonwealth and the States voluntarily to refer powers to each other

BE IT ENACTED by the Parliament of the Commonwealth of Australia,
with the approval of the electors, as required by the Constitution, as follows:

Short title

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10 "108A. (1) The Parliament of the Commonwealth may designate a matter referred to in sub-section (2) of this section as a matter in relation to which this section is to apply and, where a matter is so designated, the powers of the Parliament of each State to make laws of the State extend, subject to this section, to the making of laws with respect to that matter and with respect to
15 matters incidental to the execution of the power to make such laws.

“(2) A matter designated under sub-section (1) of this section shall be—

- (a) the matter of the imposition of duties of excise, or a matter that is included in that matter;
- (b) the matter of places acquired by the Commonwealth for public purposes, or a matter that is included in that matter; 5
- (c) any other matter with respect to which the Parliament of the Commonwealth has exclusive power to make laws; or
- (d) the matter of the investing of a specified federal court other than the High Court with State jurisdiction in matters of a specified kind.

“(3) The powers of the Parliament of a State under this section are not affected by the fact that any power of the Parliament of the Commonwealth is, apart from this section, exclusive but are in all other respects subject to the provisions of this Constitution that apply to the powers of the Parliaments of the States. 10

“(4) Except as provided in sub-section (3) of this section, the powers of the Parliament of a State under this section are not subject to any restrictions or conditions other than— 15

- (a) those that are applicable by virtue of the terms and conditions of the designation by the Parliament of the Commonwealth of the relevant matter; and 20
- (b) those that are applicable from time to time under any law relating to the manner of the making, or the form, of laws of the State.

“(5) Nothing in this section derogates from the powers that the Parliament of a State has apart from this section.

Provisions applicable to references of matters by States and designation of matters by Commonwealth 25

“108B. (1) The reference of a matter by the Parliament of a State for the purposes of paragraph (xxxvii) of section 51 of this Constitution or the designation of a matter by the Parliament of the Commonwealth for the purposes of section 108A of this Constitution— 30

- (a) shall be by Act of the Parliament making the reference or designation;
- (b) may be so made as to take effect at a future time or subject to a condition precedent;
- (c) may be so made as to cease to have effect, if not sooner revoked, at a fixed time or upon a particular event, or at a time to be fixed; 35
- (d) may be revoked at any time by the Parliament by which the reference or designation was made, but only by an Act of that Parliament that expressly revokes the reference or designation;
- (e) may be extended in duration by, or in accordance with provision made by, an Act of the Parliament by which the reference or designation was made; 40
- (f) may be so made as to be subject to conditions, including conditions as to the laws that may be made by virtue of the reference or designation or as to the operation of those laws; and

(g) does not prevent the exercise of any power by the Parliament by which the reference or designation was made.

5 “(2) Where a reference or designation referred to in this section is revoked or otherwise ceases to have effect, a law of the Commonwealth or of a State, to the extent that it is in force by virtue of the reference or designation, ceases to have effect, but where a reference or designation is extended in duration beyond the time at which it would otherwise have ceased to have effect but without other change, it shall not be taken to have ceased to have effect at that time.”