# THE OXFORD COMPANION TO THE HIGH COURT OF AUSTRALIA

*Edited by*

TONY BLACKSHIELD

MICHAEL COPER

GEORGE WILLIAMS

*Research Assistants*

FRANCESCA DOMINELLO

SUSAN PRIEST

TROY SIMPSON

OXFORD

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be a barrier to judicial appointment, especially to a position as important and sensitive as that of High Court judge'. Many in the legal profession now share that view.

PETER DURACK
AMELIA SIMPSON

***Australia Acts*** 1986 is the compendious name for twin statutes, each called the *Australia Act*, enacted respectively by the Australian and UK Parliaments in identical terms. Their primary effect was to sever the remaining links of law and government in the Australian states with the UK. Their particular effect on the High Court was to close the last avenues of appeal from state courts to the **Privy Council**, and to end a series of difficult cases concerning the continued operation of British law in Australia.

The Commonwealth of Australia, like other British Dominions, had been given independent Dominion status by the *Statute of Westminster* 1931 (Imp). This liberation did not, however, affect the position of the states, which thus retained some of the constitutional attributes of British colonies. The Australia Acts gave the states the same degree of independence from Britain as the Commonwealth had attained over 40 years earlier.

While making Australia's independence complete, the Acts also made it final. Section 4 of the Statute of Westminster had kept open the possibility that the UK might legislate for Australia at Australia's request and consent; section 9(2) had limited the Commonwealth's power to override British legislation; section 10(2) had permitted Australia to revoke its adoption of the Statute. The Australia Acts repealed these provisions.

The problem of ascertaining what English statutes were in force in Australia had been tackled after **World War I** by the Victorian judge Leo Cussen, whose 'years of patient and erudite labour' resulted in the *Imperial Acts Application Act* 1922 (Vic). A 1967 report by the NSW Law Reform Commission produced the *Imperial Acts Application Act* 1969 (NSW), and Victoria extended its 1922 legislation by passing the *Imperial Acts Application (Amendment) Act* 1971 (Vic). These initiatives were confined to the identification and rationalisation of English statutes 'received' in Australia through the **reception of English law**; they did not tackle the larger problem of Imperial statutes operating by 'paramount force' and beyond the power of the state parliaments to amend or repeal. But they drew attention to the problem, and from the early 1970s onwards, discussions among Commonwealth and state **Attorneys-General** and **Solicitors-General** were moving towards the eventual enactment of the Australia Acts. The final plan was settled by Premiers' Conferences in 1982 and 1984.

Three developments in the 1970s gave impetus to the discussions. The first was the 1973 Sydney session of the Australian Constitutional Convention. The second was a series of High Court cases drawing attention to the operation in the Australian states of long-outdated provisions in the *Merchant Shipping Act* 1894 (Imp) setting limits to the amount of compensation for injuries or damage sustained on or caused by a ship. The UK amendments increasing those limits to more realistic levels did not apply in Australia; and the states were effectively powerless to make any amendments themselves. The Court acknowledged the anachronism, but held that the slow evolution of Australian independence had not altered the legal situation (see **Stephen** in *China Ocean v SA* (1979)). **Murphy** (see *Bistricic v Rokov* (1976)) contended that the evolutionary process had merely worked out the implications of what happened conceptually when the Constitution came into force on 1 January 1901: from that moment on, Australia had been an independent nation, in which no remnant of 'imperial–colonial' relations could survive. But no other Justice accepted that view.

The third development was the Court's explication, in ***Viro v The Queen*** (1978), of the consequences of abolition of appeals from High Court to Privy Council. Since appeals to the Privy Council from the **state Supreme Courts** remained open, it might happen that, on the same legal issue, one litigant would appeal to the Privy Council and another to the High Court, with opposite results—by each of which the Supreme Courts would be bound. In *Southern Centre of Theosophy v SA* (1979), SA argued that the abolition of Privy Council appeals from the High Court had entailed, as a necessary logical consequence, the abolition of such appeals from state courts as well, since otherwise there would be what **Dixon** had called in *Ffrost v Stevenson* (1937) 'an antinomy inadmissible in any coherent system of law'. But only Murphy accepted the argument.

In 1979 the NSW Parliament passed a Privy Council Appeals Abolition Bill. NSW Governor Roden Cutler reserved it for the Queen's assent, which she refused on the advice of her British Ministers—specifically Lord Carrington as Secretary of State for Foreign and Commonwealth Affairs. It was said that at a subsequent cocktail party Murphy had raised the issue with Carrington, who explained that assent was withheld because the Bill might be unconstitutional: the NSW Parliament might have no power to abolish Privy Council appeals. Murphy agreed that this might be so, but observed that in such a case the proper course is for assent to be given so that the constitutional issue can be tested in the courts. Carrington replied: 'But the courts cannot pronounce on the validity of an Act of Parliament'—thus revealing that his advice to the Queen was based on a complete misapprehension of Australian constitutional practice.

On the issue of Privy Council appeals, as on all the issues covered by the Australia Acts, the locus of constitutional power to legislate was indeed uncertain. Perhaps it might be vested in the states, since their constitutional arrangements were affected; perhaps in the Commonwealth Parliament, since the matter affected the relationship between the UK and Australia and might therefore be an '**external affair**' under section 51(xxix) of the Constitution; perhaps in cooperative state and federal legislation under section 51(xxxviii) of the Constitution; or perhaps in the UK Parliament, since Imperial legislation operating by 'paramount force' was involved. But there were political and legal difficulties with all these suggestions.

In the end, the legislative strategy was comprehensive. The Commonwealth Parliament enacted its own version of the Australia Act, and also an *Australia (Request and Consent) Act* 1986 (Cth)—requesting the UK Parliament to enact its version, and consenting to that enactment, as section 4 of the Statute of Westminster envisaged. And both Commonwealth enactments had first been requested by leg-

islation in every state (for example, the *Australia Acts Request Act* 1985 (NSW)).

In *Sue v Hill* (1999), the joint judgment of **Gleeson**, **Gummow** and **Hayne** reviewed the effect of the Australia Act by reference to the functions of government identified by the traditional **separation of powers**—legislative, executive and judicial. As to legislative power, the Australia Act made it clear that no future UK legislation could apply to any part of Australia (section 1), and vested in the Parliament of each state any legislative power which the UK Parliament might have retained in relation to that state (section 2(2)). Section 2(1) freed the state Parliaments from the dubious constraints of the doctrine of extraterritoriality, which denied or limited the operation of a state's legislation outside its own territory. (As the Court pointed out in *Union Steamship v King* (1988), judicial developments in cases such as *Pearce v Florenca* (1976) had rendered that supposed limit largely innocuous in any event.) More importantly, section 3 freed the state Parliaments from the limits on legislative power affirmed by the *Colonial Laws Validity Act* 1865 (Imp)—making that Act inapplicable to any state legislation, and specifically negating its concept that the states could not enact laws 'repugnant' to paramount British laws. Yet the foundation that the 1865 Act had provided for 'manner and form' provisions, by which **state constitutions** have been amended to impose effective limits on the power of future parliaments, was preserved and re-enacted: it now depends not on section 5 of the 1865 Act, but on section 6 of the Australia Act.

As to executive power, section 7 affirmed the position of state Governors as representing the Queen. The Queen (on the Premier's advice) appoints the Governor, and may exercise her powers and functions herself if 'personally present in a State'. Otherwise all her powers and functions are exercisable solely by the Governor, on advice tendered solely by the Premier. Sections 8 and 9 preclude any survival of the obsolete procedures by which legislation might be reserved for the Queen's assent or disallowed by her. By section 10, the UK government 'shall have no responsibility for the government of any State'. Finally, as to judicial power, section 11 abolished all remaining avenues of appeal to the Privy Council from any Australian court.

The joint judgment in *Sue v Hill* used these provisions to confirm that a British citizen is nowadays a citizen of a 'foreign power'. It conceded that Britain could not be regarded as a foreign power if its governing institutions retained any power in Australia, but used the Australia Act to demonstrate that this was no longer the case.

The Australia Act came into operation on 3 March 1986, after the Queen had travelled to Canberra in order to proclaim its commencement in her capacity as Queen of Australia. Yet much academic **commentary** has assumed that the effectiveness of the Act depended on its UK version. The implication is that the Australian version alone could not have achieved its objectives: that to sever the states' links with the UK, legislation by the UK was essential. The issue is symbolically important because, if the Australian version was sufficient, then even before 1986 Australia was arguably already independent: its **sovereignty** would not be negated by residual linkages with the UK, provided that the power to terminate them lay wholly within Australia. By contrast, if

Queen Elizabeth II gives royal assent to the Australia Acts on 2 March 1986 at Government House, Canberra, with Prime Minister Bob Hawke standing immediately behind

that objective could not be achieved without the assistance of UK legislation, then even in 1986 Australia was arguably not independent.

It is therefore significant that the joint judgment in *Sue v Hill* referred only to the Australian version—suggesting that the UK version was enacted 'out of a perceived need for abundant caution', and discounting any significance for Australia of the idea that, under the British conception of parliamentary sovereignty, the UK Parliament might retain the theoretical power to repeal its version of the Australia Act (and even the Statute of Westminster). If such a repeal were to happen, said the judgment, its effect in the UK would be a matter

> for those adjudicating upon the constitutional law of that country. But whatever effect the courts of the United Kingdom may give to an amendment or repeal of the 1986 UK Act, Australian courts would be obliged to give their obedience to s 1 of the statute passed by the Parliament of the Commonwealth.

Moreover, the joint judgment (supported on this point by **Gaudron**) held specifically that the Australian version was valid under section 51(xxxviii) of the Constitution, which enables the Commonwealth Parliament to legislate with respect to 'the 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'. The decision accepted the broad view of section 51(xxxviii) unanimously taken in *Port MacDonnell Professional Fishermen's Association v SA* (1989) (see **Nationhood, Court's role in building**).

A year before the Australia Acts—after plans for the legislative package were far advanced—the decision in *Kirmani*

*v Captain Cook Cruises (No 1)* (1985) pointed to other possible sources of power. One was section 2(2) of the Statute of Westminster, which enables a Dominion Parliament to repeal or amend any UK 'Act, order, rule or regulation in so far as the same is part of the law of the Dominion'. Another was the external affairs power, since it is commonly accepted that the expression 'external affairs' rather than 'foreign affairs' was chosen because the **framers of the Constitution** intended the power to extend to relations with the UK (see, for example, **Barwick** in the *Seas and Submerged Lands Case* (1975)). The four majority Justices in *Kirmani* agreed that, on one or both of these grounds, a Commonwealth enactment in 1979, amending the British Merchant Shipping Act in its application to the states, was valid. Yet with no clear majority for either ground and thus no clear ***ratio decidendi***, the effect of the decision remains enigmatic.

If the Australian version of the Australia Act taken by itself was valid, it follows, as *Sue v Hill* implied, not only that the UK version was (from the viewpoint of Australian law) an unnecessary extra precaution, but that (for purposes of Australian law) any legal consequences must be derived solely from the Australian version. This is of practical importance in view of suggestions that the Australia Act, or the circumstances of its enactment, may have opened up an alternative method of amending the Constitution, bypassing the referendum process required by section 128.

The most frequent suggestion is as follows. Section 8 of the Statute of Westminster made it clear that the Commonwealth power to repeal or amend British legislation did not allow it to alter the Constitution or the *Commonwealth of Australia Constitution Act* 1900 (Imp); and section 5 of the Australia Act makes it clear that the power of the states to repeal or amend British legislation does not extend to either of those instruments, nor to the Statute of Westminster. But by section 15(1) of the Australia Act, the Commonwealth, 'at the request or with the concurrence of the Parliaments of all the States', can repeal or amend both the Statute of Westminster (in its Australian applications) and the Australia Act itself. The argument is that this procedure could be used to remove or modify the fetters imposed by section 8 of the Statute of Westminster and section 5 of the Australia Act, thus rendering the Constitution itself (or any specified part of it) open to legislative amendment. That amendment could then be achieved at a second stage—whether by further resort to cooperative legislation; or by Commonwealth legislation under section 2(2) of the Statute of Westminster; or by some wholly new procedure created by the initial amendment under section 15(1).

Clearly, no ordinary exercise of Commonwealth–state cooperation under section 51(xxxviii) of the Constitution could circumvent section 128, which emphatically declares: 'This Constitution shall not be altered except in the following manner.' To make sense of the argument about the Australia Act, we must assume that the formula used in section 15(1) (request or concurrence 'of all the States') is *different* from the formula in section 51(xxxviii) of the Constitution (request or concurrence 'of all the States directly concerned'). But this seems unduly strained. If, as seems likely, the Australia Act does not create a new independent alternative to section 51(xxxviii), but simply allows section 51(xxxviii) to be used for the specified purposes, any use of section 15(1) would still be 'subject to this Constitution'.

In any event, section 15(1) could create a new avenue for changing the Constitution only if the legislative powers used to enact it permitted such a result; and no possible basis for the Australian version could have that effect. The external affairs power, like section 51(xxxviii), is 'subject to this Constitution'. As for the power conferred by section 2(2) of the Statute of Westminster, no hypothetical future repeal of section 8 of that Statute could alter the fact that section 2(2) was effectively limited by section 8 when the Australia Act was passed. Accordingly, the supposed effect of section 15(1) must depend exclusively on its UK version. Moreover, the argument must assume that the UK version can have an effect which the Australian version cannot—that is, that the two identical texts of section 15(1) can be given different interpretations.

In any event, the power of the UK Parliament to legislate in the manner suggested would also be doubtful. Despite the theoretical possibility that the UK Parliament might assert a continuing Imperial power not limited by the Statute of Westminster, that is not what the UK version of the Australia Act purported to do. It purported to exercise the power retained by section 4 of the Statute of Westminster, to legislate for a Dominion provided that its request and consent is 'expressly declared'. That power, like the Commonwealth Parliament's power under section 2(2) of the Statute, would appear to be limited by the declaration in section 8 of the Statute that 'nothing in this Act shall be deemed to confer any power to repeal or alter' the Australian Constitution.

Of course, it might be said that section 2(2) of the Statute did not 'confer' a new power, but simply limited an existing power. And, in any event, the theory that the UK Parliament retains an inherent power to legislate inconsistently with the Statute of Westminster always lurks in the background. But the short answer to these conundrums is what *Sue v Hill* suggested: that these would be conundrums for British constitutional law, of no relevance in Australia.

In fact, the High Court's response suggests that far from undermining the democratic foundation of the Constitution, the Australia Act has reinforced it. Until 1986, the validity of the Australian Constitution was conventionally ascribed to its enactment by the UK Parliament at a time when that Parliament had Imperial authority over Australia. But a number of Justices—notably Mason in *Australian Capital Television v Commonwealth* (1992) and **McHugh** in *McGinty v WA* (1996)—have accepted that, since British legislation no longer has any relevance, the legitimacy of the Constitution must now depend on its foundation in popular sovereignty. As Mason put it, the Australia Act 'marked the end of the legal sovereignty of the Imperial Parliament and recognized that ultimate sovereignty resided in the Australian people'. Thus, although—as Gummow pointed out in *McGinty*—the Australia Acts were not themselves an exercise of popular sovereignty, they have led to an acceptance of that sovereignty as the foundation upon which Australia's constituent instruments must be construed. It is hardly likely that section 15(1), construed upon that foundation, would be found to have subverted that foundation.

TONY BLACKSHIELD