III Practice of the Individual States and Territories of the Commonwealth

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Papua and New Guinea Act 1968

The Papua and New Guinea Act 1949, as amended, is, *inter alia*, a translation of Australian international obligations in respect of the Trust Territory of New Guinea, into the realm of municipal law. It is not the purpose of this note to comment on the success of this translation, but to draw attention to the Papua and New Guinea Act 1968,[1] which, in amending the already much amended principal Act, made further changes both within the executive branch of government of the administrative union of which the Trust Territory forms a part, and in respect of the relationship of the executive and the legislature. The Act replaces the Administrator's Council[2] with the Administrator's Executive Council,[3] which comprises the Administrator, seven Ministerial Members drawn from the elected membership of the House of Assembly, and three Official Members of the House, while provision was also made for the appointment of a further elected member of the House who is not of ministerial members' rank.[4]

The Ministerial Members cannot be described as Ministers in the English or Australian sense, as, though they may be entrusted with substantial executive powers, they are not responsible to the legislature but to the Administration of the Territory, that is, the executive branch of government.[5] In this sense, the ministerial membership system is more akin to those presidential systems of government where the ministers are responsible to the executive rather than to the legislature. Although the Ministerial Members retain their status as elected members of the House, their statutory function in the legislature is to represent the Administration.[6]

Provision is made for an elaborate process of appointing Ministerial and Assistant Ministerial Members, involving nomination by the House of Assembly, the concurrence of the Administrator, and ulti-

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1 Commonwealth Statutes, No. 25 of 1968, assented to and in operation on 27 May 1968.

2 Established by Act No. 47 of 1960, s. 6.

3 The changes introduced by the 1968 Act followed, though did not mirror, the recommendations of the House of Assembly's Select Committee on Constitutional Development.

4 Papua and New Guinea Act 1949-1968, s. 20.

5 Ibid., ss. 19, 24 and 25.

6 Ibid., s. 25 (1)(b).

mately, appointment by the Commonwealth Minister for External Territories.[7] The removal of a ministerial member is also a complex process,[8] though one which would be unlikely to be put to much use.

While it would be difficult to deny that the 1968 amendment to the Papua and New Guinea Act is an indication of further advancement towards the Trusteeship goal of self government and independence, it would be difficult to show that it represented any rapid acceleration of this process.

In commenting on the ministerial membership system, the 1968 United Nations Visiting Mission stated in its Report that: "Appreciable as these changes are, the Executive Council still remains an advisory body as before".[9] The Mission recommended the introduction of changes "leading to full ministerial responsibility" within two years.[10]

Jurisdiction over foreigners' fishing

The Fisheries Act 1967[11] introduced a new jurisdictional concept into the law governing fishing in the seas adjacent to Australia and Eastern New Guinea. It established a single ". . . declared fishing zone . . ." in these waters, defined in s. 4 of the 1967 Act to include proclaimed waters lying within the 12 mile limit, calculated as being 12 nautical miles to the seaward of ". . . the baselines by reference to which the territorial limits of Australia are defined for the purposes of international law . . .", ". . . the waters adjacent to each territory not forming part of the Commonwealth . . ." to the 12 mile limit.

The Fisheries Act 1952-1966, which the 1967 Act amended, had already introduced the jurisdictional concepts of "Australian waters" and "proclaimed waters". Australian waters were defined in s. 4 of the earlier Act as:—

"(a) Australian waters beyond territorial limits;
(b) the waters adjacent to a territory and within territorial limits; and
(c) the waters adjacent to a territory, not being part of the Commonwealth, and beyond territorial limits."

The precise extent of "Australian waters" appears to remain undefined. However, s. 7 of the Fisheries Act 1952-1966 authorized the Governor-General, by Proclamation, to declare any Australian waters to be proclaimed waters "for the purposes of this Act". Jurisdiction over Australian-based fishing operations was only asserted within "proclaimed waters" under the Fisheries Act 1952-1966, making the question of the extent of "Australian waters" irrelevant for most practical purposes.

It would appear that under the Fisheries Act 1952-1966, jurisdiction was only asserted over Australian-based fishing operations within

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7 Ibid., s. 26.
8 Ibid., ss. 26 (1)(3) and (5), 27, 28 and 29A.
9 *Report of the United Nations Visiting Mission to the Trust Territory of New Guinea*, 1968, United Nations, New York, 1968, p. 38, para. 148.
10 Ibid.
11 Commonwealth of Australia, No. 116 of 1967.

"proclaimed waters", and that the basis of the assertion of jurisdiction lay in the amenability of Australian-based fishermen to the jurisdiction of the Australian municipal courts, for the areas comprised within the Proclamations were very large indeed, extending far into the Coral Sea, the Tasman Sea, including the Great Australian Bight and the Gulf of Carpentaria, enclosing an area of sea well in excess of that normally allowed by international law. The foreign-based fishing operations of foreigners in foreign ships lay outside the ambit of the Act, except in so far as such fishing operations took place within territorial waters.[12]

The effect of the 1967 amendment is to assert jurisdiction over foreign fishing operations, including those not based in Australia, within that part of "the declared fishing zone" lying inside "proclaimed waters".[13] The Proclamations made under the Fisheries Act[14] have defined proclaimed waters in such a way as to exclude "waters that are within the territorial limits of a State or of a Territory of the Commonwealth" in an attempt to avoid conflict between Commonwealth and Papua and New Guinea fishing legislation.

Assistant Administrator Henderson said in the Territory's House of Assembly on 15 November 1967 that: "Our present fishing legislation in this Territory controls fishing rights up to three miles. The Federal bill in no way infringes on Papua and New Guinea legislative rights over this zone . . . . The (Federal) bill provides for the licensing in Papua and New Guinea of Papua and New Guinea based fishermen, who will need to obtain licences to fish in this area between three and 12 miles off-shore."[15] He appears to have taken the view that each external territory of the Commonwealth has a territorial sea of its own, a view subsequently described by Barwick, C.J., in *Bonser* v. *La Macchia*[16] as a misconception. However, despite any possible misconceptions as to the powers of the Territory legislature, the Fisheries (Licensing) Ordinance 1966 did not define the precise limits of Territory waters, merely describing these as "the territorial waters of the Territory" so that this ordinance could hardly be treated as being *ultra vires*, though it could well be that licences issued under it could not be supported.

The assertion of Commonwealth, as opposed to Territory jurisdiction, in waters adjacent to the Territory and within the three mile limit would, in the view of Kitto, J.,[17] be supported by s. 122 of the Commonwealth Constitution. Although it would appear that by

12 Section 5 (2) of the Fisheries Act 1967 implies that this was the draftsman's view of the earlier legislation. There is nothing in the Fisheries Act 1952-1966 to rebut the presumption of its compliance with international law. *Bloxam v. Favre* (1883), 8 P.D. 100, at p. 107, per Sir James Hannen, P.

13 E.g., s. 5 (2).

14 Commonwealth of Australia Gazettes of 9 December 1954, 16 February 1956, and 22 August 1968.

15 House of Assembly Hansard, vol. 1, No. 15, at p. 2888. The Territory legislation referred to was the Fisheries (Licensing) Ordinance 1966 [No. 58 of 1966].

16 (1969), 43 A.L.J.R. 275, at p. 281.

17 Ibid., at p. 288.

s. 4 of the 1967 Act, the waters adjacent to the continent of Australia, the Territory of Papua, and the Trust Territory of New Guinea are deemed to form a composite area within which Commonwealth jurisdiction has been extended. The draftsman has apparently sought to avoid the possible implication that, in the view of the Commonwealth, the seas adjacent to Papua and New Guinea have the same status for all purposes as those adjacent to mainland Australia and Tasmania, or, are part of them. By the adoption of the device of describing separately Australian waters and the waters adjacent to each Territory, there is some recognition, not only of the differing basis of Australian jurisdiction in these waters, but also of the difference in status between individual territories and their adjacent waters. At the same time, jurisdictional rights have been asserted which can presumably be relied on by Australian territories on achieving self-government or independence.

Nevertheless, it might also have been desirable to amend the definition of "Australian waters" in s. 4 of the Fisheries Act, which at present includes the waters adjacent to external Territories and outside territorial limits, in such a way as to give statutory consistency to the conceptual distinction between the seas surrounding eastern New Guinea and the Australian Commonwealth.

However, in so far as the external territories are concerned, this statutory extension of Commonwealth jurisdiction raises several problems.

Firstly, it may be that the Papuan 12 mile zone now extends southwards into the area enclosed by Queensland's northern boundary,[18] which extends within Papua territorial waters.[19] As it would seem that both Papua and Australian waters at present fall within a single ". . . declared fishing zone . . ." set up by the Act,[20] this problem, at present, is of little practical consequence, though, as the Territory of Papua and New Guinea moves towards greater political autonomy, the problem of demarcation of Papuan and Australian waters will eventually have to be solved.

Secondly, previous practice has been for Australian jurisdiction to be asserted over the Territory of New Guinea, and, by implication, the waters adjacent to it, after obtaining the prior consent of the supervising international body—originally, the League of Nations, and subsequently, the United Nations. It does not appear that the agreement of the United Nations was obtained prior to these statutory assertions of jurisdiction over Trust Territory waters beyond the three mile limit.

In the Mandate of 17 December 1920 it is stated: "The Territory over which the Mandate is conferred . . . comprises the former

18 P. W. Van Der Veur, *Search for New Guinea's Boundaries,* Canberra, 1966, pp. 21 et seq.

19 House of Representatives Hansard, 2 and 3 November 1967, p. 2746.

20 Section 3 (c).

German Colony of New Guinea and the former German islands situated in the Pacific Ocean and lying south of the Equator, other than the islands of the Samoan group and the island of Nauru."[21] The Mandate is silent on the question of jurisdiction over territorial waters, but there is no evidence that Australia acquired rights more extensive than those possessed by the German Empire, which presumably did not extend beyond the three mile limit. The adoption of the Imperial Territorial Waters Jurisdiction Act 1878[22]—defining the territorial waters of all British territorial dominions as extending to the three mile limit—as part of the law of the Mandated Territory, by s. 14 of the Laws Repeal and Adopting Ordinance 1921, seems to have been a contemporary confirmation that territorial rights in New Guinea did not then extend beyond the three mile limit.

The Trusteeship Agreement of 13 December 1946, which was confirmed by the Papua and New Guinea Act 1949, and contained in a schedule to it, merely indicates that the Agreement applies to ". . . that portion of the island of New Guinea and the groups of islands administered therewith under the Mandate dated 17 December 1920, conferred upon His Britannic Majesty and exercised by the Government of Australia".[23]

So neither the Mandate nor the Trusteeship Agreement provide any apparent basis for the extension of Australian jurisdiction to or beyond the 12 mile limit. The justification for this must be found elsewhere, if at all. However, the rules of international law dealing with the assertion of jurisdiction over fishing grounds adjacent to territorial waters are not so well settled that they can be unequivocally relied upon to justify this extension of jurisdiction, at least in so far as the Trust Territory is concerned.

The Petroleum (Submerged Lands) Act 1967 as it relates to the Territories of Papua and New Guinea[24]

This Act asserted jurisdiction over the exploitation of the petroleum resources of the Australian continental shelf, and purports to be in conformity with the Convention on the Continental Shelf of 1958 to which Australia is a party. It also applies to Papua and New Guinea. Section 11 (2) asserts jurisdiction over the continental shelf adjacent to each Territory, falling within limits separately defined in respect of each Territory in the Second Schedule to the Act. In s. 4 the Act adopts the definition of continental shelf contained in the 1958 Convention, but appears to leave open the general question of sovereignty over the continental shelf adjacent to the two territories. Although the first recital in the Preamble to the Act states that: ". . . in accordance with international law Australia, as a coastal State, has sovereign rights over the continental shelf beyond the limits of Australian

21 Article 1. The Mandate is to be found in the *Laws of the Territory of New Guinea* 1921-1945, vol. 1, pp. 3-4.

22 41 and 42 Vict. c. 73.

23 Article 1.

24 Commonwealth of Australia, No. 118 of 1967.

territorial water... ". Nevertheless, in the enacting provisions, the territorial waters of the external territories seem to be placed in a different category from those adjacent to the mainland of Australia and Tasmania.

Section 11 (2), which deals with the application of Territory laws dealing with the exploitation of petroleum to the continental shelf, states that the appropriate Territory laws are to prevail, ". . . as if that area were part of that Territory and, in the case of the Northern Territory of Australia, were part of the Commonwealth . . .", thus contrasting the status of the territorial waters of the external territories and the Commonwealth.

However, by defining the continental shelf area of each Territory separately, the way is left open for Papua and New Guinea, either jointly or severally, to assume sovereign rights in the area of the Continental Shelf on attaining independence.

In the House of Assembly on 15 November 1967, Assistant Administrator Henderson said that: "Various exploration permits have been granted by the Administration over areas outside territorial waters and in view of the doubts as to the constitutional validity of our legislation in such areas, the Commonwealth, through this Bill, establishes for the Territory title to its off-shore areas in accordance with accepted international principles. I would point out to Members of the House that this House has no jurisdiction to legislate beyond the three mile limit. The application of Commonwealth legislation to our off-shore areas will require certain adjustments in respect of parts of our existing permits and licences over off-shore areas. It will be necessary for a Bill to be introduced into this House to make adjustments for this transitional period and the Administration foreshadows the introduction of such a Bill later during this meeting.'[25]

Later in the same Session the House of Assembly passed the Petroleum (Prospecting and Mining) Ordinance 1967,[26] amending the Petroleum (Prospecting and Mining) Ordinance 1951-1965, and acknowledging the paramountcy of Commonwealth legislation in this field. Section 14 (B)(1) prohibited the Administrator from issuing or extending petroleum permits, and leases and licences already granted, leaving all further licences and leases to be issued under the Commonwealth Act.

It is also of interest that in the description of the Papuan continental shelf in the schedule to the Commonwealth Act, extends Papuan rights well within the area claimed for most other purposes by Queensland. In places the Queensland State boundary comes well within Papuan territorial waters.[27] The Petroleum (Submerged Lands) Act 1967 thus complicates the boundary problems which will need to be solved before the Territory of Papua and New Guinea achieves independence.

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25 House of Assembly Hansard, vol. 1, No. 15, pp. 2886-8

26 No. 4 of 1968.

27 P. W. Van Der Veur, *Search for New Guinea's Boundaries*, Canberra, 1966. pp. 21 et seq.