V. Territory

Territory - Australian external territories - Legal regimes of Christmas Island and Cocos (Keeling) Islands - Legislation

On 27 May 1992 the Minister for Transport and Communications, Mr Collins, was granted leave to incorporate into *Hansard* the second reading speech for the Territories Law Reform Bill 1992 (HR Deb 1992, Vol 184, p 2804). That speech read in part as follows:

> Mr President, this Bill represents a substantial portion of the legislative action flowing from the Government's response to the recommendations of the House of Representatives Standing Committee on Legal and Constitutional Affairs in its report *Islands in the Sun - The Legal Regimes of Australia's External Territories and the Jervis Bay Territory*.
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> For Australia's Indian Ocean Territories of Christmas and the Cocos (Keeling) Islands, this Bill represents a giant step forward in the task the Government began in 1984 of bringing standards and living conditions in these Territories into line with those of comparable communities elsewhere in Australia.
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> Mr President, the inadequacy of the existing legal regimes in the Indian Ocean Territories derives from the fact that when the Territories became Australian Territories in the 1950s, their Imperial and Singapore-derived laws were largely left in force. To this base were added local Ordinances and a small number of Commonwealth Acts.
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> It is widely recognised that the resulting legal regimes are seriously deficient, unfair and inappropriate. These bodies of law have been severely criticised by the House of Representatives Standing Committee on Legal and Constitutional Affairs, the Federal Court, the Territories' Supreme Courts, Human Rights Australia, the Director of Public Prosecutions, and the Commonwealth Grants Commission. The regimes as they stand also obstruct the Government's objectives of extending to Territories' residents the same rights and opportunities as other Australians enjoy.
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> Mr President, in 1984 the Government invited the United Nations to supervise an Act of Self-Determination in Cocos. The Cocos Islanders were given three choices - independence, integration with an existing country, or free association with an existing country. They voted overwhelmingly for integration with Australia.
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> The United Nations definition of integration requires that the people of Cocos receive the same treatment and have the same obligations, rights and benefits as mainland Australians. In the lead-up to the Act of Self-Determination, the Commonwealth promised that living standards would be brought to mainland standards not later than 1994. The Government is well on track to meet that timetable.

The Commonwealth Grants Commission has been used as the arbiter over the changes required. In August 1990 the Government generally accepted the Commission's recommendations to bring government programs, works, services and taxes into line with those on mainland Australia.

The proposed changes were discussed in detail in extensive consultations with the Cocos Malay community leaders. They were incorporated in a Memorandum of Understanding, which was formally signed by the then Prime Minister and Cocos community leaders in March 1991. The M.O.U. provides for upgrading of Government works and services, restructuring of the Cocos (Keeling) Islands Council and the Cocos Islands Co-operative, financial assistance to the Council, major law reform, extension of taxation and introduction of mainland employment conditions. These changes are being introduced over three years to be completed on 1 July 1992.

Mr President, the application of a contemporary body of mainland law is fundamental to the changes which are being put in place.

In 1984 the Government also began the process of bringing conditions on Christmas Island into line with those in mainland Australia. Since then, a form of local government has been extended to the Island and mainland wages and employment conditions have been aligned progressively with mainland standards. Mainland social security benefits and health care arrangements now extend to the Island.

As with Cocos, a Package of Changes has been developed in consultation with the local community to extend to residents of Christmas Island rights, opportunities and obligations equivalent to comparable mainland communities, including similar local and State-type government structures, assistance programs, taxes and charges.

Again, Mr President, the application of a living body of mainland law is fundamental to the changes to be put in place. Not only will it give Island residents the rights and protections under the law enjoyed by their mainland counterparts but it will provide the legal infrastructure necessary for development and economic growth in the Territory. ...

It should be understood that while this Bill will replace the essentially Singapore based regime with a Western Australian based body of law, this regime will still be subject to modification by Ordinance under the Christmas Island Act and the Cocos (Keeling) Islands Act. ...

This Bill applies Western Australian law, as in force from time to time, as Commonwealth law. That is to say, the laws will be in force by virtue of Acts made by this Parliament, rather than by force of the Western Australian Parliament. As such the political responsibility for the applied law will continue to rest with the Commonwealth. ...

Federal law is also being generally extended to the Indian Ocean Territories by this Bill by reversing the current rule that a Federal Act only extends if it is expressed to extend. From 1 July this year a Federal Act will extend unless it is expressed to not extend.

This Bill will also amend the Acts Interpretation Act 1901 so that "Australia" and "the Commonwealth", when used in the geographic sense, will include the Christmas and Cocos Islands, unless the contrary intention is

specified. As part of making this change, this Bill amends a number of Federal Acts, to ensure they extend, or prevent their extension at this time. After 1 July only a small number of Federal Acts will not extend to the Islands.

Apart from the matters relating to the Indian Ocean Territories, another significant recommendation of the *Islands in the Sun* report was that Australian citizens resident on Norfolk Island be given the right of optional enrolment for the purposes of representation in the Federal Parliament.

I am pleased to be able to inform the Senate that agreement has been reached with the Norfolk Island Government on implementation of this recommendation.

Unfortunately, however, it has not been possible within the time available to include the necessary amendments to give effect to the agreement in this Bill. However, I understand that the appropriate legislative amendments are being prepared by the Minister for the Arts and Territories for introduction into the Parliament in the near future.

Territory - Australian external territories - Australian Antarctic Territory - Australian law in Antarctica - Parliamentary report

The following excerpts are taken from the report of the House of Representatives Legal and Constitutional Affairs Committee entitled *Australian Law in Antarctica*, which was tabled in Parliament (PP No. 252/1992) on 5 November 1992 (see HR Deb 1992, Vol 186, p 2676). It is normal practice for the Government to prepare a response to such Parliamentary reports. The Government's response to *Australian Law in Antarctica* will appear in the Australian Practice in International Law section of Volume 15 of this *Year Book*. (Some footnotes have been omitted from the excerpts from the Report.)

The Antarctic Treaty

General Provisions

2.2 Australia signed the Antarctic Treaty on 1 December 1959 as one of the 12 original signatories. Australia implemented the Treaty through the *Antarctic Treaty Act* 1960 which commenced on 22 September 1961. The Antarctic Treaty applies to the area south of 60 degree south latitude including land, islands and sea.

2.3 By signing the Treaty, Australia assumed a range of international commitments relating to the use of Antarctica. In common with the other Treaty Parties, Australia assumed these commitments "recognising that it is in the interest of all mankind that Antarctica shall continue for ever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord".

2.4 As one of the original signatories to the Treaty, Australia is entitled to participate in Antarctic Treaty Consultative Meetings, at which the Consultative Parties formulate policies which are recommended to the Governments which are party to the Treaty.

2.5 The Treaty provides that countries which accede to the terms of the Treaty and demonstrate significant scientific interest in Antarctica can receive voting membership as Antarctic Treaty Consultative Parties. The Antarctic Treaty Consultative Parties comprise the 12 original signatories plus 13 countries which have acceded to the Treaty and have demonstrated significant scientific research programs in Antarctica. There are a further 14 Non-consultative Parties which have acceded to the Treaty but not yet demonstrated a significant degree of scientific interest in Antarctica.

2.6 The Treaty is part of international law and forms the basis of a system of international regulatory mechanisms for Antarctica. In part it:

- stipulates that Antarctica should forever be used exclusively for peaceful purposes (Article 1);
- guarantees freedom of scientific research throughout Antarctica, and promotes exchange of scientific information and personnel (Articles 2 and 3);
- prohibits nuclear explosions, the disposal of nuclear waste, and measures of a military nature (Article 5); and
- establishes a system of on-site inspection by observers who have complete freedom of access to all areas of Antarctica in order to ensure the observance of the Treaty (Article 7).

2.7 The Treaty intentionally does not provide any resolution of conflicting claims of jurisdiction in Antarctica, but instead, is based on the Contracting Parties "agreement to disagree" on sovereignty claims. This is achieved through Article 4 which provides that any actions taken by signatories while the Antarctic Treaty is in force cannot constitute a basis for asserting a claim to territorial sovereignty in Antarctica. Article 4 also prohibits the assertion of any new claim, or enlargement of an existing claim, to territorial sovereignty while the Treaty is in force.

2.8 While nothing in the Treaty involves a renunciation by Australia of its claim to territorial sovereignty over the Australian Antarctic Territory, territorial claims in Antarctica are for the most part not recognised by other countries. Australia's sovereign claim to the Australian Antarctic Territory is recognised by only four countries namely New Zealand, France, Norway and Britain.

Application of Laws to Foreign Nationals

2.9 The Treaty also imposes some limitations on the application of the laws of Treaty parties to areas of Antarctica. Article 8 provides that observers and scientific personnel exchanged under Article 3, and their staff, are subject only to the jurisdiction of the Contracting Party of which they are nationals in respect of all acts or omissions occurring while they are in Antarctica for the purpose of exercising their functions under Articles 3 and 7.[3]

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3 Article 3 provides that scientific personnel may be exchanged in Antarctica between expeditions and stations. Article 7 provides that Contracting Parties are entitled to send their own nationals as observers to any part of Antarctica (including the Australian Antarctic Territory) to carry out inspections to ensure

2.10 Section 4 of the Antarctic Treaty Act gives effect to this requirement. This section provides that such a person, if not an Australian citizen, is not subject to Australian laws in force in the Australian Antarctic Territory in respect of any act or omission occurring while she or he is in Antarctica for the purpose of exercising her or his functions. However, by virtue of sub-section 4(2), an Australian citizen is subject to Australian laws in force in the Territory even if the act or omission occurred in a part of Antarctica outside the Territory, if the person is in Antarctica as a member of a scientific expedition or as an observer, or their staff.

2.11 Article 9(1)(e) of the Treaty provides for the adoption of measures by the Contracting Parties regarding the conflicts of jurisdiction in Antarctica. No specific measures on jurisdiction have been adopted and the questions of sovereignty and jurisdiction in Antarctica remain controversial.

2.12 Pending the introduction of measures under Article 9(1)(e), and without prejudice to the provisions concerning observers and scientific personnel, the Contracting Parties concerned in any dispute with regard to the exercise of jurisdiction in Antarctica are required by the Treaty to consult together immediately with a view to reaching a mutually acceptable solution (Article 8(2)).

2.13 Article 10 requires each Contracting Party to exert appropriate efforts, consistent with the Charter of the United Nations, to the end that none engages in any activity in Antarctica contrary to the principles or purposes of the Antarctic Treaty.

Other International Influences on the Legal Regime

2.14 The Antarctic Treaty system includes two other treaties which create obligations to which Australia is bound and which have a direct effect on the legal regime of the Australian Antarctic Territory. These are the Convention for the Conservation of Antarctic Seals of June 1972, and the Convention on the Conservation of Antarctic Marine Living Resources of May 1980.

2.15 The Convention for the Conservation of Antarctic Seals prohibits commercial sealing and requires each Party to the Convention to control the killing or capture of seals by its nationals or vessels under its flag. Australia has recognised its obligations by proclaiming the *Antarctic Seals Conservation Regulations* 1986 made under the *Antarctic Treaty (Environment Protection) Act* 1980.

2.16 The Convention on the Conservation of *Antarctic Marine Living Resources* has been incorporated into the legal regime of the Territory by the *Antarctic Marine Living Resources Conservation Act* 1981 which prohibits fishing and unauthorised research into marine organisms in the area south of the Antarctic Convergence.

2.17 Australia is also required to observe, in the Australian Antarctic Territory and elsewhere in Antarctica, recommendations arising from the Antarctic

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the observance of the Treaty. All areas, including stations, installations and equipment, and ships and aircraft at points of discharging or embarking cargoes or personnel in Antarctica, must be open, at all times to inspection by such observers. Aerial observation is also authorised.

Treaty Consultative Meetings. These include the Agreed Measures for the Conservation of Antarctic Fauna and Flora, which were adopted under Article 9 of the Antarctic Treaty and implemented in Australia by the *Antarctic Treaty (Environment Protection) Act* 1980.

International Obligations and the Application of Australian Laws

Preserving sovereignty over the Australian Antarctic Territory has always been an important element of Australia's Antarctic policy. At times it has been the pre-eminent element.

2.21 The application of the domestic laws of claimant States in Antarctica is partially addressed by Article 8(1) of the Antarctic Treaty which provides that those individuals covered by Articles 3 and 7, that is scientific exchange personnel, observers and their staff, are subject only to the jurisdiction of their own country "in respect of all acts or omissions occurring while they are in Antarctica for the purpose of exercising their functions [under the Treaty]".

2.22 The purpose of Article 8(1) is to enable scientific exchange personnel, observers and staff to carry out their duties in scientific research and inspections of observance of the Treaty without hindrance from other claimant States in Antarctica. It is, however, commonly thought that the provision of this Article extends to all non-nationals, not just to scientific personnel observers and staff.

2.23 That the Article does not extend to other individuals not included in these categories is in fact made clear by Article 8(1) itself which states that this exclusion of jurisdiction applies "... without prejudice to the respective positions of the Contracting Parties relating to jurisdiction over all other persons in Antarctica".

2.24 This point, namely that Australian law may be applied to foreign nationals not covered by Articles 3 and 7 of the Treaty, is also made by the Department of Foreign Affairs and Trade: "There is nothing in the text of the Treaty to suggest that the authors intended that the immunity provided for in Article 8(1) should extend to all the members of a foreign expedition".

2.25 The Department continues: "... the fact that the parties to the Antarctic Treaty were able to agree on the apportionment of jurisdiction only in respect of these limited categories of personnel is indicative of the divisions between them on the issue of jurisdiction".

2.26 The view that Article 8(1) applies to only a specified category of individuals, and that apart from this provision the Antarctic Treaty does not purport to regulate jurisdiction, was also put by Dr Tsamenyi, Dean of Law at the University of Tasmania.

2.27 This conclusion is also reflected in section 4(1) of the Antarctic Treaty Act, the instrument by which Australia implements the Antarctic Treaty. As is made clear by the Department of the Arts, Sport, the Environment and Territories: "There is nothing in the Antarctic Treaty Act which expressly prevents application of Australia law to other foreign nationals in the Australian Antarctic Territory".

2.28 On face value there is a tension between those provisions of the Antarctic Treaty, particularly under Article 4, which "freeze" sovereign claims and the

extent to which claimant States may legitimately exercise sovereign prerogatives. But, in the view of the Department of Foreign Affairs and Trade: "the stipulation that acts taking place while the Antarctic Treaty is in force do not constitute a basis for asserting or supporting a claim to territorial sovereignty (does not) mean that those acts are themselves prohibited by the Treaty".

2.29 The Department concludes: "Thus, the formal scope which remains for applying Australian legislation to the Australian Antarctic Territory remains considerable.... Whether to do so in any particular case becomes a matter of policy judgement."

2.30 The Department of Foreign Affairs and Trade also argues that there may be circumstances in which the application of Australian law to foreign nationals present in the Australian Antarctic Territory may serve to strengthen the Treaty System, basing this view on Article 10 of the Antarctic Treaty which provides that "each of the Contracting parties undertakes to extend appropriate efforts, consistent with the Charter of the United Nations, to the end that no-one engages in any activity in Antarctica contrary to the principles or purposes of the present Treaty".

Conclusion

2.31 The Committee is of the view that there exists a strong misconception about the scope of Article 4(2) of the Antarctic Treaty and the degree to which it constrains Australia in applying Australian law to foreign nationals in the Australian Antarctic Territory. The Committee agrees with the views of the Department of Foreign Affairs and Trade, Dr Tsamyeni and the Department of the Arts, Sport, the Environment and Territories that Australia is not prevented by Article 8(1) or Article 4(2) of the Antarctic Treaty from applying Australian laws to foreign nationals in the Australian Antarctic Territory.

2.32 It is both in Australia's sovereign interests and consistent with Australia's obligations under the Antarctic Treaty to extend and apply Australian law to foreign nationals in the Australian Antarctic Territory who are not otherwise exempted by Article 8(1) of the Antarctic Treaty.

2.33 This conclusion is consistent with the stated intention of the Australian Government at the time of implementing Antarctic Treaty obligations in Australian legislation. In speaking on the second reading of the *Antarctic Treaty Bill* 1960 the Hon Fredrick Osborne, the then Minister for Air, stated: "In exercise of her sovereignty Australia has applied a complete code of law to the Australian Antarctic Territory. That law is, in our view, applicable to all persons in the Territory, and a breach of the criminal law, for example, would be punishable in an Australian court".

RECOMMENDATION 1

The Committee recommends that, as a matter of principle, Australian law be extended and applied to those foreign nationals in the Australian Antarctic Territory who are not otherwise exempt under Article 8(1) of the Antarctic Treaty.

Territory – Australian external territories – Australian Antarctic Territory – Arrangement with Italy for scientific cooperation

On 9 August 1992 the Department for Foreign Affairs and Trade issued a news release which read in part:

> Australia and Italy will tomorrow sign a bilateral Arrangement for Scientific Cooperation in the Antarctic.
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> The Arrangement is the first of its kind which Australia has entered into with another Antarctic Treaty Consultative Party. Although informal cooperative arrangements have been concluded with other Antarctic Treaty partners on a case by case basis, this will be the first such arrangement that provides a framework for scientific cooperation across a range of areas of common interest.
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> The signature of the Arrangement reflects the close cooperation between Italy and Australia during the negotiations which led up to the adoption of the Protocol on Environmental Protection to the Antarctic Treaty in 1991. It also represents a new emphasis among Antarctic Treaty partners on developing a more systematic approach to international collaboration in research programs and the associated logistic facilities.