

The outcomes

With history as a guide, most commentators are not expecting to see many or any of the final recommendations made by the Morling Inquiry adopted by the Government or the Parliament. In 1982 a Royal Commission tackled many of the same issues and its recommendations have gathered dust on library shelves.

The number and range of submissions will probably force the Morling Inquiry to offer the Tasmanian Government a series of preferred options. These options will attempt to encapsulate the main ideas and proposals presented to the Inquiry. The Inquiry members will indicate which options are preferred by the Board of Inquiry. The major problem, and the same one facing all reformers in Tasmania, is that such changes will need to be accepted by a majority of Upper House members. In light of this reality the Morling Inquiry will most likely suggest that its options be put to the Tasmanian public in a referendum.

Comment

The Morling Inquiry has been an interesting exercise in participatory democracy. For two months Tasmanians were able to follow and consider a wide variety of possible options for restructuring the Tasmanian Parliament. On each day of the hearing considerable space was given in the media to the substance of various public submissions. The debate was vigorous, informed and, above all else, constructive. My greatest apprehension is that the Australian parliamentary process of the 1990s may be unable to respond positively to so much well-meaning advice from the electorate.

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INTERNATIONAL LAW

A constitutional gap?

MELISSA CASTAN discusses the legality of the Timor Gap Treaty.

On 18 August 1994 the High Court of Australia rejected a challenge to Commonwealth legislation implementing the Federal Government's treaty with Indonesia over the Timor Gap.

The treaty established co-operative rule over petroleum resources in the Timor Gap area to the north of Australian territorial waters. In *Horta and Others v Commonwealth of Australia* (1994) 123 ALR 1 (subsequently *Horta*) three East Timor born Australians challenged the Timor Gap legislation.

The plaintiffs, led by Jose Ramos Horta, questioned the validity of Commonwealth legislation based on the 'external affairs' power of the Australian Constitution, when that legislation contravenes international law. They also challenged the propriety of Australia's recognition of Indonesian sovereignty over East Timor, and whether the Australian courts could inquire into those acts of recognition by the Australian Government.

The Timor Gap Treaty

The parties largely agreed to the facts underpinning the claim (set out at 3). To interpret the legal issues, some political context is necessary.

In December 1975 the Republic of Indonesia occupied the former Portuguese Colony of East Timor. Indonesia has remained in occupation of East Timor, and has claimed sovereignty over the territory since 1976. The Australian Government recognised that claim to sovereignty in 1979.

Australia and Indonesia claim rights to overlapping parts of the continental shelf that lies between the coast of East Timor and the coast of mainland Australia. The area of overlap is known as the Timor Gap. The Timor Gap is of strategic interest to Australia, but its real value lies in the petroleum reserves that are thought to exist in the sea-bed.

In the decade that followed Australia's recognition of Indonesia's sovereignty over East Timor, a series of negotiations was entered into over the rights to the Timor Gap resources. In 1989 Australia and Indonesia executed an agreement that treated the Timor Gap as a 'Zone of Co-operation'. The agreement permitted the two nations to share control of the rights to explore and exploit the petroleum resources in the Zone, until the making of a formal, permanent delimitation of the Gap area.

The agreement's terms are set out in a pact called the 'Treaty Between Australia and the Republic of Indonesia on the Zone of Co-operation in an Area Between the Indonesian Province of East Timor and Northern Australia' (the Timor Gap Treaty). Australia considered its entry into the Timor Gap Treaty to be consistent with its obligations under international law (at 3).

In 1990 the Commonwealth Parliament enacted two pieces of legislation designed to enable Australia to fulfil its obligations under the Timor Gap Treaty. The primary Act, the *Petroleum (Australia-Indonesia Zone of Cooperation) Act 1990* (Cth), was aimed at establishing the regime of co-operation and implementing financial arrangements envisioned by the Treaty. A secondary Act, the *Petroleum (Australia-Indonesia Zone of Cooperation) (Consequential Provisions) Act 1990* (Cth), amended other Commonwealth laws made necessary as a consequence of the primary Act. Both Acts operated from 18 February 1991 onwards.

To pass these laws, the Parliament purported to rely on its power to make laws with respect to 'external affairs', conferred in s.51(xxix) of the Australian Constitution.

The parties' submissions

Horta and his co-plaintiffs began proceedings in the High Court in 1993, seeking declarations that the two Acts were not valid laws, because the Commonwealth Parliament had exceeded its legislative powers. They also sought a ruling that the Timor Gap Treaty was beyond the scope of the Commonwealth Government's executive power; thus not validly made.

Horta's main argument was that the two Acts were not laws with respect to 'external affairs' for the purposes of the constitutional grant of legislative power in s.51(xxix) of the Constitution. This argument was based on Horta's assertion that the Timor Gap Treaty is void under international law. If Indonesia's occupation of East Timor is unlawful in international law, then Australia's entry into the Treaty with

Indonesia is inconsistent with its obligations under customary international law, the Charter of the United Nations, and other international covenants to which Australia is a party.

This allegation is grounded in the contention that Indonesia has no valid claims to sovereign rights over the sea adjacent to East Timor, as that territory was occupied contrary to international law. This contention is one which is currently under consideration in the International Court of Justice. The plaintiffs argued that the Commonwealth Parliament's power with respect to external affairs was confined to the enactment of domestic laws that are not inconsistent with the requirements, obligations or constraints of international law (at 4).

Horta also argued that the Commonwealth's exercise of executive power under s.61 of the Constitution was constrained by the principles and rules of international law. Thus the Australian Government had no power to recognize Indonesia's claim to sovereignty over East Timor, nor to make a treaty dealing with the territorial waters of the disputed territory, as such acts of recognition were contrary to international law. The plaintiffs submitted that the legislative and executive power of the Commonwealth, conferred in the Constitution, must be confined within the limits of conformity with obligations existing at international law. As Horta's counsel put it, the external affairs power under the Constitution does not extend to authorising Australia to act as an 'unlawful actor' on the international stage (at p.33 of the transcript of the case).

Horta had also contended that the laws were beyond the external affairs power because they purport to deal with Australia's sovereign rights over its claimed Continental Shelf. The 'Continental Shelf' is itself a creation of international law, embodied in various international conventions. So, in dealing with its own Continental Shelf, Australia may only act in accordance with the international law system from which Australia derives those sovereign rights.

The Commonwealth responded to Horta's claim by denying that the Australian courts have jurisdiction to inquire into the propriety of the executive acts involving the recognition of Indonesia's sovereignty over East Timor, and entry into the Timor Gap Treaty. That is, the issues of international law which Horta raised would not be justiciable matters before the High Court.

The Commonwealth also asserted that its Parliament had legislative competence to enact the laws regardless of any inconsistency with Australia's obligations at international law, whether in the making of the treaty or in the implementation of its provisions (at 4).

The Commonwealth argued that the two Acts were validly enacted under the external affairs power because they deal with matters that are geographically external to Australia, a proposition drawn from the case of *Polyukhovich v Commonwealth* (1991) 172 CLR 501. It followed, the Commonwealth argued, that the two Acts would not lose their character as laws with respect to external affairs under s.51 of the Constitution, even if the Timor Gap Treaty were found to be void at international law, or if Australia were involved in a breach of international law by entering into the treaty, or by enacting the laws giving effect to that treaty.

The High Court's decision

In a surprisingly brief judgment the High Court unanimously disposed of Horta's claims.

The Court had no difficulty in finding that the Acts dealing with the Timor Gap Treaty, and the exploration and exploitation of petroleum resources in that area are matters coming within the phrase 'external affairs' for the purposes of s.51(xxix). That is, the Acts were laws with respect to matters that were territorially external to Australia, '[t]here is an obvious and substantial nexus between each [of those matters] and Australia' and 'they are all matters which the parliament recognises as affecting or touching Australia' (at 6). As such, the laws made regarding those external matters are *prima facie* within the legislative power granted by s.51(xxix).

The Court made it clear that the Acts would remain valid laws about external affairs whether or not their provisions relate to Australia's obligations under the Timor Gap treaty, or even if there were no treaty, simply because the Acts deal with matters geographically external to Australia.

Without explanation, the Court rejected the plaintiffs' second argument regarding the propriety of the Commonwealth Government's actions and did not deal with the argument concerning the Continental Shelf regime at all.

The Court warned that there should be no inference that it supported the view that the questions of international law that were raised by Horta could be justiciable in the case before them. The judges agreed with the Commonwealth's submissions on this point and concluded that:

in the absence of some real question of sham or circuitous device to attract legislative power, the propriety of the recognition by the Commonwealth Executive of the sovereignty of a foreign nation over foreign territory can [not] be raised in the courts of this country. [at 7]

Thus the Court refused Horta's invitation to consider the scope and constraints on the Commonwealth executive power.

Horta's case demonstrates the High Court's increasing tendency to interpret the external affairs power widely, with few limitations. The case reinforces the proposition, set out by the majority in *Polyukhovich*, that legislation dealing with any matter geographically external to Australia will *prima facie* be characterised as legislation regarding external affairs, under s.51(xxix) of the Constitution. These laws will not lose this character merely because they are inconsistent with the requirements or constraints of international law. Presumably this is so even where the Commonwealth *purports* to be acting under a set of rules or a regime which stems from international law.

Further, the propriety of the Commonwealth Government's actions in international affairs would appear to be beyond the scope of judicial supervision, unless those actions are clearly spurious attempts to make use of the external affairs power.

The Commonwealth Government remains free, under the Constitution, to use its executive power to pursue domestic objectives which may be repugnant to Australia's obligations as a member of the international community. *Horta's* case suggests that the High Court will not interfere with this freedom of executive power, and the East Timorese must seek recourse outside the Australian judicial system.

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