Current Legal Developments

Australia

Australia Extends Territorial Sea to 12 Nautical Miles

On 13 November 1990 the Australian Attorney-General, Michael Duffy, and the Minister for Foreign Affairs and Trade, Senator Gareth Evans, announced that the government had agreed to extend Australia’s territorial sea from three nautical miles to 12 nautical miles. A Proclamation extending Australia’s territorial sea was signed by the Governor-General of Australia, William Hayden, on 9 November 1990, with effect from 20 November 1990 (see Appendix).

Australia has signed but not yet ratified the 1982 United Nations Convention on the Law of the Sea (LOSC). That Convention provides that every state has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles (Article 3). During UNCLOS III (1973–1982) Australia supported the right of states to extend the territorial sea to 12 nautical miles. Australia has, however, been rather conservative in its maritime claims. One hundred and eight states have adopted a 12-mile territorial sea and until Australia’s recent announcement Australia was one of only 11 countries that continued to claim a three nautical mile territorial sea.

The trend towards a 12-mile limit has, of course, been a dominant trend in state practice (confirmed by the 1988 decision of the United States to move to a 12-mile limit). In Australia’s area of geo-political interest all the states of Southeast Asia (except Singapore) and the Pacific have a 12-mile territorial sea.

A number of advantages were cited by the government in its announcement to extend Australia’s sovereignty over its water, sea-bed and airspace out to 12 nautical miles. These advantages were simply noted without elaboration in the government’s press release but it is possible to suggest some broad factors that clearly influenced Canberra’s thinking on the issue of the width of the territorial sea.

The relevant Ministers (Foreign Affairs and Attorney-General’s) stated that there were considerable defence, customs and quarantine advantages in extending Australia’s territorial sea. As far as defence is concerned there are security benefits from such a decision. It limits the scope for authorized overflight of foreign military aircraft close to the coastline (there is no right to overflight by foreign aircraft over...

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1 News Release M193, Minister for Foreign Affairs and Trade, 13 November 1990.
2 It should be noted that the United States in announcing its decision for proclaiming a 12 nautical mile territorial sea specifically cited national security as a reason for its decision. See Noyes (1989) 4 IJECL 142–148.
the territorial sea) and permits Australia to take steps to prevent non-innocent passage as far seawards as possible. In the territorial sea, submarines are required to navigate on the surface and show their flag, while potential intelligence collectors would find it more difficult to gather intelligence at 12 miles. As LOSC allows temporary suspension of the right of innocent passage in specific areas of the territorial sea, if such suspension is essential for the conduct of weapons exercises (Article 25), the move to a 12-mile territorial sea permits a greater degree of safety during weapons trials and practices. In times of tension Australia might wish to close specific areas of its territorial sea for security reasons and a 12-mile limit may here give certain operational advantages.

There has been no reaction by Australian defence spokesmen to the decision but it is understood that Australian defence planners were involved in the decision-making process leading to the November announcement. There is little likelihood that the decision will have any implications for any increase in defence assets as Australia’s military strategy already emphasizes the ability of Australia’s defence forces to operate through the vast area of northern Australia and its maritime approaches.

As far as customs and quarantine are concerned Australia can now enforce customs and quarantine within 12 nautical miles. Australia, however, under the earlier 1958 Convention on the Territorial Sea and Contiguous zone exercised legislative jurisdiction with respect to customs within 12 nautical miles of the coast. The powers which a coastal state can exercise within the contiguous zone are limited as compared with those that it could exercise within a territorial sea.

The government announcement of 13 November 1990 also stated that a 12-mile territorial sea would allow Australia to “more effectively control its marine environment . . . the ability to enforce oil and other marine pollution measures, as well as regulate navigation, in our extended 12 nautical mile territorial sea, will be another safeguard in protecting such valuable areas as the Great Barrier Reef.” For some time Australia has been reviewing options for a shipping casualty in the Great Barrier Reef area. A new scheme for the introduction of a compulsory pilotage programme to replace the existing voluntary arrangements under an IMO resolution will enter into force in mid-1991. A wider territorial sea of course increases the area of water that may become subject to a compulsory pilotage scheme.

3 Article 19 of LOSC lists activities any of which render passage non-innocent. Apart from wilful pollution, violations of laws relating to fishing, customs and immigration, all of the prejudicial activities are security related.

4 Customs Act: s. 59, 184, 185. Australia does not claim a 12-mile contiguous zone from the baselines from which the territorial sea is measured as is allowed under the 1958 Convention. The LOSC provides for a contiguous zone which may not extend beyond 24 nautical miles from the territorial sea baselines (Article 33). There is no indication at this stage that Australia is considering introducing a 24 nautical mile contiguous zone, although arguably the provisions in LOSC relating to the contiguous zone reflect customary international law.

5 For details see “Protecting the Great Barrier Reef: Compulsory Pilotage Scheme”, Backgrounder, Department of Foreign Affairs and Trade, Canberra, 14 December 1990, pp. 3–4.