AUSTRALIAN LAW IN ANTARCTICA

The report of the second phase of an inquiry into the legal regimes of Australia's external Territories and the Jervis Bay Territory

House of Representatives Standing Committee on
Legal and Constitutional Affairs

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Front cover: Ice shelf, Australian Antarctic Territory
Back cover, top: Big Ben, Heard Island
Back cover, bottom: Penguin colony, McDonald Island

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'Powerless, one was in the spell of an all-enfolding wonder. The vast, solitary snow-land, cold-white under the sparkling star-gems; lustrous in the radiance of the southern lights; furrowed beneath the icy sweep of the wind. We had come to probe its mystery, we had hoped to reduce it to terms of science, but there was always the "indefinable" which held aloof, yet riveted our souls.'

Sir Douglas Mawson

from *The Home of the Blizzard, being the story of the Australasian Antarctic Expedition, 1911-1914.*

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* Mr Nehl and Mr Snow were members of the Committee for the purpose of this inquiry.

TERMS OF REFERENCE

On 22 September 1988 the Committee was asked by the then Attorney-General, the Hon Lionel Bowen QC MP, to examine, inquire into and report on the adequacy of the laws and legislative structure of Australia's external Territories and the Jervis Bay Territory, with particular reference to:

(a) the degree to which the citizens of the Territories receive the same benefits, rights and protection under the law as other citizens of the Commonwealth of Australia; and

(b) the extent to which the laws of the Territories have been identified, are applicable to the circumstances of the Territories and are administered.

On 15 May 1990 following the reappointment of the Committee in the 36th Parliament, the Attorney-General, the Hon Michael Duffy MP, asked the Committee to continue the work of its predecessor.

PREFACE

Australia has a longstanding presence and international reputation in Antarctica. In recent years Australia has taken a leading role in seeking a new conservation-based management regime for Antarctica and to this end has banned mining by both Australian and foreign nationals in the Australian Antarctic Territory, and by Australians anywhere else in Antarctica.

In conducting this inquiry, the Committee was mindful of the increased international concern for environment protection in Antarctica and of the need for our laws to effectively meet these concerns.

The recommendations contained in this report focus on the need to ensure that Australian citizens working in or visiting Australia's Antarctic and sub-Antarctic Territories are accorded comparable benefits, rights and protection under the law as received by mainland citizens. At the same time, the report recognises that the legal regime needs to take account of the special circumstances caused by the geographic and climatic isolation of the Territories.

The development and maintenance of an appropriate and up to date legal regime is not only important for those who work in or visit the Territories, but it also reinforces and helps maintain Australia's sovereign rights and interests in the Australian Antarctic Territory.

The Report first provides some historical background to Australian sovereignty over the Australian Antarctic Territory and describes the components of the existing legal regime.

Chapter 2 considers the extent to which international obligations constrain Australia's ability to apply laws in the Australian Antarctic Territory in exercise of its sovereignty, particularly in respect of foreign nationals.

The Report then assesses the effectiveness and relevance of the existing legal regime of the Australian Antarctic Territory and, in doing so, looks at various matters including current practices in applying Australian laws in the Territory.

Two specific inadequacies in the legal regime of the Australian Antarctic Territory, relating to environmental management and the regulation of tourism, are addressed in Chapter 4. In this context, the Chapter also considers the adequacy of the current administrative arrangements for the Territory.

In Chapter 5 the effectiveness and relevance of the legal regime of the Territory of Heard Island and McDonald Islands is examined. The key issues in this Chapter are the enforcement of laws and the management of the Islands for nature conservation purposes.

Finally, Chapter 6 of the Report, draws together the Committee's key findings in a concluding statement.

THE COMMITTEE'S RECOMMENDATIONS

RECOMMENDATION 1

The Committee recommends that, as a matter of principle, Australian law be extended and applied to foreign nationals in the Australian Antarctic Territory who are not otherwise exempt under Article 8(1) of the Antarctic Treaty. (Page 15)

RECOMMENDATION 2

The Committee recommends that the *Fisheries Management Act* 1991 be amended to include in the Australian Fishing Zone the 200 nautical miles adjacent to the Australian Antarctic Territory so as to extend Australian jurisdiction to the activities of non-Contracting Parties to the Antarctic Treaty. (Page 18)

RECOMMENDATION 3

The Committee recommends that the *Air Navigation Act* 1920 and the *Civil Aviation Act* 1988 be enforced with regard to the activities in the Australian Antarctic Territory of non-Contracting Parties to the Antractic Treaty. (Page 20)

RECOMMENDATION 4

The Committee recommends that Australia make clear to other Contracting Parties its intent to apply Australian law in the Australian Antarctic Territory to the extent contemplated in Recommendation 1, and that Australia negotiate arrangements with other Contracting Parties to ensure the smooth transfer of jurisdiction in circumstances where Australia does not wish to apply its law concerning scientific bases and personnel. (Page 23)

RECOMMENDATION 5

The Committee recommends that the *Australian Antarctic Territory Act* 1954 be amended so as to define the legal regime of the Australian Antarctic Territory as including the laws of Tasmania rather than the laws, other than the criminal laws, of the Australian Capital Territory and the criminal laws of the Jervis Bay Territory. (Page 27)

RECOMMENDATION 6

The Committee recommends that greater use be made of the ordinance making powers under section 11 of the *Australian Antarctic Territory Act* 1954 to legislate specifically for the Territory. (Page 28)

RECOMMENDATION 7

The Committee recommends that the Antarctic Division consult directly with the Australian Federal Police, as well as with the Attorney-General's Department, regarding the development of the Criminal Procedures Ordinance. (Page 29)

RECOMMENDATION 8

The Committee recommends that the Criminal Procedures Ordinance extend powers of arrest and custody to station leaders, and define clear procedures requiring station leaders to notify offences to the Australian Federal Police and to the relevant coronial authorities. (Page 29)

RECOMMENDATION 9

The Committee recommends that Australia actively support the negotiation of a further annexe to the Protocol on Environment Protection to the Antarctic Treaty to cover tourism. (Page 32)

RECOMMENDATION 10

The Committee recommends that the Australian Antarctic Territory be declared a nature reserve under the *National Parks and Wildlife Conservation Act* 1975. (Page 36)

RECOMMENDATION 11

The Committee recommends that discussions be held between the Commonwealth and the Tasmanian Governments regarding the possible incorporation of the Heard Island and McDonald Islands within the state of Tasmania, subject to:

- the Territory being declared a nature reserve under the Tasmanian *National Parks and Wildlife Act* 1970;
- the adjacent waters of the Territory being declared a marine reserve under the Tasmanian National Parks and Wildlife Act; and
- the plan of management required under the Tasmanian National Parks and Wildlife Act specify the banning of mining in the nature reserve. (Page 43)

RECOMMENDATION 12

The Committee recommends that the Australian Government vigorously pursue the application for World Heritage listing for Heard Island. (Page 43)

RECOMMENDATION 13

The Committee recommends that the Antarctic Division, as a matter of urgency, complete the plan of management for Heard Island required under Section 8 of the Environment Protection and Management Ordinance. (Page 43)

1. LEGAL REGIME OF THE AUSTRALIAN ANTARCTIC TERRITORY

Description and Historical Background

1.1 The Australian Antarctic Territory comprises nearly 3 million square kilometres, almost half of the Antarctic continent, and lies immediately south of Australia. The land area of the Territory is equivalent to approximately 78 per cent of the area of Australia and comprises:

> ... all islands and territory, other than Adelie Land, situated south of the 60th degree south latitude and lying between the 160th degree east longitude and the 45th degree east longitude.[1]

1.2 The vast bulk of the Australian Antarctic Territory is uninhabited. There are three permanently occupied Australian research stations in the Territory and four field bases used to support summer programs, as well as a Chinese and a number of Russian stations.

1.3 The first recorded sightings of Antarctica were made by a number of voyagers in the 1820s although no proclamations were made on behalf of the respective sovereigns sponsoring those voyages undertaken by Branfield (Britain), Palmer (United States) and Bellingshausen (Russia).[2]

1.4 The earliest definite sightings of that part of the Antarctic mainland subsequently to become the Australian Antarctic Territory were made by Captain J Biscoe in 1830-32.[3]

1.5 During the early 1800s interest in Antarctica was initially stimulated by the sealing and whaling industries. While a number of research and exploration expeditions were organised at that time, extensive land exploration was not made until Captain Robert Scott's first expedition in 1901-4.

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1 *Australian Antarctic Territory Acceptance Act* 1933, Section 2.

2 Professor James Crawford and Dan Rothwell, 'Legal Issues Confronting Australia's Antarctica', Supreme and Federal Court Judges Conference, 1992, p.3.

3 Dr Gillian Trigg, *International Law and Australian Sovereignty in Antarctica*, 1986, p.103.

1.6 The first Australian Antarctic Expedition, which took place between 1911 and 1914 under the command of Sir Douglas Mawson, was responsible for sighting and charting large tracts of the Antarctic coastline and inland areas which later formed the foundation of Australia's sovereignty claims in Antarctica. Further extensive claims to sovereignty were made by the British, Australian and New Zealand Antarctic Research Expedition (BANZARE) of 1929-31, also led by Mawson.

1.7 Following this, the British Government issued an Order in Council on 7 February 1933 asserting British sovereign rights over the Australian Antarctic Territory and placed the Territory:

> ... under the authority of the Commonwealth of Australia.[4]

1.8 The transfer of sovereignty over the Territory was implemented by the *Australian Antarctic Territory Acceptance Act* 1933 which provided:

> That part of the Territory in the Antarctic seas which comprises all the islands and territories, other than Adelie Land, situated south of the 60th degree south latitude and lying between the 160th degree east longitude and the 45th degree east longitude, is hereby declared to be accepted by the Commonwealth as a Territory under the authority of the Commonwealth, by the name of the Australian Antarctic Territory.

1.9 The *Australian Antarctic Territory Acceptance Act* 1933 came into effect in 1936 and is the statutory basis for Australia's sovereignty over the Territory.

The Legal Regime

1.10 The legal regime of the Australian Antarctic Territory comprises a complex mix of Commonwealth legislation, ordinances specific to the Territory, applicable laws of the Australian Capital Territory and the Jervis Bay Territory, and obligations arising from the Antarctic Treaty.

1.11 The main expression given by the Commonwealth to the legal regime for the Territory can be found in the *Australian Antarctic Territory Act* 1954 which provides for the following legislation to apply:

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4 Dr Gillian Trigg, *ibid*, p.109.

- laws, other than criminal laws, in force in the Australian Capital Territory so far as they are applicable and not inconsistent with any ordinance made under the Australian Antarctic Territory Act (sub-section 6(1));

- criminal laws in force in the Jervis Bay Territory so far as they are applicable and not inconsistent with any ordinance made under the Australian Antarctic Territory Act (sub-section 6(2));

- laws expressly applying to the Territory, for example the *Antarctic Treaty (Environment Protection) Act* 1980, and Acts expressed to extend to the Territory (section 8); and

- ordinances made by the Governor-General under section 11 of the Australian Antarctic Territory Act.

1.12 Other Commonwealth and non-Commonwealth aspects of the legal regime are described below.

Administrative Arrangements

1.13 Under the current Administrative Arrangements Order, the Minister responsible for the Australian Antarctic Territory is the Minister for the Arts, Sport, the Environment and Territories.

1.14 Australia's Antarctic Program is managed by the Antarctic Division of the Department of the Arts, Sport, the Environment and Territories. The Antarctic Division is responsible for the management and support of the Australian National Antarctic Research Expeditions and the implementation of Australia's international obligations concerning the Australian Antarctic Territory. The Division also has some role in law enforcement in the Territory given the responsibilities of station leaders to maintain 'some sort of law and order' and to advise the Director of the Division in the event of major offences.[5]

5 DASET, *Evidence*, pp.36-37.

1.15 The Antarctic Division was first established in 1948 to administer and provide logistic support for the scientific activities conducted under the auspices of the Australian National Antarctic Research Expeditions. Over time this focus has broadened to the point where the Division has acquired de facto responsibility for administering the Territory.

Commonwealth Aspects of the Legal Regime

1.16 The principal source of the Commonwealth's power to make laws for the Australian Antarctic Territory is section 122 of the Constitution which states:

> The Parliament may make laws for the government of any Territory surrendered by any State to and accepted by the Commonwealth, or of any Territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth ....

1.17 In addition, the Commonwealth may also make laws for the peace, order and good government of the Commonwealth pursuant to section 51 of the Constitution, which apply to the Australian Antarctic Territory.

1.18 The application of Commonwealth Acts to the Australian Antarctic Territory is provided for by section 8(1) of the Australian Antarctic Territory Act:

> An Act or a provision of an Act (whether passed before or after the commencement of this Act) is not, except as otherwise provided by that Act or by another Act, in force as such in the Territory, unless expressed to extend to the Territory.

1.19 As section 4 of the Australian Antarctic Territory Act defines the Territory as being the 'Australian Antarctic Territory', it could be argued that Commonwealth legislation only extends to the Australian Antarctic Territory where it is 'expressly extended' either specifically or generally.

1.20 However, when section 8(1) is read in conjunction with paragraph 17 pd of the *Acts Interpretation Act* 1901, the operation of the provision appears to be broadened somewhat. The Acts Interpretation Act provides that, unless expressly stated otherwise, any Act that refers to 'external Territory' applies that legislation to Australia's external Territories.

1.21 The provision of these two Acts have generally been interpreted as meaning that a Commonwealth Act will apply to the Australian Antarctic Territory where:

(a) it refers to the Territory specifically; or

(b) uses a general expression which clearly includes the Territory without specifically identifying it (an example of such an expression is section 6 of the *Ozone Protection Act* 1989 which provides that 'this Act extends to all the external Territories').[6]

1.22 Accepting this interpretation, it seems that a large body of Commonwealth law applies to the Australian Antarctic Territory and its coastal seas.[7] The Department of the Arts, Sport, the Environment and Territories have advised the Committee that in its opinion some one hundred and seventy separate Commonwealth Acts extend to the Australian Antarctic Territory.

Non-Commonwealth Aspects of the Legal Regime

1.23 The application of laws, other than Commonwealth laws, to the Territory is governed by section 6 of the Australian Antarctic Territory Act, as amended by the *Crimes Legislation Amendment Act* 1991.

1.24 Following these amendments, section 6 provides:

> 6(1) Subject to this Act, the laws (other than the criminal laws) in force from time to time in the Australian Capital Territory (including the principles and rules of common law and equity so in force) are, by virtue of this section, so far as they are applicable to the Territory and are not inconsistent with an Ordinance, in force in the Territory as if the Territory formed part of the Australian Capital Territory.

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6 Attorney-General's Department, *Submission*, p.52. (See also aspects of the decision in Jolley v Mainka, 1933 49 CLR 242).

7 Section 15(b) of the *Acts Interpretation Act* 1905 applies the operation of any Commonwealth law within a Territory to the coastal sea of that Territory.

> 6(2) Subject to this Act, the criminal laws in force from time to time in the Jervis Bay Territory are, by virtue of this section (so far as they are applicable to the Territory and are not inconsistent with an Ordinance) in force in the Territory as if the Territory formed part of the Jervis Bay Territory.

1.25 As noted by the Attorney-General's Department:

> The Ordinance-making power provided by the *Jervis Bay Territory Acceptance Act* 1915 allows the Commonwealth to override or alter any laws of the Australian Capital Territory which apply to the Jervis Bay Territory.[8]

1.26 By this mechanism the Commonwealth may override any inappropriate Australian Capital Territory laws which apply to the Jervis Bay Territory and which would otherwise have application in the Australian Antarctic Territory by virtue of section 6(2).

1.27 Both sub-sections 6(1) and 6(2) of the Australian Antarctic Territory Act say that only those laws which are 'applicable' to the Territory shall apply there, so that it is necessary to determine the meaning of this phrase in order to ascertain which laws satisfy this criterion.

1.28 The Attorney-General's Department advises that there is no evidence of any judicial consideration being given to the question of whether a particular law in force in the Australian Capital Territory (or the Jervis Bay Territory in regard to criminal law) is 'applicable' to the Australian Antarctic Territory.[9]

1.29 The principles for determining whether or not a law is 'applicable' received consideration in the High Court judgement of Dugan v Mirror Newspapers (1979) 142 CLR 83. Justice Gibbs was of the view that a law will not be applicable, first, where it cannot reasonably be administered in the conditions of the place of intended application or, second, where it relates to matters peculiar to the place of enactment.

1.30 The question of whether or not a law in force in the Australian Capital Territory or the Jervis Bay Territory is applicable in the Australian Antarctic Territory must then be determined by considering two factors:

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8 Attorney-General's Department, *Submission,* p.58.
9 Attorney-General's Department, *Submission,* p.52.

- examining the statute itself to see whether or not it was enacted purely as a response to local conditions. Examples of such statutes would be those referring to objects or locations occurring only in the Australian Capital Territory or Jervis Bay Territory, or having a purpose that could only be given effect to in those Territories; and

- if the statute was not enacted solely to deal with local circumstances, whether the law can reasonably apply in the circumstances existing in the Australian Antarctic Territory.

1.31 A relevant consideration in resolving this second question is whether or not rights given under the statute can be enforced. In this regard section 7(1) of the Australian Antarctic Territory Act anticipates that an administrative structure for implementing rights and enforcing obligations will operate in the Territory:

> Subject to sub-section (2), where a power or function is vested in a person or authority (other than a court) by a law in force in the Territory under section 6, the power or function is, in relation to the Territory, vested in, and may be exercised or performed by, that person or authority.

1.32 This then suggests that there are many laws of the Australian Capital Territory and Jervis Bay which are applicable to the Australian Antarctic Territory. Although, as the Attorney-General's Department points out, many laws of the Australian Capital Territory and Jervis Bay are in practice irrelevant to the circumstances in the Antarctic Territory and are only 'applicable' in the sense of capable of being applied there, and having practical effect in the future.[10]

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10 Attorney-General's Department, *Submission*, p.53.

2. INTERNATIONAL CONTEXT

2.1 An important aspect of the effectiveness of Australia's legal regime in Antarctica is our ability to apply and enforce Australian law against foreign nationals in the Australian Antarctic Territory. The ability to enforce law is at the core of sustaining claims to sovereignty. The responsibilities and obligations assumed by Australia under the Antarctic Treaty, and the differing interpretations of those responsibilities and obligations, impact greatly on this issue.

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).[1]

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.[2] 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.

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1 DASET, *Submission*, p.79.
2 Professor James Crawford and Dan Rothwell, *op. cit.*, p.2.

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]

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.

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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 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.

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 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

2.18 Almost all submissions received by the Committee concentrated on the relationship between Australia's international obligations, primarily under the Antarctic Treaty, and Australia's sovereign rights in the Australian Antarctic Territory. 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 (see panel 1).

PANEL ONE: AUSTRALIA'S ANTARCTIC POLICY OBJECTIVES

Australia's Antarctic policy is based on the region's strategic, scientific, environmental and potential economic importance for Australia. In 1989 the Government defined Australia's Antarctic policy objectives as:

- to preserve our sovereignty over the Australian Antarctic Territory, including our sovereign rights over the adjacent offshore areas;
- to maintain Antarctica free from strategic and/or political confrontation;
- to protect the Antarctic environment, having regard to its special qualities and effects on our region;
- to take advantage of the special opportunities Antarctica offers for scientific research;
- to be informed about and able to influence developments in a region geographically proximate to Australia; and
- to derive any reasonable economic benefits from the living and non-living resources of the Antarctic (excluding the deriving of such benefits from mining and oil drilling).

Source: DASET, *Submission*, p.77.

2.19 The Department of the Arts, Sport, the Environment and Territories has advised the Committee that the goal of emphasising Australian sovereignty through the establishment of bases was paramount in the early stage of the Antarctic Treaty, but that more recently the allocation of Australian resources in the Territory was driven by scientific objectives.[4]

2.20 For many who made submissions to the inquiry, the application of Australian laws in the Territory, including where appropriate enforcement against foreign nationals is essential if Australia is to sustain its claim to sovereignty. The interpretation of Australia's obligations under the Antarctic Treaty is a critical factor in this.

4 DASET, *Evidence*, p.34-35.

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.[5]

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5 DFAT, *Submission*, p.392.

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.[6]

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.[7]

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.[8]

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

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6 Dr B M Tsamenyi, Dean of Law, University of Tasmania, *Submission,* p.270.

7 DASET, *Submission,* p.87.

8 DFAT, *Submission,* p.S383. (See also University of Tasmania, Faculty of Law, *Evidence,* p.158.)
NOTE: The limitation on claims to sovereignty is prescribed in Article 4(2) of the Treaty which states:
> No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force.

United Nations, to the end that no-one engages in any activity in Antarctica contrary to the principles or purposes of the present Treaty'.[9]

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.[10]

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.

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[9] DFAT, *Submission*, p.S388.
[10] House of Representatives Debate, 28 September 1960, p.1432.

3. EFFECTIVENESS OF THE CURRENT LEGAL REGIME

3.1 The application of Australian law to the Australian Antarctic Territory is an assertion of jurisdiction and therefore an essential element in the maintenance of Australia's claim to sovereignty over the Territory.[1] Whilst it is true that Article 4(2) of the Antarctic Treaty does not recognise acts or activities as constituting a basis for asserting territorial sovereignty in Antarctica, the Committee accepts that Australia's claim to sovereignty, will in practice be weakened by non-application and non-enforcement of Australian laws in the Territory.

3.2 There are two elements in attempting to determine the effectiveness of the current legal regime. First, the extent to which the laws that comprise the legal regime are applied. And second, the extent to which they are relevant and are capable of being applied.

Current Practice in Applying Commonwealth Laws Expressly Relating to the Australian Antarctic Territory

3.3 As described earlier, the *Australian Antarctic Territory Acceptance Act* 1933, the *Australian Antarctic Territory Act* 1954 and the *Antarctic Treaty Act* 1960, are the foundations of Australia's assertion of sovereignty over the Territory.

3.4 In addition the Commonwealth has made laws to implement Australia's obligations in Antarctica arising from international conventions. The Committee has received evidence that in some respects these laws are not consistently applied.

3.5 The *Antarctic Treaty (Environment Protection) Act* 1980 implements Australia's agreement to the Antarctic Treaty's Agreed Measures for the Conservation of Antarctic Flora and Fauna. The Antarctic Seals Conservation Regulations 1986 made under this Act implements the Convention for the Conservation of Antarctic Seals. The Act applies to Australians in the Australian Antarctic Territory and elsewhere in Antarctica and to foreign nationals in the Australian Antarctic Territory, with the exemption of those designated as scientific exchange personnel and observers. In practice, the Antarctic

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[1] Attorney-General's Department, *Submission*, p.399.

Territory (Environment Protection) Act has not been applied to unauthorised conduct of foreign nationals in the Australian Antarctic Territory.[2]

3.6 The *Antarctic Marine Living Resources Conservation Act* 1981 implements the Convention on the Conservation of Antarctic Marine Living Resources 1980, which covers the area south of the Antarctic Convergence, that being the zone where the cold waters of the Southern Ocean meet the warmer waters of the north. The Act prohibits unauthorised fishing by Australian nationals and vessels in these Antarctic waters. By virtue of sub-section 5(2)(b), this Act applies to foreign nationals and vessels within the Australian Fishing Zone, other than those designated as scientific exchange personnel and observers.

3.7 It could be assumed then that foreign nationals and vessels would be prohibited from unauthorised fishing in the waters surrounding the Australian Antarctic Territory. However, this application of the Antarctic Marine Living Resources Conservation Act was negated by the *Fisheries Management Act* 1991 which exempted the 200 nautical miles adjacent to the Australian Antarctic Territory from inclusion in the Australian Fishing Zone. The practical effect is that the Commonwealth can regulate Australian commercial fishing in the waters adjacent to the Australian Antarctic Territory, but does not regulate foreign fishing activities.[3]

3.8 This non-enforcement of Australia's obligations under the Convention on the Conservation of Antarctic Marine Living Resources also conflicts with the United Nations Convention on the Laws of the Sea which provides that a coastal State has sovereign rights over the natural resources of its 200 nautical mile Exclusive Economic Zone, including seabed resources. It is a clear example of Australia choosing not to exert sovereign rights over a Territory to which it has claimed sovereignty.

3.9 The Committee concludes that, in principle, Australian legislation expressly relating to the Australian Antarctic Territory should not be inconsistent with Australia's claims of sovereignty over the Territory.

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2 Professor James Crawford and Dan Rothwell, *op.cit.*, p.24.
3 DASET, *Submission*, p.81.

3.10 The Committee is greatly concerned at the practice of not applying to foreign nationals Commonwealth legislation expressly relating to the Australian Antarctic Territory, particularly in relation to legislation which implements Australia's international obligations in Antarctica. Not only is it in contravention of the express intentions of the Parliament but it, at least arguably, sits ill with Australian claims to sovereignty over the Territory.

3.11 The practice of exempting foreign nationals from this body of Australian law relating to the Australian Antarctic Territory assumes that all other Contracting Parties to the Antarctic Treaty and Conventions relating to Antarctica will apply and enforce their own domestic legislation against their own nationals. This assumption of Contracting Parties mutually implementing Antarctic Conventions in domestic legislation is flawed by the activities of nationals of non-Contracting Parties who are not bound by agreement to the Conventions. Australia's practice of effectively exempting all foreign nationals from legislation such as the Fisheries Act has been of principal benefit to non-parties to the Antarctic Treaty.[4]

RECOMMENDATION 2

The Committee recommends that the *Fisheries Management Act* 1991 be amended to include in the Australian Fishing Zone the 200 nautical miles adjacent to the Australian Antarctic Territory, so as to extend Australian jurisdiction to the activities of non-Contracting Parties to the Antarctic Treaty.

3.12 The Committee considers that Australia's claim to sovereignty are not diminished by Australia allowing other Contracting Parties to enforce their laws against their own nationals in the Australian Antarctic Territory, however, where offences occur and such law enforcement is not applied Australia should enforce its own jurisdiction in the Territory.

Current Practice in Applying Commonwealth Laws Extended to the Australian Antarctic Territory

3.13 By virtue of sub-section 8(1) of the Australian Antarctic Territory Act and paragraph 17pd of the *Acts Interpretation Act* 1901, a considerable body of Commonwealth law applies to the Australian Antarctic Territory.

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4 Professor James Crawford and Dan Rothwell, *op.cit.*, p.29.

3.14 A listing of Commonwealth law held to apply to the Territory was provided to the Committee by the Department of the Arts, Sport, the Environment and Territories. The Department, however, noted that:

> A large proportion of the Commonwealth legislation expressed to extend to the Australian Antarctic Territory does not have any practical application given existing circumstances.[5]

3.15 There is no available evidence as to which of the identified applicable laws has no practical application or the basis on which such a decision may be made. The Department of the Arts, Sport, the Environment and Territories advised the Committee that:

> The laws applicable in the Australian Antarctic Territory have not been systematically identified, as such a resource-intensive task has not been considered necessary to ensure the efficient administration of the Territory. A number of Commonwealth laws have been extended to the Territory while some have specifically not been extended for various policy reasons.[6]

3.16 Ms Lidgerwood, of the Centre for Comparative Constitutional Studies at the University of Melbourne, cited the *Air Navigation Act* 1920 and the *Sea Installations Act* 1987 as two examples illustrating the apparent divide between the intention of the Parliament in extending legislation to the Australian Antarctic Territory and the non-application of those laws by Australian authorities.[7]

3.17 The *Air Navigation Act* 1920 extends to 'every Territory' (section 2) and is complemented by the *Civil Aviation Act* 1988, which also includes external territories in its application (section 3(1)). These Acts implement the Provisions of the Convention of International Civil Aviation, known as the Chicago Convention, established on 7 December 1944. Australia and the then USSR are among the 150 parties to the Convention.[8] Within the Australian Antarctic Territory, the four former Soviet bases have airstrips in operation, the Peoples Republic of China has a base but no airstrip and there is no Australian airstrip in the Territory. As a matter of Australian law, the activities of former Soviet aircraft are governed by this Commonwealth legislation.

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5 DASET, *Submission,* p.82.
6 DASET, *Submission,* p.101.
7 C Lidgerwood, *Submission,* p.223-238.
8 Multilateral Treaties: Index and Current Status, p.109.

3.18 Article 26 of the Chicago Convention states that with regard to investigation of accidents, the State in which the accident occurs is to institute an inquiry into the circumstances of the accident, in accordance with recommended procedure. The Civil Aviation Authority, in conjunction with the Bureau of Air Safety Investigation, thus has the jurisdiction to conduct such investigation, (section 9 of the Civil Aviation Act) but has not done so in the Australian Antarctic Territory.

3.19 There have been a number of air accidents reported in the Territory involving Soviet aircraft yet, Ms Lidgerwood notes, Australian authorities have not investigated these. Therefore, Australia is in the invidious position of asserting legal rights but declining to enforce them with respect to Australian Antarctic Territory airspace.

3.20 The Sea Installations Act raises similar problems. This Act was clearly intended to apply to the Australian Antarctic Territory under section 5(6), and to both Australians and foreign nationals (section 11). However, enforcement of the Act would require that foreign vessels travel to and from the Territory via mainland Australia. This is unrealistic and it is unlikely that implementation of the Act would be possible.

3.21 These two examples of non-application of Australian law in the Territory also illustrate other issues important to this matter, these being diplomatic considerations and the practicality of implementation.

3.22 The Sea Installations Act is a prime example of the difficulties of implementing legislation which does not recognise the particular circumstances of the Territory.

RECOMMENDATION 3

The Committee recommends that the *Air Navigation Act* 1920 and the *Civil Aviation Act* 1988 be enforced with regard to the activities in the Australian Antarctic Territory of non-Contracting Parties to the Antarctic Treaty.

3.23 An example of how Commonwealth legislation can conflict with the principle of Australian sovereignty over the Australian Antarctic Territory is the *Customs Act* 1901. This Act does not extend to the Territory which is regarded by the Australian Customs Service as a place outside Australia for customs purposes. As a result, duty-free concessions are available to people travelling to and from the Territory.

3.24 Witnesses from the Department of Political Science at the University of Tasmania maintain that this duty-free status of the Australian Antarctic Territory implies that expeditioners and visitors to the Territory are travelling overseas, and would influence the perception of Australian sovereignty over the Territory held by other claimant States to Antarctica.[9]

3.25 This view was also expressed by representatives of the University's Faculty of Law, who point out that this practice conflicts with the *Migration Act* 1958 under which a person travelling to the Territory is deemed not to have left Australia.[10]

3.26 The Committee agrees that the intent of the Migration Act better reflects Australia's sovereignty over the Territory.

3.27 The Committee is, however, mindful that the provisions of the Customs Act which apply customs duty do not extend to most of Australia's external territories, including the Australian Antarctic Territory, by virtue of sub-section 4(1) of that Act which defines 'Australia' when used in a geographical sense as not including an external Territory[11] (the exception is the Territory of Heard Island and McDonald Islands). Accordingly, the duty-free status of the Australian Antarctic Territory is similar to that of other Australian external territories such as Norfolk Island and Christmas island, the legal regimes of which were examined in the first phase of this inquiry.

3.28 While aware of the possible impact that the duty-free status of the Australian Antarctic Territory may have on perceptions of Australia's sovereignty over the Territory, the Committee accepts as reasonable, that Australia's customs regime should be applied in a consistent manner to all external territories. Accordingly the Committee does not agree that the Customs Act should be amended to remove the duty-free status of the Australian Antarctic Territory.

3.29 A clear example of Departmental inaction regarding the implementation of Australian criminal law in the Australian Antarctic Territory came to the notice of two members of the Committee while visiting the Territory during the course of the inquiry. The case involved the death of a member of an expedition from the then USSR at a base located in the Territory in close proximity to an Australian base.

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9 Department of Political Science, University of Tasmania, *Evidence*, p.134.
10 Faculty of Law, University of Tasmania, *Submission*, p.266.
11 Australian Customs Service, *Submission*, p.359.

3.30 The head of the Australian base was an appointed Deputy Coroner and was informed, at the time, that the death had occurred. No attempt was made by the Deputy Coroner or any other Australian authority to establish the cause of death or to conduct a coronial inquiry. The deceased was buried on site. The individual was not covered by Article 8(1) of the Antarctic Treaty and thus was not exempt from the application of Australian law.

3.31 The Committee sought an explanation from both the Department of the Arts, Sport, the Environment and Territories and the Department of Foreign Affairs and Trade as to the non-exercise of Australian jurisdiction in this matter. The former responded that in accordance with usual practice it was regarded as a matter for the appropriate Soviet authorities,[12] while the latter explained that maintaining the national autonomy of scientific research stations is in the practice of the Antarctic Treaty Consultative Parties.[13]

3.32 This general application of Commonwealth law to the Australian Antarctic Territory without subsequent enforcement is questionable. The view was put to the Committee that:

> ... if Commonwealth legislation is not applied in practice, then it cannot be said to form part of the legal regime.[14]

3.33 The existing situation of inconsistency between legislative intent and administrative practice regarding Commonwealth laws in the Australian Antarctic Territory is an unsatisfactory one. Australian sovereignty should be reflected in both legislative principle and practice with regard to both Australian and foreign nationals. Where it is considered that it would be inappropriate for policy reasons to apply a particular Australian law to foreign nationals, who are not otherwise exempt from Australian jurisdiction under the Antarctic Treaty, this should be by legislative decision rather than administrative non-enforcement of that law.

3.34 The Committee considers that while the Antarctic Treaty does not preclude the extension of Australian law to foreign expeditioners who are not exempt under Article 8(1) of the Treaty, nevertheless there is merit in consideration being given to explicitly placing all foreign expeditioners under the legal jurisdiction of their own country. The

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12 DASET, *Submission*, p.290.
13 DFAT, *Submission*, p.343.
14 C Lidgerwood, *Submission*, p.179.

Committee strongly considers that such an arrangement should only be extended to foreign nationals who are scientific expedition members from Contracting Parties. Tourists and other visitors to the Australian Antarctic Territory would, consistent with recommendation 1, be subject to Australian law for actions and offences committed in the Territory.

RECOMMENDATION 4

The Committee recommends that Australia make clear to other Contracting Parties its intent to apply Australian law in the Australian Antarctic Territory to the extent contemplated in Recommendation 1, and that Australia negotiate arrangements with other Contracting Parties to ensure the smooth transfer of jurisdiction in circumstances where Australia does not wish to apply its law concerning scientific bases and personnel.

Current Practice in Applying the Laws of the Australian Capital Territory and the Jervis Bay Territory

3.35 The *Australian Antarctic Territory Act* 1954 provides that the laws, other than criminal laws, of the Australian Capital Territory and the criminal laws of the Jervis Bay Territory in so far as they are applicable to the Australian Antarctic Territory and do not contravene Ordinances made under that Act, are in force in that Territory. This does not mean that the Australian Capital Territory legislature is responsible for the Australian Antarctic Territory, but rather that the Antarctic Division of the Department of the Arts, Sport, the Environment and Territories is responsible for monitoring the appropriateness of Australian Capital Territory and Jervis Bay Territory laws and making ordinances under the Australian Antarctic Territory Act and the *Jervis Bay Acceptance Act* 1915 to override any inappropriate laws.

3.36 Ms Lidgerwood, in her submission, maintains that:

> the existence of provisions ensuring that Ordinances made by the Governor General would prevail over any inconsistent Australian Capital Territory law suggests that the application of Australian Capital Territory law was intended as a stop gap measure, and that Ordinances made specifically for the Territories are considered a more appropriate source of law.[15]

[15] C Lidgerwood, *Submission*, p.181.

3.37 However, relatively few ordinances have been made under the Australian Antarctic Territory Act and consequently the external application of Australian Capital Territory laws, and since March 1991 the criminal laws of the Jervis Bay Territory, form a substantial part of the legal regime of the Territory.

3.38 Concerns about the application of Australian Capital Territory and Jervis Bay Territory laws relate significantly to the practical difficulties of law enforcement in the Australian Antarctic Territory, as well as to the appropriateness of the laws.

3.39 In a submission to the Committee, the Attorney-General's Department outlines the special difficulties of applying law in the Australian Antarctic Territory:

- there are no police, magistrate or judges in the Territory and no immediate physical access to them;
- there is no postal communication with the Territory for extended periods;
- personal service is not possible;
- there are no readily accessible experts in forensic science;
- if winter access is required, complex negotiations with other countries which maintain a presence in Antarctica may be necessary and these can be very expensive;
- there is no system for securing or protecting evidence; and
- station leaders are concerned about their rights and responsibilities with respect to citizen's arrest and the increased likelihood in future of criminal activity.[16]

Relevance of the Existing Legal Regime

3.40 Evidence to the Committee presented the existing legal regime as being difficult to apply, cumbersome and failing to demonstrate a substantial commitment to the Territory.[17]

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16 Attorney-General's Department, *Submission*, p.59-60.
17 C Lidgerwood, *Evidence*, p.55.

3.41 Some of the specific difficulties are perceived to be:

- the degree of relevance of much of Commonwealth legislation and the criminal and civil laws of those Territories;

- the practical difficulties in enforcement given the isolation of the Territory; and

- the current misconception that Australian legislation cannot be applied to foreign nationals in the Territory.

3.42 Several witnesses at inquiry hearings questioned the applicability of Australian Capital Territory and Jervis Bay Territory law to the Australian Antarctic Territory, and expressed the view that if a law cannot be realistically implemented it should be repealed or redrafted to state why it cannot be implemented[18], or that the existing laws be largely replaced by a code of law relevant to the special circumstances of the Territory.[19]

3.43 In the Committee's view the present legal regime of the Territory is overcomplex, unnecessarily unwieldly and in need of reform.

3.44 The Committee considered several options for improving the legal regime in the Australian Antarctic Territory:

- retaining the extension of Commonwealth law to the Territory and replacing the applicable law of the Australian Capital Territory and the Jervis Bay Territory with the laws of Tasmania;

- developing a specific Australian Antarctic Territory code of law tailored to the special circumstances in Antarctica; or

- retaining the existing regime.

3.45 The option of extending the law of Tasmania to the Territory to replace the currently applied law of the Australian Capital Territory and Jervis Bay Territory is based on the view that the laws of these Territories are largely inappropriate and irrelevant to the special circumstances of the Australian Antarctic Territory.

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18 C Lidgerwood, *Evidence*, p.56.
19 S Dorsett, *Evidence*, p.160.

3.46 In its earlier report on Phase I of the inquiry into the legal regimes of Australia's external territories, the Committee adopted the general principle that the laws of the closest mainland State or Territory are the most appropriate to be applied in each territory under consideration. Consistent with this, the Committee recommended the application of NSW law to the Jervis Bay Territory with possible incorporation of the Territory within the State of New South Wales.

3.47 The Committee reaffirms that general principle and the recommendation regarding the Jervis Bay Territory, and on this basis, is of the view that the application of the criminal law of the Jervis Bay Territory to the Australian Antarctic Territory is *inappropriate and unsatisfactory.*

3.48 The question, then, is whether the civil and criminal laws of Tasmania, which encompass a similar range of categories of offences as apply under Australian Capital Territory and Jervis Bay Territory law, would be of greater relevance. It is estimated that 70% to 80% of Australian Capital Territory laws currently applying in the Australian Antarctic Territory are not appropriate.[20] A significant number of Tasmanian laws may be similarly inappropriate.

3.49 The Committee is of the view that the difficulties in law enforcement arising from the special conditions of the Australian Antarctic Territory will exist irrespective of which substantive law is applied.

3.50 Attorney-General's Department observes that the practical problem of enforceability of laws is not unique to that Territory but is also relevant in other small remote communities.[21]

3.51 Australia's sovereign interests in the Australian Antarctic Territory, together with international obligations relating to the Territory, require a body of law over which the Commonwealth has direct control.

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[20] DASET, *Submission*, p.89.
[21] Attorney-General's Department, *Submission*, p.54.

3.52 The actual application of that law, and its enforcement, is a major issue in considering the effectiveness of the legal regime of the Australian Antarctic Territory, both in terms of its applicability and whether those laws can be practicably enforced given the geographic and climatic circumstances of a Territory so isolated from the Australian mainland.

3.53 This reality does not, however, diminish the advantages of a consolidation and simplification of the laws of the Australian Antarctic Territory.

3.54 The Committee is of the view that given the weight of evidence as to the unwieldiness and inappropriateness of applying Jervis Bay Territory and Australian Capital Territory laws to the Australian Antarctic Territory, it would be consistent with the general principle that the laws of the closest mainland State or Territory are the most appropriate, to apply Tasmanian laws to the Territory.

3.55 An alternative approach to reforming the legal regime would be the development of an Australian Antarctic Territory code comprising ordinances made under the Australian Antarctic Territory Act, and Commonwealth legislation expressly relating to the Territory, together with relevant Commonwealth laws extended to the Territory and appropriate laws of the Australian Capital Territory.

3.56 However, the Committee recognises that substantial resources would be required for this task, together with those necessary for the continuing monitoring of legislation in order to keep such a code up to date, and that the development of an Antarctic Territory code is not a realistic solution.

RECOMMENDATION 5

The Committee recommends that the *Australian Antarctic Territory Act* 1954 be amended so as to define the legal regime of the Australian Antarctic Territory to include the laws of Tasmania rather than the laws, other than the criminal laws, of the Australian Capital Territory and the criminal laws of the Jervis Bay Territory.

3.57 The making of ordinances under the Australian Antarctic Territory Act would continue in order to override inappropriate laws, or meet particular circumstances of the Territory and not accounted for in Tasmanian law. Section 11 of that Act provides the Commonwealth with the capacity to adapt by ordinance those Tasmanian laws which do not meet the special requirements of the Territory.

3.58 Relevant to this is the uniform criminal code proposed by the Standing Committee of Attorneys-General, which would simplify and codify existing State and Commonwealth criminal laws. A simplified and uniform criminal code together with the Criminal Procedures Ordinance which is being developed specifically for the Australian Antarctic Territory would improve the application and enforcement of criminal law in the Territory.

3.59 The Committee believes that the making of ordinances under the Australian Antarctic Territory Act is an efficient means of developing law specific to the Territory.

RECOMMENDATION 6

The Committee recommends that greater use be made of the ordinance making powers under section 11 of the *Australian Antarctic Territory Act* 1954 to legislate specifically for the Territory.

3.60 It is apparent to the Committee that reporting procedures in instances of offences are not clearly defined. The Committee heard a number of examples of offences that have occurred in the Australian Antarctic Territory. But the Australian Federal Police advised the Committee that, apart from being notified of rare instances of relatively minor property discrepancies, they have not been called upon by Antarctic Division to investigate actions in the Territory.[22]

3.61 The Committee was also advised that the Australian Federal Police, the agency responsible for law enforcement in the Australian Antarctic Territory, has not been consulted on the development of the proposed Criminal Procedures Ordinance.

3.62 The Committee considers that it is inappropriate and inefficient to consider substantive, evidential and procedural aspects of criminal law in isolation from questions of enforcement. The issue of the extent of authority of the Australian National Antarctic Research Expedition station leaders in the Territory is also critical in this matter.[23]

3.63 The Committee views as unsatisfactory the existing situation whereby the leader of each Australian station in the Australian Antarctic Territory is responsible for maintaining order without having any police powers of law enforcement.[24]

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22 Australian Federal Police, *Submission*, p.141.
23 Attorney-General's Department, *Submission to Phase I of the Inquiry*, p.513.
24 DASET, *Evidence*, p.36.

RECOMMENDATION 7

The Committee recommends that the Antarctic Division consult directly with the Australian Federal Police, as well as with the Attorney-General's Department, regarding the development of the Criminal Procedures Ordinance.

RECOMMENDATION 8

The Committee recommends that the Criminal Procedures Ordinance extend powers of arrest and custody to station leaders, and define clear procedures requiring station leaders to notify offences to the Australian Federal Police and to the relevant coronial authorities.

4. SPECIFIC INADEQUACIES OF AUSTRALIAN LAWS IN THE *AUSTRALIAN ANTARCTIC TERRITORY*

4.1 The inadequacy of the current situation regarding the application and enforcement of Australian law in the Australian Antarctic Territory is exemplified in the areas of environmental management and tourism.

Tourism in the Australian Antarctic Territory

4.2 The potential of Antarctica as a tourist destination brings into focus in practical terms the issues discussed in this report with regard to observance of international obligations, and the implementation of Australian law, in respect of both Australians and foreign nationals in the Australian Antarctic Territory. This applies with respect to criminal, civil and environmental law.

4.3 The management of increasing numbers of people visiting the Australian Antarctic Territory is a matter of increasing concern. The possibility of environmental damage, pollution from visiting tourist ships, criminal damage and other offences gives urgency to the need for appropriate and enforceable laws.

4.4 During the hearings in Hobart the real potential for damage was discussed, illustrated by the incident of theft of heritage material by tourists from Macquarie Island,[1] a sub-Antarctic island of Tasmania which was explored by Sir Douglas Mawson's British, Australian and New Zealand Antarctic Research Expedition (BANZARE) of 1929-31.

4.5 It is clear from evidence to the Committee that the existing legal regime is inadequate for the regulation of tourism in the Territory, and that Australia does not have the necessary infrastructure to deal with unauthorised people entering the Territory.[2]

4.6 As described previously only a designated group of foreign nationals are exempt from Australian jurisdiction in the Australian Antarctic Territory. The Antarctic Treaty

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1 DASET, *Evidence*, p.29.
2 DASET, *Evidence*, p.10.

neither states nor implies that Australian jurisdiction does not extend to tourists or private visitors in the Territory.

4.7 The impact of tourism in Antarctica was reported upon in 1989 by the House of Representatives Standing Committee on Environment, Recreation and the Arts.[3] That Committee noted that commercial tourism commenced in Antarctica in the 1950's, and that both tourist ship and commercial air operations were increasing in numbers, with firm interest in similar tourist ventures to the Australian Antarctic Territory. A number of recommendations were made concerning the monitoring and regulating of tourist activity in the Territory.

4.8 The Committee supports the broad conclusions of the 'Tourism in Antarctica' report that:

- Australian legislation is applicable to foreign nationals in the Territory;
- the development of measures to regulate tourist activities is urgently needed; and
- the Australian Government should take the initiative in discussions at Antarctic Treaty Consultative Meetings to support the development of a tourism convention for Antarctica.

4.9 This matter of the impact of tourism in Antarctica, particularly on the environment, has also been under discussion for some time by the Antarctic Treaty Consultative Parties.

4.10 Following the Australian Government's announcement in 1989 of its decision not to sign the Convention on the Regulation of Antarctic Mineral Resource Activities, Australia together with France sought the negotiation of a comprehensive environmental protection convention designating Antarctica as a 'Nature Reserve - Land of Science' and which would include a prohibition on mining in Antarctica. This initiative was one of a number of proposals considered at a Special Consultative Meeting of Antarctic Treaty Consultative Parties in Chile in November 1990. Following further negotiations, on 4 October 1991 the parties agreed to a protocol providing for comprehensive protection of the Antarctic environment.

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[3] House of Representatives Standing Committee on Environment, Recreation and the Arts (ERA Committee), *Tourism in Antarctica*, 1989.

4.11 The Protocol on Environment Protection to the Antarctic Treaty designates Antarctica as a natural reserve and establishes a legally binding regime for environmental management and protection. There are five annexes to the Protocol concerning:

- requirement for environmental impact assessments;
- conservation of Antarctic fauna and flora;
- waste disposal and waste management;
- prevention of marine pollution; and
- area protection and management.

4.12 Acting on its concern to ensure that the presence of tourists and other visitors in Antarctica be regulated so as to limit adverse impacts on the environment, the 11th Antarctic Treaty Special Consultative Meeting recommended that Consultative Parties meet to discuss proposals for a further annexe to the Protocol to cover tourism.

4.13 An alternative to the proposed annexe would be for each Consultative Party to develop and issue guidelines advising tourist operators of their responsibilities in Antarctica. In the Committee's view an internationally agreed annexe to the Protocol is likely to be more successful in regulating tourism than nationally based administrative guidelines that do not have a legal basis.

4.14 The Committee is concerned that the environmental impact of tourism be limited, and is of the view that such a set of guidelines would be inadequate. The Committee considers that it is preferable that a comprehensive annexe on tourism be added to the Protocol on Environment Protection to the Antarctic Treaty, in order that all aspects of tourism, including safety issues, be provided for.

RECOMMENDATION 9

The Committee recommends that Australia actively support the negotiation of a further annexe to the Protocol on Environment Protection to the Antarctic Treaty to cover tourism.

Environmental Management of the Australian Antarctic Territory

4.15 Australia's Antarctic policy objectives include the protection of the Antarctic environment, having regard to its special qualities and effects on our region.

4.16 Following the signing of the Antarctic Treaty international interest in Antarctica focussed on scientific research and activity in the region. More recently, increasing emphasis has been given to environmental matters as evidenced by the agreement of the Antarctic Treaty Consultative Party's to the Protocol on Environment Protection to the Antarctic Treaty.

4.17 This concern for effective environmental management in the Antarctic region has also increased within Australia. In 1985 the Antarctic Science Advisory Committee recommended that the Commonwealth develop and implement a conservation strategy to ensure sound environmental management practices by Australia in Antarctica. The Advisory Committee considered that Australian operations in Antarctica had caused environmental problems and that it was essential that a conservation strategy address this matter as well as the potential problems associated with increased future activity in Antarctica.[4]

4.18 The urgent need for a conservation strategy was also stressed in the Environment, Recreation and the Arts Committee report on Tourism in Antarctica.[5] That Committee noted, for example, that the Antarctic Division had never undertaken an adequate environmental impact assessment program for any of its stations, field bases or operations, or prepared any regional or station environmental management plans.[6]

4.19 The extraordinarily high conservation value of Antarctica and the need for effective environmental management within the Australian Antarctic Territory was raised in a number of submissions to the Committee.

4.20 The increase in tourism, in particular, reinforces the urgent need for an environmental plan of management.

4.21 In considering this matter, the Committee took into account the increased international obligations of Australia concerning environmental management in the Australian Antarctic Territory, and the capacity of the existing infrastructure to meet these obligations.

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4 1985-87 Report of the Antarctic Science Advisory Committee, cited by Greenpeace, *Submission*, p.42.
5 ERA Committee, *op.cit.*, p.16.
6 ibid, p.13.

4.22 *The Antarctic Division is highly regarded in its management of Australia's* Antarctic research program. However, there is a potential for conflict in its roles as the manager of the research program and as enforcer of environmental protection standards over those activities. These conflicting responsibilities concern the administration and support of Australia's scientific research program in the Territories, effective environmental management, the implementation of international obligations and the application of Australian laws in the Territories.

4.23 The conflicting role of the Antarctic Division as both the operational and regulatory agency in the Territory is illustrated by an incident reported of the dumping of garbage in waters off Heard Island by Australian National Antarctic Research Expedition members dismantling the summer base on the island, an action reportedly observed by senior employees of the Antarctic Division.[7] This action was in contravention of the Environmental Protection (Sea Dumping) Act which forbids the dumping of land-generated wastes in the territorial seas.

4.24 The Antarctic Division's primary function, reasonably so, is to administer and provide logistic support for the Australian National Antarctic Research Expeditions, with a subsequent lesser focus on regulatory and environmental management. Until relatively recently the Division had little resource conservation expertise, although an environmental officer has now been appointed.[8] The Committee is however aware of the genuine commitment of expeditioners to protecting the Antarctic environment.

4.25 *An illustration of the potential for trade-off between conservation matters and* other priorities of the Antarctic Division, given existing resources, is the urgent need for action to preserve the historic Mawson's Huts site. The inquiry into Tourism in Antarctica recommended in 1989 that urgent action be taken to conserve these buildings.[9]

4.26 However, the Department of the Arts, Sport, the Environment and Territories advised the Committee that the necessary conservation work has not been undertaken.[10]

4.27 The Committee considers that there are great difficulties in requiring an agency to effectively exercise a range of, at times, conflicting functions. The increasing importance of effective environmental management in the Australian Antarctic Territory

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7 Kriwoken, Hay and Keage, *op.cit.*, p.15.
8 DASET, *Evidence*, p.51.
9 ERA Committee, *op.cit.*, p.22.
10 DASET, *Evidence*, p.26.

requires that this function be vested in an agency whose prime function is the protection and conservation of wildlife and the enforcement of environmental legislation.

4.28 The Committee concludes that the declaration of the Australian Antarctic Territory as a reserve under the *National Parks and Wildlife Conservation Act* 1975 would achieve effective environmental management of the Territory and would implement Australia's obligations under the Protocol on Environment Protection to the Antarctic Treaty.

4.29 The alternative, namely amending the Antarctic Treaty (Environment Protection) Act to implement the Protocol, would be inadequate due to the limited scope of that Act. The Antarctic Treaty (Environment Protection) Act applies only to specially protected areas designated under the Agreed Measures for the Conservation of Antarctic Flora and Fauna or an area declared as a specially protected area for a reason specified in the Agreed Measures,[11] or sites of special scientific interest recommended by the Scientific Committee on Antarctic Research of the International Council of Scientific Unions.[12]

4.30 This limited protection contrasts unfavourably with the Protocol which designates the whole of Antarctica as a natural reserve requiring comprehensive environmental management and protection, a requirement most effectively met by application of the National Parks and Wildlife Conservation Act.

4.31 Australia has signed but not yet ratified the Protocol, which requires that scientific research programs, tourism and all other government and non-government activities be conducted without detrimental effect on the Antarctic environment including the surrounding seas.[13] Annexes to the Protocol provide for environmental evaluations of the impact of proposed activities in Antarctica, environmental management plans, protection of fauna and flora, prevention of marine pollution and waste disposal and waste management.

4.32 The provisions of the National Parks and Wildlife Conservation Act meet these requirements. Sub-section 6(1) of the Act provides for the establishment and management of reserves (and parks) in order to implement obligations accepted by Australia under international agreements. Sub-sections 7(3) and 11(8) provide that the purpose for which an area is declared a reserve may be specified and that the plan of

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11 Section 8(3), *Antarctic Treaty (Environment Protection) Act* 1980.
12 Section 8(4), *Antarctic Treaty (Environment Protection) Act* 1980.
13 Article 3, *Protocol on Environment Protection to the Antarctic Treaty.*

management for that area shall recognise the purpose for which it was declared a reserve. The Committee supports the declaration of the Australian Antarctic Territory as a reserve under the National Parks and Wildlife Conservation Act for the purpose of implementing the Protocol on Environment Protection to the Antarctic Treaty.

4.33 There would be no conflict between declaring the Australian Antarctic Territory as a nature reserve under the National Parks and Wildlife Conservation Act, and the provisions of the Antarctic Treaty (Environment Protection) Act regarding special sites. The protection of sites of special scientific interest is consistent with the purpose of the National Parks and Wildlife Conservation Act and such sites would be incorporated into the management plan for the Territory.

4.34 The development of a management plan under the Act would be the responsibility of the Australian National Parks and Wildlife Service, while the scientific aims of Australia's Antarctic program would remain the responsibility of the Antarctic Division of the Department of the Arts, Sport, the Environment and Territories.

4.35 The National Parks and Wildlife Conservation Act has the flexibility to enable co-operative arrangements to be achieved regarding the development and implementation of an environmental plan of management, with the full involvement of the Antarctic Division. It should be possible, for example, for the Director of the Australian National Parks and Wildlife Service to delegate all or any of his powers or functions in relation to the implementation of a plan of management to appropriate officers of the Antarctic Division or to station leaders at Australian bases.

4.36 The on-site presence of Australian National Parks and Wildlife Service rangers could be achieved through co-operative arrangements between the Service and the Antarctic Division, taking as a precedent the logistical support provided by the Antarctic Division to rangers of the Tasmanian Parks and Wildlife Service on the sub-Antarctic Macquarie Island.[14]

RECOMMENDATION 10

The Committee recommends that the Australian Antarctic Territory be declared a nature reserve under the *National Parks and Wildlife Conservation Act 1975*.

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[14] DASET, *Evidence*, p.28.

5. LEGAL REGIME OF THE HEARD ISLAND AND McDONALD ISLANDS TERRITORY

Description and Historical Background

5.1 The Heard Island and McDonald Islands group lies 4,100 kilometres south-west of Australia and 1,500 kilometres north of Antarctica at latitude 53 degrees 07' south, approximately half-way between south-western Australia and southern Africa.

5.2 Heard Island is a spectacular landform, an active glacier-clad volcano rising abruptly from the ocean to a height of over 2,700 metres, with about 75 per cent of the island covered by a glacial icecap about 150 metres in depth. The McDonald Islands are a group of islands and off-shore islets where the terrain makes scientific exploration difficult. The first recorded landing on the McDonald Islands was made by helicopter in 1971.

5.3 The Heard Island and McDonald Islands group is the only major sub-Antarctic island group where there are no human-introduced plants or animals and is consequently a pristine environment. The islands are considered one of the most significant ecosystems in the world and have been nominated for World Heritage listing.

5.4 As with Antarctica, early human occupation of the islands was linked with the sealing industry. The earliest sightings of Heard Island were made by James Heard in November 1853, and Captain McDonald in January 1854 who then sailed westward and discovered the small group of islands that is named after him.

5.5 Between 1855, when the first known landing was made on Heard Island by Captain Erasmus Darwin Rogers, and 1880, when the harvesting of elephant seals for oil extraction essentially ceased, the island was among the most intensively harvested in the sub-Antarctic.

5.6 Heard Island was visited in 1929 by the British, Australian and New Zealand Antarctic Research Expedition led by Sir Douglas Mawson. A scientific research station established on Heard Island in late 1947 was the first research station run by the Australian National Antarctic Research Expeditions in the Antarctic region.

5.7 Sovereignty of Heard Island and the McDonald Islands was transferred from the United Kingdom to the Australian Government in December 1947. The *Heard Island and McDonald Islands Act* 1953 established the islands as a separate territory of Australia and provided for its administration. The Territory lies north of the Antarctic region and Australia's sovereignty over the Territory is not disputed.

The Legal Regime

5.8 The legal regime of the Heard Island and McDonald Islands Territory is of similar complexity to that of the Australian Antarctic Territory. It is established by sections 5, 7 and 10 of the Heard Island and McDonald Islands Act and comprises:

- under sub-section 5(1) laws, other than criminal laws, in force in the Australian Capital Territory so far as they are applicable and not inconsistent with any ordinance made under the Heard Island and McDonald Islands Act;

- under sub-section 5(2) criminal laws in force in the Jervis Bay Territory so far as they are applicable and not inconsistent with any ordinance made under the Heard Island and McDonald Islands Act;

- under sub-section 7(1) laws expressly applying to the Territory, and Acts expressed to extend to the Territory; and

- ordinances made by the Governor-General under section 10 of the Act.

Administrative Arrangements

5.9 Under the Administrative Arrangements Order, the Commonwealth Minister responsible for the Territory of Heard Island and McDonald Islands is the Minister for the Arts, Sport, the Environment and Territories.

5.10 The Antarctic Division administers the Territory and provides supporting infrastructure and logistics to the Australian National Antarctic Research Expedition's summer science programs on Heard Island.

5.11 The Territory has no permanent human occupation. Expeditioners on Heard Island are as isolated as those in the Australian Antarctic Territory and due to the complete lack of infrastructure on the island may experience to some extent even greater hardships.[1] The McDonald Islands are rarely visited on account of their inaccessibility.

Application of Laws to the Territory

5.12 The Commonwealth laws which apply in the Territory are essentially the same as those which apply in the Australian Antarctic Territory, apart from the *Antarctic Treaty (Environment Protection) Act* 1980 and the Antarctic Seals Conservation Regulations, both of which relate to obligations under the Antarctic Treaty.[2]

5.13 The application of Commonwealth Acts to the Territory is described in sub-section 7(1) of the Heard Island and McDonald Islands Act which, together with paragraph 17pd of the *Acts Interpretations Act* 1901, which provides that, unless expressly stated otherwise, any Act that refers to 'external Territory' applies to Australia's external Territories.

5.14 The Committee concludes that, as with the Australian Antarctic Territory, a large body of Commonwealth laws could be held to apply to the Heard Island and McDonald Islands Territory and its coastal seas.

5.15 As is the case with the Australian Antarctic Territory, the 'applicability' and hence the relevance of the laws of the Australian Capital Territory and Jervis Bay Territory to Heard Island and McDonald Islands is questionable.[3]

Relevance of the Existing Legal Regime

5.16 The Department of the Arts, Sport, the Environment and Territories advised the Committee that, with only a few exceptions, the Antarctic Division does not actively apply Commonwealth legislation to the Territory.[4] The two main exceptions are the *Antarctic Marine Living Resources Conservation Act* 1981 and the *Environment Protection and*

1 DASET, *Submission*, p.164.
2 DASET, *Submission*, p.166.
3 DASET, *Submission*, p.168.
4 DASET, *Submission*, p.167.

Management Ordinance 1987 (made pursuant to the Heard Island and McDonald Islands Act).

5.17 Legislation applied by other Commonwealth agencies to the Territory is the *Customs Act* 1901 and the *Sales Tax (Exemptions and Classifications) Act* 1935. Under the Customs Act the Territory, as an uninhabited island, is not regarded as a place outside Australia and consequently duty-free concessions are not available to people travelling to and from the Territory.

5.18 The *Fisheries Management Act* 1991, which replaces the *Fisheries Act* 1952, extends to Heard Island and McDonald Islands and includes the Territory's waters within the Australian Fishing Zone. Certain parts of these waters come within the Antarctic Convergence and hence into the area of application of the Convention for the Conservation of Antarctic Marine Living Resources.

5.19 Both the *Antarctic Marine Living Resources Conservation Act* 1981, which implements this Convention, and the *Fisheries Management Act* 1991 prohibit unauthorised fishing by Australian and foreign nationals in the Australian Fishing Zone surrounding the Territory.

5.20 The Department of Primary Industry and Energy advised that commercial fishing is currently not permitted within these waters, although future harvesting was not ruled out should commercially viable stocks of fish become evident.[5] Preliminary findings from fisheries survey work carried out by the Antarctic Division research vessel RV Aurora Australis in the waters around Heard Island indicate low levels of fish stocks.[6]

5.21 As noted, the Territory of Heard Island and McDonald Islands is as isolated as the Australian Antarctic Territory and there are similar practical difficulties in enforcing laws.

5.22 Given the lack of continuous settlement of the Territory, the Committee questions the applicability of the laws of the Australian Capital Territory and Jervis Bay Territory. A Criminal Procedures Ordinance is being developed pursuant to the Heard Island and McDonald Islands Act to address the practical application of criminal law in the Territory.

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5 Department of Primary Industry and Energy, *Evidence*, p.280.
6 Department of Primary Industry and Energy, *Submission*, p.568.

5.23 In considering the legal regime of the Territory the Committee took into account its uninhabited status. In its earlier report on Phase I of the inquiry into the legal regimes of Australia's external territories, the Committee adopted the general principle that uninhabited external territories be incorporated into the nearest mainland legal jurisdiction. The Committee reaffirms this principle in relation to the Heard Island and McDonald Islands Territory, concluding that on this basis the Territory should be incorporated into the state of Tasmania.

5.24 Australian sovereignty over the Territory is undisputed, unlike Australia's claims regarding the Australian Antarctic Territory, consequently there is no impediment to the incorporation of the Heard Island and McDonald Islands Territory into the state of Tasmania. Tasmania already has long experience in administering Macquarie Island, a sub-Antarctic island which has been part of that State since the early 1800's.

Environmental Management

5.25 A number of witnesses to the inquiry drew the Committee's attention to the unique conservation value of Heard Island and McDonald Islands, and the need for effective environmental management of the Territory.[7] Greenpeace submitted to the Committee that in order to protect food sources for the Island's wildlife, environmental management of the Territory needs to extend to the surrounding waters of the Islands.[8]

5.26 While the Environment Protection and Management Ordinance required the preparation of a management plan for the Territory as soon as practicable after the commencement of the Ordinance in January 1988, several witnesses expressed concern that a comprehensive management plan still did not exist.[9]

5.27 The Australian Government recognises the high conservation value of the Territory and has nominated Heard Island for inclusion on the World Heritage list. The initial nomination was considered by the World Heritage Bureau in June 1991 which requested that the Australian Government review the legal status for the protection of

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7 Professor Davis, Institute of Antarctic and Southern Ocean Studies, *Evidence*, p.102 (see also Wilderness Society, *Evidence*, p.76).

8 Greenpeace, *Evidence*, p.199.

9 C. Lidgerwood, *Evidence*, p.57 (See also Professor Davis, *op.cit.*, p.102).

the islands and indicate whether they will be accorded protected area status, and report on progress achieved in the preparation of the management plan for the islands.[10]

5.28 World Heritage Listing does not exclude mining or similar commercial activities in the nominated area. The Committee was advised that the waters around Heard Island and McDonald Islands, the Heard-Kerguelan Plateau, are listed in the Government's Offshore Exploration Strategy of exploration areas for release around the year 2000 to 2015. The Bureau of Mineral Resources ranks the petroleum potential of the Heard-Kerguelan Plateau to be high amongst the more remote "frontier" areas of Australia.[11]

5.29 As with the Australian Antarctic Territory, the potential for tourist ventures to the Heard Island adds urgency to the application of an effective strategy for environmental management in the Territory.

5.30 It has been put to the Committee that an appropriate way of ensuring the effective environmental management of the Territory would be for the Territory to be declared as a nature reserve under the National Parks and Wildlife Conservation Act. This Act provides for environmental management with the objective of protecting conservation values while enabling scientific activity to continue.

5.31 Declaring the Territory to be a nature reserve would be an alternative to the current incomplete protection given by the Environment Protection and Management Ordinance. Declaration would achieve effective environmental management of the Territory and provide protected area status overseen by the national environmental management authority. Declaration as a nature reserve would bring a number of advantages including greater national and international recognition of the Territory's conservation value, which would support Australia's nomination of Heard Island for World Heritage listing, and a nationally consistent approach to natural resources management.[12] It would also extend environmental protection to the Territory's continental shelf, whereas the protection under Ordinance is limited to the territorial seas.

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10 DASET, *Evidence*, p.252.
11 Department of Primary Industries and Energy, *Submission*, p.353.
12 Australian National Parks and Wildlife Service, *Submission*, p19.

5.32 In its report on Phase I of the Inquiry into the Legal Regimes of Australia's External Territories and the Jervis Bay Territory, the Committee recommended that the National Parks and Wildlife Conservation Act should be used as the standard means of providing for nature conservation in the external territories.

Conclusion

5.33 The Committee's priority concern regarding the legal regime of the Heard Island and McDonald Islands Territory is to arrive at simplified legal arrangements for the administration of the Territory, and in doing so providing for its effective environmental protection.

5.34 To this end, the Committee is of the view that the Territory should be incorporated into Tasmania as a nature reserve.

RECOMMENDATION 11

The Committee recommends that discussions be held between the Commonwealth and the Tasmanian Governments regarding the possible incorporation of the Heard Island and McDonald Islands within the state of Tasmania, subject to:

- the Territory being declared a nature reserve under the Tasmanian *National Parks and Wildlife Act* 1970;
- the adjacent waters of the Territory being declared a marine reserve under the Tasmanian National Parks and Wildlife Act; and
- the plan of management required under the Tasmanian National Parks and Wildlife Act specify the banning of mining in the nature reserve.

RECOMMENDATION 12

The Committee recommends that the Australian Government vigorously pursue the application for World Heritage listing for Heard Island.

RECOMMENDATION 13

The Committee recommends that the Antarctic Division, as a matter of urgency, complete the plan of management for Heard Island required under Section 8 of the Environment Protection and Management Ordinance.

6. CONCLUSION

6.1 The legal regime in the Australian Antarctic Territory and the Territory of Heard Island and McDonald Islands is a complex mix of Commonwealth laws, ordinances specific to the Territories, and applicable laws of the Australian Capital Territory and the Jervis Bay Territory. The challenge is to rationalise and streamline this complex arrangement of laws so as to achieve a body of appropriate and enforceable law for these Territories.

6.2 The Committee believes that the legal regime for the Australian Antarctic Territory should be amended to comprise those Commonwealth laws which are currently held to apply, and a refined and specifically relevant package of laws based on the laws of Tasmania. This regime should be developed and maintained, as appropriate, by the making of ordinances under the Australian Antarctic Territory Act.

6.3 The Committee believes that, in particular, urgent attention needs to be given to effective environmental management and the regulation of tourist activities.

6.4 The Committee does not accept that administrative guidelines advising tourist operators of their responsibilities in Antarctica are adequate for regulating tourism, and supports instead the negotiation of a further annexe to the Protocol on Environment Protection to the Antarctic Treaty to cover tourism.

6.5 The Committee concludes that the Antarctic Treaty does not constrain Australia in applying Australian law to foreign nationals in the Australian Antarctic Territory, who are not otherwise exempted under the Treaty, and that this should be reflected in both the drafting of legislation and in its enforcement.

6.6 Taking into account Australia's international obligations to provide effective systems of environmental management and protection in the Australian Antarctic Territory, the Committee considers it appropriate that the Territory be declared to be a nature reserve in accordance with the National Parks and Wildlife Conservation Act.

6.7 It is evident that the administration of the Australian Antarctic Territory and the Territory of Heard Island and McDonald Islands has become increasingly complex and has imposed diverse and often conflicting responsibilities on the Antarctic Division of the Department of the Arts, Sport, the Environment and Territories. The Committee's

recommendation to declare the Antarctic Territory to be a nature reserve, thus passing ultimate responsibility for environmental management to the Australian National Parks and Wildlife Service, would allow the Antarctic Division to focus its attention and resources on its other responsibilities, such as managing Australia's scientific research programs in Antarctica, and developing and maintaining the legal regime of the Australian Antarctic Territory.

6.8 Consistent with its approach to the legal regimes of uninhabited external territories in Phase I of the inquiry, the Committee believes that the Heard Island and McDonald Islands Territory should be incorporated into the state of Tasmania. Consequently, the laws of the Australian Capital Territory and Jervis Bay Territory currently held to apply to the islands would be replaced by the criminal and civil laws of Tasmania.

6.9 The Committee gives high priority to the protection and management of the unique environment of the Heard Island and McDonald Islands Territory. The Committee concludes that the Territory should be declared a nature reserve and the adjacent waters a marine reserve, with the plan of management for the islands specifically banning mining in the nature reserve.

6.10 The Australian Government should vigorously pursue the application for World Heritage listing for Heard Island and, pending World Heritage listing and declaration as a nature reserve, the Antarctic Division should urgently complete the plan of management required under the Environment Protection and Management Ordinance.

MICHAEL LAVARCH MP
Committee Chair

14 October 1992

DISSENTING REPORT

by

Alan Cadman MP, Gary Nehl MP, Chris Miles MP and
Ian Sinclair MP

Among the unique characteristics of the Australian Antarctic Territory (AAT) is its extraordinary isolation and the unpredictability and turbulence of its weather.

These factors together with the priority essential for scientific research require discipline in the management of resources both human and physical and economy in their use.

These are present constraints on the Antarctic Division (AD) in its management of the AAT.

Budget pressures make it unlikely that any significant additional funds will be available either for the AD or the AAT in the immediate future.

The adoption of Recommendation 10 making the AAT a Nature Reserve under the *National Parks and Wildlife Conservation Act* 1975 would introduce rangers responsible to the National Parks and Wildlife Service into the AAT outside the responsibilities of the AD.

This would almost certainly be an additional charge on the limited funds available for the AD. It could also affect discipline in the extraordinary managerial environment of Australia's Antarctic bases.

The protection of the environment of the Antarctic must be given a high priority but there is no evidence to suggest that either Expeditioners or the AD administration have a different view.

If an enhanced environmental response should be required this can be achieved by appointing one or more Expeditioners within the AD to exercise that responsibility. This would retain the single line of command essential but permit the development and implementation of an appropriate environmental plan of management.

This could be done after consultation with the Australian National Parks and Wildlife Service.

We oppose Recommendation 10.

Paragraph 5.11 of the report identifies the isolation and inaccessibility of Heard Island and the McDonald Islands.

These make their administration by the Tasmanian State Government impossible without significant assistance from the AD. This cannot be provided at much less a cost than necessary were it to maintain administrative responsibility.

Their isolation and the wildness of the Southern Ocean make their administration quite different from that of other Island Territories to which earlier reports of the Committee have referred.

Practical administrative priorities and efficient use of available funds suggest the responsibility for their management should remain with the AD and not be transferred to the Tasmanian Government.

The Recommendation is subject to three subsidiary observations. If administrative responsibility remains with the AD the declaration of a Nature Reserve or of adjacent waters as Marine Reserve should be under Federal not Tasmanian Legislation.

For the resource and discipline reasons set out in argument against Recommendation 10 an appropriate management plan should be defined and administered by officers of the AD and not be given to the National Parks and Wildlife Service.

Dot point 3 suggests the banning of mining on Heard Island and McDonald Islands.

As described in paragraph 5.28 of the report, the waters around Heard Island and McDonald Islands and the Heard-Kerguelan Plateau have been listed in the Government's Offshore Exploration Strategy as possible exploration areas for release around the years 2000 to 2015.

This indicates the possible resource potential of the region and we believe that to ban mining in 1992 without consideration of future circumstances is not justifiable.

We oppose Recommendation 11.

Recommendation 12 suggests that the Australian Government vigorously pursue World Heritage listing for Heard Island.

Effective environmental control is not about labels but proper management. Experience with Lord Howe Island suggests that World Heritage listing does not enhance environmental management but rather prejudices it.

We oppose Recommendation 12.

Alan Cadman MP

Gary Nehl MP

Chris Miles MP

Ian Sinclair MP

16 October 1992

RESERVATION

by

Michael Ronaldson MP

I agree with the dissenting report by Mr Cadman, Mr Nehl, Mr Miles and Mr Sinclair in relation to Recommendations 10 and 11 for the reasons outlined in their dissent.

I have reservations, however, about their conclusions in relation to Recommendation 12.

Subject to an appropriate environmental management program being in place, I can see no reason why World Heritage listing for Heard Island should not be actively pursued.

Michael Ronaldson MP

16 October 1992

DISSENTING REPORT

by

Kevin Andrews MP

I concur with the dissenting report by Alan Cadman MP, Gary Nehl MP, Chris Miles MP and Ian Sinclair MP, subject to one reservation.

In recommendation 10, the Committee recommends that the Australian Antarctic Territory be declared a nature reserve under the *National Parks and Wildlife Conservation Act* 1975. This recommendation is based partially on the conflicting role of the Antarctic Division as both the operational and regulatory agency in the Territory. (para 4.23).

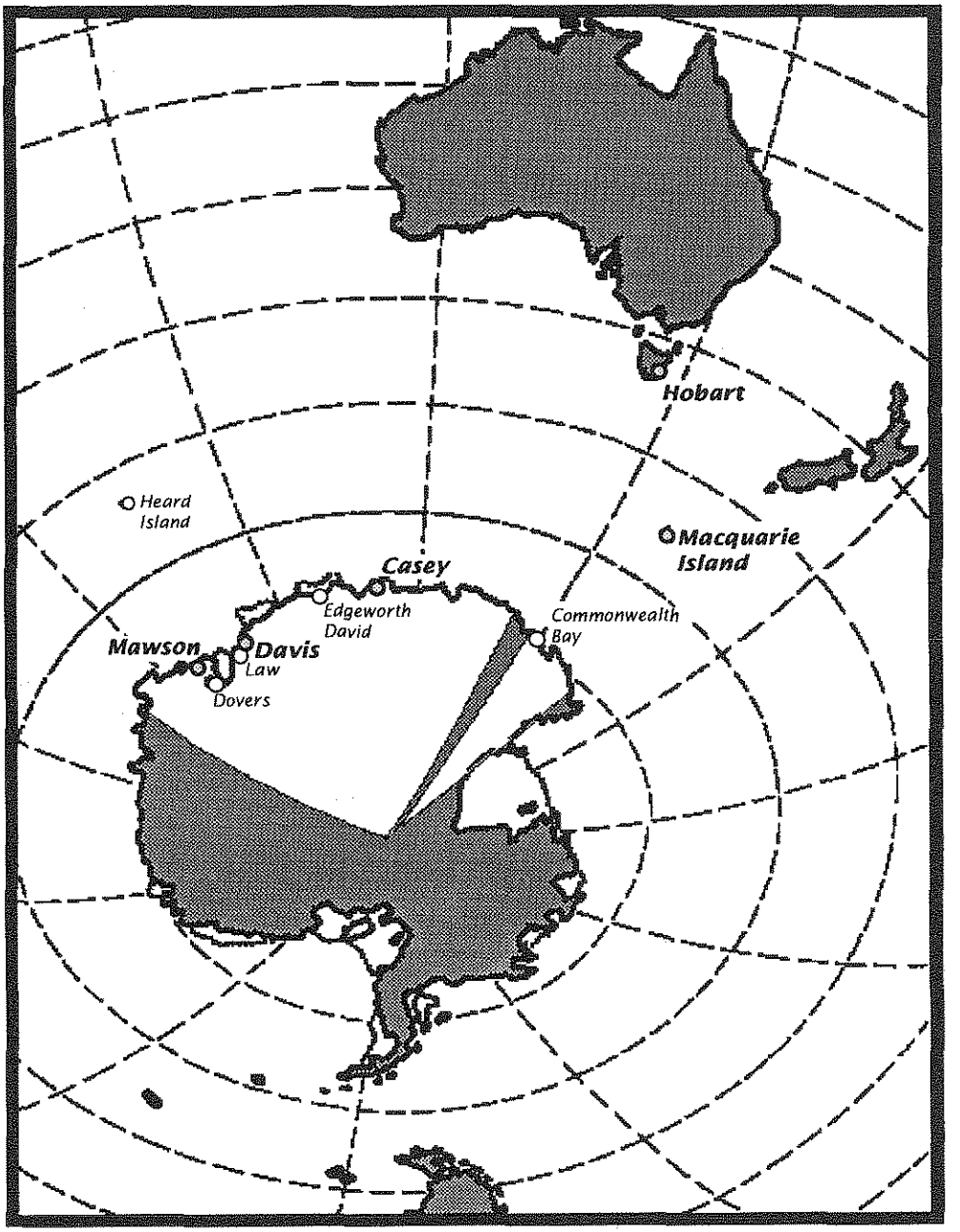
I am of the opinion that generally operational and regulatory functions should not be posited in one body. I appreciate that the Antarctic Territory may constitute a special case because of its geographic location, the lack of available resources and the costs involved in effectively maintaining two agencies. As these matters require more consideration, I reserve my judgement.

Otherwise I concur with the Committee, subject to the specific matters of dissent noted by Mr Cadman, Mr Nehl, Mr Miles and Mr Sinclair.

Kevin Andrews MP

16 October 1992

MAP OF THE AUSTRALIAN ANTARCTIC TERRITORY AND OF THE HEARD ISLAND AND MCDONALD ISLANDS TERRITORY



Australian Antarctic Territory is unshaded.

CONDUCT OF THE INQUIRY

On 22 September 1988 the then Attorney-General, the Hon Lionel Bowen QC MP, asked the Committee to conduct an inquiry into the legal regimes of Australia's external territories.

The Committee decided to undertake the inquiry in two phases. The first phase, covering the Territories of Ashmore and Cartier Islands, the Coral Sea Islands, Christmas Island, Cocos (Keeling) Islands and Norfolk Island, was concluded in March 1991 with the tabling of the Committee's report *Islands in the Sun.*

The terms of reference for phase two of the inquiry were advertised in national newspapers in June 1990. In addition, the Committee invited a range of organisations and individuals with an acknowledged interest in the Australian Antarctic Territory and Heard and McDonald Islands to make written submissions to the inquiry. The Committee received 40 submissions to the inquiry (a list of those who made submissions is at Appendix 2.)

The Committee also took evidence at public hearings in Hobart (on 4 April 1991) and in Canberra (on 12 and 25 September 1991). A list of the witnesses who appeared before the Committee at public hearings is at Appendix 4.

Copies of the submissions to the inquiry and the transcripts of evidence taken at public hearings are available from the Committee secretariat. The submissions and transcripts are also available for inspection at the Parliamentary Library and the National Library of Australia.

As well as taking formal evidence, two members of the sub-committee, Mr Snow and Mr Nehl, were privileged to undertake an inspection of Australian operations in the Australian Antarctic Territory and on Heard Island during January and February 1991.

The Committee greatly appreciates the co-operation and assistance it received during the course of the inquiry from officers of the Antarctic Division of the Department of the Arts, Sport, the Environment and Territories from members of the Australian National Antarctic Research Expeditions and from the officers and crew of the MV Icebird.

APPENDIX 3

SUBMISSIONS TO THE INQUIRY

Submissions were received from the following agencies and organisations

Government Agencies

- Attorney-General's Department
- Australian Customs Service
- Australian Electoral Commission
- Australian Federal Police
- Australian National Parks and Wildlife Service
- Australian Taxation Office
- Bureau of Meteorology
- Department of Administrative Services
- Department of Community Services and Health
- Department of Defence
- Department of Employment, Education and Training
- Department of Foreign Affairs and Trade
- Department of Immigration, Local Government and Ethnic Affairs
- Department of Primary Industries and Energy
- Department of Prime Minister and Cabinet
- Department of the Arts, Sport, the Environment, Tourism and Territories
- Department of Transport and Communications
- Department of Social Security

Organisations

- Greenpeace Australia Ltd
- The Wilderness Society

Individuals

Associate Professor B Davis
Institute of Antarctic and Southern
Ocean Studies
University of Tasmania

Ms C Lidgerwood
Centre for Comparative Constitutional Studies
University of Melbourne

Dr B Tsamenyi, Dr S Blay and Ms S Dorsett
Faculty of Law
University of Tasmania

APPENDIX 4

EXHIBITS TO THE INQUIRY

Exhibit No.	
1	Macquarie Island Nature Reserve Visitors Handbook
2	Subantarctic Islands Minimum Impact Code
3	Help to Protect New Zealand's Islands from Problem Animals and Plants
4	Guidelines for Tourism Operations at Macquarie Island Nature Reserve
5	Conserving Antarctica's Earliest Historic Buildings
6	Macquarie Island Nature Reserve - Draft Management Plan
7	Antarctica After 1991: The Legal and Policy Options by Blay, Piotrowicz and Tsamenyi
8	The Convention on the Regulation of Antarctic Mineral Resource Activities: Can a Claimant Veto it? by Blay and Tsamenyi
9	Australia and the Convention for the Regulation of Antarctic Mineral Resource Activities by Blay and Tsamenyi
10	A Window on Antarctica
11	Properties for which nominations have been referred back to nominating *states for further information/documentation*

APPENDIX 5

WITNESSES AT PUBLIC HEARINGS

HOBART, 4 APRIL 1991

- Department of the Arts, Sport, the Environment, Tourism and Territories
  - Ms W Fletcher, Legal Officer, Antarctic Division
  - Mr R Maggs, Acting Station and Field Operations Manager, Antarctic Division
  - Mr R Moncur, Director, Antarctic Division

- Centre for Comparative Constitutional Studies
  - Miss C Lidgerwood, Researcher

- The Wilderness Society
  - Mr A Graham

- Institute of Antarctic and Southern Ocean Studies (University of Tasmania)
  - Professor B Davis, Deputy Director

- Department of Parks, Wildlife and Heritage
  - Mr G Copson, Wildlife Management Officer
  - Mr R Pearse, Assistant Secretary

- Department of Premier and Cabinet
  - Mr S Calais, Senior Policy Analyst

- Department of Political Science, (University of Tasmania)
  - Mr H Hall, Lecturer
  - Dr R Herr, Head of Department

- Faculty of Law (University of Tasmania)
  - Dr S Blay, Senior Lecturer
  - Miss S Dorsett, Lecturer
  - Dr B Tsamenyi, Dean

CANBERRA, 12 SEPTEMBER 1991

- Department of Foreign Affairs and Trade
  - Mr B Doran, Director, Antarctic Section
  - Mr P Heyward, Desk Officer for CCAMLR, Antarctic Section
  - Mr M McKeown, Environment and Antarctic Branch
  - Mr H Wyndham, Assistant Secretary, Environment and Antarctic Branch

CANBERRA, 25 SEPTEMBER 1991

. Australian National Parks and Wildlife Service
  - Dr D Kay, General Manager, Education, Research and Corporate Development
  - Dr G Shaughnessy, Senior Project Officer

. Greenpeace Australia
  - Mr I Fry, National Liaison Officer

. Attorney-General's Department
  - Ms V Buring, Legal 2, Criminal Law and Law Enforcement Division
  - Mr H Burmester, Principal Adviser (International Law)

. Department of the Arts, Sport, the Environment, Tourism and Territories
  - *Mr G Early, Assistant Secretary, Territories Branch*
  - Ms W Fletcher, Legal Officer, Antarctic Division
  - Mr R Moncur, Antarctic Division
  - Mr M Rollinson, Director, Legal Section
  - Ms C Santamaria, First Assistant Secretary, Corporate Management and Territories Division
  - Dr Andrew Turner, Assistant Secretary, Nature Conservation

. Department of Primary Industries and Energy
  - Mr R Daukus, Director, Offshore Minerals and Policy Coordination Section, Coal and Minerals Division
  - Ms M Harwood, Manager, Policy Development and Coordination, Australian Fisheries Service
  - Mr R Leslie, Safeguards Officer, Nuclear Materials Accountancy and Control Section,
  - Mr R Murphy, Senior Executive Officer, Operations, AQIS
  - Mr C Penney, Acting Assistant Secretary, Exploration and Development Branch, Petroleum Division