

DEPARTMENT OF THE PARLIAMENTARY LIBRARY

NAURU (HIGH COURT APPEALS) BILL 1976

Date introduced: 7 October, 1976
House: House of Representatives
Presented by: Hon. R.J. Ellicott, Q.C., Attorney-General

The purpose of this Bill is to seek the approval of the Parliament to an Agreement between the Commonwealth of Australia and the Republic of Nauru that would allow appeals to be brought to the High Court from certain classes of decisions of the Supreme Court of Nauru. The text of the Agreement is set out in the Schedule to the Bill.

The Agreement

The Preamble notes the arrangements that formerly applied, i.e. that appeal lay to the High Court, by leave of that Court, from all the judgments, etc. of the then Court of Appeal of Nauru. It notes the desire of the Government of Nauru that suitable provision be made for appeals to the High Court of Australia from certain judgments, decrees, orders and sentences of the Supreme Court of Nauru.

The Agreement sets out the matters in which appeals are to lie to the High Court and those matters in which appeals are not to lie. It provides that procedural matters relating to appeals are to be governed by Rules of the High Court; and that applications to the Nauru Court for leave to appeal in civil matters are to be made in accordance with the law of Nauru.

Also, that the judgment appealed from is to be stayed until the High Court decides the appeal unless the Nauru Supreme Court orders otherwise; and that High Court orders on appeals are to be made binding and effective in Nauru.

Article 5 recognizes that the signatories will need to pay regard to constitutional and other requirements (enactment of enabling legislation), before the Agreement can come into force. An exchange of Notes will signify that all requirements have been met. The Agreement may be terminated by either country, on 90 days notice.

The Bill

Proposes that the Act would come into force not earlier than the date on which the Agreement comes into force.

Expresses the approval of this Parliament to the Agreement.

Provides for appeals to lie and applications for leave to be made to the High Court under the Agreement.

The High Court will be empowered to make Rules of Court for procedure in matters coming to it from Nauru.

Provisions are made as to the nature of the judgment that may be made on appeal and as to the manner in which, in a divided court, a question is to be decided. Clause 10 deals with the appearance of a party before the High Court, either personally or by a representative. That representative may be a legal practitioner of the High Court or of the Supreme Court of a State or Territory, or may be a barrister and solicitor of the

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Supreme Court of Nauru. If an appeal is made in a criminal matter by a person who is required to serve a sentence of imprisonment imposed by a court of Nauru, that person cannot appear personally in the High Court.

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Nauru (High Court Appeals) Bill

At first sight it might be thought that the Commonwealth Constitution does not authorise the Australian Parliament to legislate to provide for appeals from the courts of another country nor permit the High Court of Australia to have such appeals added to its appellate jurisdiction.

Further it might be thought unlikely that the constitution of another country would permit appeals to be taken to a court of this country against the decisions of its own courts.

Any doubts on this latter point are set at rest by subsection 57 (2) of the Constitution of Nauru which provides —

“The Legislative Assembly may provide that an appeal lies as prescribed by law from a judgment decree, order or sentence of the Supreme Court to a court of another country”.

Commonwealth legislative power

The Commonwealth Constitution does not give the Australian Parliament specific power to legislate to provide for appeals to the High Court from the courts of another country. Section 73 of the Constitution itself gives the High Court appellate jurisdiction and empowers the Parliament to prescribe exceptions and regulations to which such jurisdiction is to be subject.

The only other provision in Chapter III of the Constitution under which Parliament may legislate in respect of appeals is section 74 which authorizes Parliament to make laws limiting the matters in which special leave to appeal to the Privy Council may be sought.

Placitum 51 (xxix) of the Commonwealth Constitution which authorizes Parliament to legislate with respect to external affairs would appear to provide the main constitutional support for the Bill. The scope of that provision of the Constitution, despite the recent High Court decision on the Seas and Submerged Lands Act, is not completely clear. In particular, it is not clear whether a bilateral as distinct from a multilateral treaty will justify legislation by the Australian Parliament under the power.

High Court jurisdiction

As pointed out above, section 73 of the Constitution, as well as authorizing the Parliament to legislate in relation to the appellate jurisdiction of the High Court, itself states that the High Court shall have jurisdiction to hear and determine certain classes of appeals.

Section 73 of the Constitution does not, however, state that no other appellate jurisdiction shall be given to the High Court and neither that section nor any other prohibits appellate jurisdiction being given to the High Court under other provisions of the Constitution.

Conclusion on constitutional matters

Thus there appears to be no impediment in the Commonwealth Constitution to Parliament legislating along the lines of the Bill nor to the High Court receiving the proposed addition to its appellate jurisdiction. The only area of uncertainty is whether

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the agreement on which the Bill is based is an external affair within placitum 51 (xxix).

As pointed out above subsection 57 (2) of the Constitution of Nauru expressly permits the legislature of that country to provide for appeals to a court of another country.

Background notes

The Australian connexion with Nauru dates from 1914 when the AIF occupied the island which had been a German Territory since 1888.

The island became a mandated territory of the United Kingdom on 28 June 1919 under the Treaty of Versailles.

The next significant step was the Nauru Island Agreement signed on 2 July 1920. This vested responsibility for the island's administration in Great Britain, Australia and New Zealand jointly and this responsibility was carried out by an Administrator appointed by the Australian Government.

The island was occupied by the Japanese on 26 August 1942.

A Trusteeship Agreement for Nauru was approved by the United Nation on 1 November 1947. This designated the Governments of the United Kingdom, Australia and New Zealand as a joint administering authority. Under an agreement between these governments, Australia exercised full powers of legislation, administration and jurisdiction in Nauru.

In 1965 the Nauru Act was passed by the Australian Parliament. This provided for an Administrator, a Legislative Council and an Executive Council. Part VII of the Act dealt with the judicial system. Section 47 established the Court of Appeal of the Island of Nauru and section 54 gave the High Court of Australia appellate jurisdiction in relation to all decisions of the Court of Appeal but only with the leave of the High Court.

The Nauru Act was repealed by the Nauru Independence Act 1967 which by subsection 4 (2) provided that on and after Nauru Independence Day—31 January 1968—“Australia shall not exercise any powers of legislation administration or jurisdiction, in or over Nauru”.

The population of Nauru on 30 June 1972 was 6,776 comprising 3,471 Nauruans, 1787 other Pacific Islanders, 891 Chinese and 627 Europeans.

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