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AUSTRALIAN LAW JOURNAL

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NAURU: ENVIRONMENTAL DAMAGE UNDER INTERNATIONAL TRUSTEESHIP by Christopher Weeramantry pages i-xx, 1-374, appendices 375-411, endnotes and bibliography 412-440, index 441-448. 1992. Melbourne: Oxford University Press. Price: Hardcover $65.

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This book was written by Judge Weeramantry before his election to the International Court of Justice noted (1991) 65 ALJ 180. It represents a synthesis of the ten volume report of a Commission of Inquiry on the Rehabilitation of Phosphate Lands in Nauru. Judge Weeramantry, then Professor of Law at Monash University, presided over the Commission and directed the completion of its report. Once completed, the report was presented to the Australian Government with a demand for a contribution by Australia to the restoration of the island of Nauru, much of it left desolate following nearly eighty years of phosphate mining. Upon the refusal of the Government of Australia to accede to the demand of the Government of Nauru, the latter commenced proceedings in the International Court of Justice. Necessarily, Judge Weeramantry plays no part in those proceedings. A preliminary objection by Australia to the Nauruan claim was dismissed by the International Court, by majority, on 26 June 1992.

Judge Weeramantry's book opens with an explanation of the origins of the phosphate industry and its importance both for Nauru and for the countries whose history has been connected with that of Nauru. He examines the period of German colonisation which followed the 1886 agreement between Imperial Germany and the United Kingdom to draw a line in the Pacific Ocean between their respective colonial

interests. Nauru fell on the German side. It was administered as a protectorate from the Marshall Islands. Ocean Island, populated by the Banabans - also later a source of phosphate - fell on the British side. It became a Crown colony.

Nauru's period as a German protectorate finished soon after the commencement of the First World War. A garrison of Australian troops was sent to take charge of the island in 1915. Australia's control of Nauru endured until independence was granted in 1967. On the signing of the Treaty of Versailles in 1919, between the successful Allies and Germany, the Australian Prime Minister, W M Hughes, demanded annexation of Nauru to Australia. For him it provided a forward base against his suspicion of Japanese expansionism. Some of the most interesting parts of Judge Weeramantry's book relate to the demands of Prime Minister Hughes against the staunch resistance of President Woodrow Wilson. Wilson, in the end, asked Hughes whether Australia "with three million square miles of its own" was going to stand out against "the whole civilized world" in respect of Nauru. To this question he received Hughes' somewhat acerbic Australian reply: "That's about it". Hughes asserted that he was speaking with the authority of 60,000 Australian dead in the Great War.

The discovery of the potential wealth of Nauru actually took place in Sydney in 1899. A young chemist conducted a random chemical test on a piece of Nauruan rock which was being used as a doorstopper at the Sydney office of the Pacific Islands Company. It was then discovered that the rock had a phenomenally high content of phosphate of lime. At first there were desperate endeavours to keep this a secret from Germany and to explore Ocean Island in the hope of discovering a like deposit. But the Germans were in the forefront of superphosphate development. They soon realised the treasure they were sitting on in Nauru. Before their forced exit in 1915, they had

begun the exploitation of this precious resource. Its special value to Australia arose from the poor quality of soil in many parts of the country and the high dependance of its trade upon primary products, including wheat. Hughes realised this and fought tenaciously for annexation. But in the end he had to settle for a mandate under the League of Nations. Nauru was in the special "C" class of mandates. The mandate was granted not to Australia but to "the British Empire" to be administered for the Crown in right of the United Kingdom, Australia and New Zealand.

In the result, however, the British Phosphate Commissioners were vested with exclusive title to the phosphate deposits on the island. This was done by virtue of the Nauru Island Agreement which was ratified by the three Parliaments. It was an extraordinary arrangement. In Judge Weeramantry's opinion it was inconsistent with the obligations of the League *Covenant* and of the very notion of a "mandate": being a "sacred trust" for the benefit of the residents of the mandated territory, not for the profit of the Commissioners pursuing the interests of the administering powers.

There are numerous vignettes recounted in the book about the control of Nauru between the Wars. In 1928, the Australian Administrator estimated that the island's deposits would last for 300 years. He seemed to think that Australian rule would be just as enduring.

In 1945, with the establishment of the United Nations, the mandate was replaced by a trusteeship under the *Charter*. Judge Weeramantry, from contemporary memoranda in the Australian foreign service, discloses the concern which was felt that the occasion of the change of status to a trusteeship territory would focus United Nations' attention on the peculiarities of the Australian rule in Nauru. But in the result, there was little attention at the time.

The Cold War was soon consuming most of the energies of the UN.

Later, in the Trusteeship Council, demands were voiced for greater attention to the future of the island. The demands were generally made by representatives of the Soviet Union and India. Australia too began to consider what would happen to the island when its phosphate resources were depleted. In 1961, Prime Minister Menzies contemplated the resettlement of the people of Nauru either on an island off the coast of Australia (Fraser Island in Queensland was mentioned) or dispersed within the Australian community. Unlike the Banabans who settled for such a deal in an island of the Fiji group, the Nauruans never found it congenial. Such resettlement or dispersal would damage, or possibly destroy, their unique culture.

In 1967 Nauru gained independence from Australia but not until after the execution of the comprehensive phosphate agreement of that year by which it purportedly released Australia from obligations of rehabilitation of the worked-out island. Judge Weeramantry records the plaintive protests of the Nauruan representatives when faced with the requirement to sign the agreement as a price for independence.

The book is not only an interesting history of a colonial episode of special significance for Australia. It is also a legal text. It collects the legal documents going back to the German protectorate, through the Australian legislation and the provisions of the League *Covenant* and the UN *Charter*. It analyses the Prussian law of mining. Under it, an obligation was imposed upon those responsible for mining to rehabilitate the land once mined out. Anyone who has seen the abandoned mines of Australia will realise the absence of such an obligation in our law during the same time. Only now, belatedly, are steps being taken to impose environmental standards on those engaged in mining. But if this was tolerable in a continental country, it left Nauru, a small island,

devastated, at least so far as its "top side" (central section) is concerned. The book records various Australian arguments for declining responsibility for the rehabilitation of the mined parts of Nauru. The notion of a trust obligation to do so is disputed. It is said that the "top side" was uninhabited. It is argued that the international community impliedly accepted the peculiar arrangements with the Phosphate Commissioners which were regularly reported to the League and then the UN Trusteeship Council. Then it is said that the comprehensive agreement of 1967 released Australia from its obligations in consideration of its payout at that time.

In due course these arguments, or some of them, may be passed upon by the author's colleagues in the International Court. But he makes a telling point concerning the obligations of trusteeship as such. As in private law, a trustee may not act to self-advantage, must be faithful to the terms of the trust, must avoid confusing its obligation and its private interests and is bound to fair dealing with those for whom the trust is held.

The Banabans, by then resettled on the island of Rabi, brought their legal claim against the Attorney General for England alleging a breach of the fiduciary relationship owed by the Crown to the Banabans on Ocean Island. That claim came for hearing before Sir Robert Megarry VC in one of the longest suits recorded in the English courts. Ultimately in *Tito & Ors v Waddell & Ors [No 2]* [1977] 1 Ch 106 the claim was dismissed. It could not be held in the English courts that the Crown had undertaken an enforceable trust or fiduciary obligation such as was alleged. But in the course of his reasons, Megarry VC was highly critical of the British government, suggesting that its agents had acted "more like a wolf than a shepherd".

According to Judge Weeramantry, Australia stands in a different

legal position. In its case, from the mandate and later the trusteeship, an undoubted relationship of "trust" in international law was created. One of the most interesting sections of the book contains an analysis of the way in which the notions of "sacred trusts" and "civilising mission" arose in jurisprudential writing of the colonising European powers. The first such notion was actually written by a Spanish lawyer just a few years after Columbus had his fateful encounter with the Americas exactly five hundred years ago. It is the mandate and the trusteeship which provides the legal basis for the suggested continuing obligation of Australia to the Nauruan people. There is no doubt that huge benefits were derived by Australian farmers, and hence Australia, from the phosphate extracted from Nauru during the sixty years of Australian control. Nauruans now seek to enforce the obligation of trusteeship and to require Australia to "disgorge" an amount equivalent to what they claim is only 7% of the aggregate benefit extracted ($72 million) in order partly to rehabilitate their island.

Of course, the Nauruan people have done well when compared to other colonised people. They own office buildings and hotels and have investments in many parts of the world. They have the use of Australian currency and access to the High Court of Australia. Increased payments to them would doubtless come out of the dwindling fund available in Australia for the support of other developing countries. But they have a unique claim. In respect of them, Australia was a trustee. A stringent requirement is imposed by Australian private law upon trustees. See eg *Scott v Scott* (1963) 109 CLR 649. It is Judge Weeramantry's thesis that no lesser essential obligations are imposed by international law.

In the context of global concern about environmental issues and the heightened attention to the application of international law to

the protection of the world's environment, this is a timely book. Clearly, it is written by an authoritative author. The devastation to Nauru must be seen, in microcosm, as an illustration of the variety of destruction of the world's environment for immediate gain but with little thought to what follows in the future. The photographs in the book show the mined-out portions of Nauru. They are vivid indeed. The tables show the tiny fraction of the profits from the export of phosphate ploughed back into the rehabilitation of the island. They present their own indictment of Australia's record as an international "trustee". Inevitably, the ecology of Nauru has been devastated during Australia's trusteeship. The self-reliance of its people has clearly been eroded. Their food patterns have altered with the changed ecology. Most species of birds, which lost their nesting places, have disappeared. Quite apart from the legal issue which the book presents it also requires the reader to face the moral issues which arise from the encounter of two worlds. It is thus an appropriate antipodean analogue to the controversies about Columbus which his anniversary presents to the northern hemisphere.

As might be expected, the appendixes are extremely detailed. The endnotes are scholarly. The chronology and bibliography are extremely useful. The index is thorough.

There is some overlap between the coverage of topics in different chapters of the book. But as this arises from the way in which the author has organised the material it is tolerable. Whenever interest flags, there is a new vignette about the German administrators, Australian politicians, Japanese occupiers and Nauruan chiefs whose inter-action provides the counterpoint to the relentless removal of the island's phosphate to be scattered on the surface of the land in outback Victoria. Australian lawyers who have a view of their country as a model international citizen, entitled to

expound human rights to all and sundry, will be chastened by a reading of this book. Whether or not a remedy is found in international law, the performance of Australia's trust obligations left much to be desired. It is to be hoped that such a serious indictment will provoke an Australian author to offer a response, if one is available, which justifies before the international community such an apparently serious departure from the normal obligations of our "sacred trust". Although this book was written and accepted for publication before Judge Weeramantry's election to the International Court of Justice it is a good thing it has been published. It deserves a wide readership in Australia and beyond.