XI TREATIES

Treaties – Australian treaty practice – giving effect to treaty obligations – interpretation of treaties by domestic courts – observance and compliance of treaties at regional, provincial and state government level – changing interpretation of treaty obligations – speech by Australian Attorney-General

On 15 August 1990 the Attorney-General, Mr Duffy, gave a speech at the conference on "The Role of Consent and the Development of International Law" organized by the Centre for International and Public Law at the Australian National University in Canberra. Part of his speech was as follows:

> ... I want to remind you, the practitioners, of some of the practical restraints and difficulties encountered by government in seeking to give effect to the international obligations to which Australia as a state has consented or to which it may wish to consent. ...
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> Treaties are drawn up in broad language, deal with events that may unfold in unpredictable ways in the future and are not easy to amend or rewrite. Termination may not be possible or feasible given the importance or significance of the treaty. Yet the fundamental principle of international law, as we all know, is that one is bound by one's treaty obligations.
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> International law does not apply different rules to the interpretation of different categories of treaties. Without exploring the issue here, perhaps it should. I ask, without seeking an answer, whether interpretation of law making treaties should not be approached differently from administrative and contract type international agreements? If greater subjectivity, or national discretion were accorded in the interpretation of broad multilateral treaties this may assist in domestic implementation of such treaties. On the other hand, there is an argument for uniformity in the application of such treaties by nations.
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> What then are some of the practical issues that face government in giving effect to treaty obligations? Let me give you some specific examples.
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> There are three areas where difficulties arise. These are:
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> 1. in interpretation of treaties by domestic courts;
> 2. the problem of ensuring observance and compliance with treaties at the Regional or Provincial and State Government level; and
> 3. the changing interpretation of treaty obligations.
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> *1. The interpretation by Courts*
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> I turn first to illustrate the problem of interpretation by courts to the area of refugees. Here we have a Convention and Protocol dating from 1951 and 1967 respectively. These were drawn up in a largely European context. Today we are faced by incredibly complex and difficult problems arising from the movement of people across national boundaries. One finds large

scale exoduses from certain countries usually due to prevailing economic as well as political considerations. This inevitably places strains on governments faced with asylum seekers. Governments are no longer in a position where they can readily accede to every claim that someone is a refugee. They have to assess in a careful manner claims to that effect.

In Australia with a system of judicial review for administrative decisions we have in recent years seen the courts involved in review concerning decisions on refugee status. This was not something that government set out deliberately to ensure. In fact governments have consistently rejected review on the merits of decisions concerning refugee status. However, as with all administrative decisions, it is difficult to exclude judicial review on grounds such as denial of natural justice or unreasonableness.

This involvement in judicial review has led the courts to a situation where they have interpreted the meaning of various phrases of the refugee convention. Some of their decisions have appeared to give very broad and generous meanings to some of the expressions and to adopt interpretations which the government itself may not consider appropriate. Faced with this position, the government has recently announced as part of the review of processes for determination of refugee status, that it will legislate to provide guidance as to the meaning of certain of the convention terms – phrases such as "well founded fear" and "persecution". The government considers it important that it retain some control of the meaning that is to be given to its international obligations in this area.

Consistently with what the government considers a proper interpretation of Convention language, it will legislate to give guidance to domestic decision makers and courts as to what it considers its obligations under the refugee Convention entail.

2. Compliance by regional Levels of Government

The Constitutional argument about the relevant powers of Federal and State governments to implement treaties that used to bedevil debate on treaty implementation in Australia has largely ceased. However, there remains the very real problem of ensuring that treaty obligations assumed by Australia can be implemented where appropriate at all levels of government. In the case of many treaties, Australia relies on state law and state government assurances in order to comply with particular Convention obligations.

This need to focus on compliance at the second level of state or regional government is becoming an issue of increasing importance in the GATT Uruguay Round. It also arises in the human rights area. This is evident in the need to report in detail on state law and practices in the various periodic reports that Australia is required to make under various human right instruments to which it is a party. And the consequence is that often detailed

consultations take place with the states about their compliance with new instruments before Australia moves to become party to them.

Which raises as a related issue the extent to which legislative implementation of treaties should take place before Australia becomes a party to them. In our legal system, treaties are not part of the law unless incorporated in some way. Traditionally, Australia has been cautious in accepting treaty obligations before enacting the necessary legislation or satisfying itself that existing legislation, federal and state, is adequate. This I think is appropriate. It does, however, sometimes lead to criticism.

For instance, the President of the Australian Human Rights Commission, Sir Ronald Wilson, at a recent seminar criticised the delay by Australia in ratifying a number of human rights instruments. He suggested that in certain cases prospective measure are contemplated under the Conventions, such as legislation or "appropriate measures". There was therefore no justification for delay in accepting various obligations.

However, except where progressive implementation is explicitly stated in the treaty, I do not think it appropriate in the Australian context to rely simply on the fact that prospective action may suffice. The executive does not always control both Houses of Parliament. State law and action is often contemplated as the appropriate way in which to enforce an obligation. One cannot necessarily be confident that the necessary legislation will be passed by Federal or State Parliaments in the future. The only safe and appropriate course is normally to require that all necessary legislative and administrative frameworks are put in place before joining a treaty. The fact that other countries do not take treaty obligations to require prior legislative measures, is not of itself reason for Australia not to insist on prior legislative measures. Other countries do not have the same constitutional framework.

I am reinforced in this need for careful appraisal of implementation requirements before joining treaties by several instances where it is now being suggested that Australia has not fully implemented certain treaty obligations. This takes me to the third area I mentioned, the changing interpretation of treaty obligations.

3. Changing Interpretation of Treaty Obligations

A multilateral treaty often takes on a life of its own, both within a country and as between countries. This often leads to calls some years after a treaty has been joined that particular action is required under a treaty that was clearly not originally contemplated.

Instance, in the same seminar paper to which I have referred, the President of the Human Rights Commission has foreshadowed that the Commission is carefully reviewing whether Australian law complies with Article 4(A) of the Racial Discrimination Convention. That provision deals with the punishment of incitement to racial discrimination. At the time Australia joined the Convention it lodged a statement which indicated it

would legislate in future to meet that commitment and meanwhile would rely on existing laws. That was seen as sufficient at the time. As perceptions have changed, the pressure for specific legislation has grown. Yet one cannot assume that such legislation will necessarily be passed by relevant legislative bodies.

Let me turn to another example, this time in the area of copyright. Australia joined the Berne Convention many years ago. This Convention contains a very general article dealing with the protection of moral rights. Yet Australia has never legislated specifically to deal with this issue. No country has specifically complained to Australia about its absence of action in this area.

At the time Australia and a number of other common law countries joined the Berne Convention it was clearly considered that existing legislative and judicial remedies were adequate to comply with that part of the Convention on moral rights. Yet today different perceptions, different expectations, are leading governments including this government to re-examine the way in which it might give effect to Convention provisions on moral rights.

In a study of this topic by the Copyright Law Review Committee no unanimity could be reached and the government was presented with a report from the Committee split four to three. The majority said no legislative change was necessary to give effect to the international obligations, while the minority vigorously argued such additional measures were necessary. Government is still considering this report and no decision has been taken as to the direction or attitude Australia should take in this matter.

This example highlights yet again the fact that a treaty obligation was accepted in good faith on the basis that no particular action was required. Yet many years later, the government has to re-examine its obligations under the treaty. This suggests to me that a careful appraisal of treaties before accepting them is desirable. This will not prevent the problem I have referred to from arising – but it may help to prevent it.

Of course, from another perspective governments often applaud the flexibility which they are accorded under many international agreements. The use of the phrase "take appropriate measures" for example appears in many Conventions. These words leave the government with a wide discretion and degree of flexibility. It is, I suspect, the sort of language that will continue to be used in many international agreements, including possibly some of the new environmental Conventions that are under consideration.

However, from my perspective as Attorney-General, I must say that if there is an international problem that requires a convention or international agreement on common action, then it seems desirable that greater rather than lesser guidance ought to be provided. In this way, governments have better appreciation of the sorts of costs and obligations they are assuming by

becoming a party and they can expect other countries to be taking similar action at similar cost.

Particularly in areas with an economic impact, and this clearly includes development of new environmental control measures, it is important that governments assume burdens that are known.

Treaties – Australian treaty practice – distinction between signature and ratification

On 9 May 1990 the Minister for Justice, Senator Tate, said in the course of an answer to a question without notice about the United Nations Convention on the Rights of the Child, 1989 (Sen Deb 1990, Vol 139, p 106):

Becoming a party to the convention is a two–stage process – first signature, and later ratification. Senator Coates would remember that signature to the convention does not make a country a party to the convention but signifies simply that the country will refrain from acts which would defeat the object and purpose of the convention until it is ratified or has made its intention clear not to ratify. The second stage is ratification, whereby a country becomes a party to the convention and is bound by it.

Treaties – signature – consent of Australian States not required

On 11 April 1991 the Attorney–General, Mr Duffy, provided the following written answer, in part, in answer to a question on notice (HR Deb 1991, p 2542):

Australian accession to the First Optional Protocol is not a matter which requires agreement by the Standing Committee of Attorneys–General. Rather, the question is one for decision of the Australian Government. The Standing Committee is, however, a valuable forum for discussion and consultation with the States and Territories on such issues, and the Government will make its decision on accession in the light of that discussion and consultation.

Treaties – reservations and declarations – distinction – federal statement – Australian declarations in relation to the General Agreement on Tariffs and Trade and Protocol I to the Geneva Conventions on humanitarian law

On 21 June 1991 the Minister for Trade and Overseas Development, Dr Blewett, provided the following written answer, in part, in answer to a question on notice (HR Deb 1991, p 5344):

The GATT does not specify the means by which contracting parties are required to seek observance of their GATT obligations by the subcentral authorities within their territories.

In practice, the measures of subcentral authorities are only examined for GATT consistency in the event of a formal complaint under GATT dispute settlement procedures. A GATT panel established to examine a complaint must first examine the measures against specific GATT obligations set down

in various GATT Articles. If the measures are found to be inconsistent with any of these obligations, the contracting party concerned would need to demonstrate to the panel that it had taken such reasonable measures available to it to ensure observance. It is for the panel to determine whether reasonable measures have been taken.

There have been only two GATT panels in which a contracting party has sought to defend the otherwise GATT inconsistent actions of its subcentral authorities on the grounds that it had taken such reasonable measures available to it to ensure observance of GATT obligations. Both cases involved Canada.

On 13 August 1991 the Attorney-General provided the following written answer, in part, in answer to a question on notice (Sen Deb 1991, p 165):

On ratification of the International Covenant on Civil and Political Rights, Australia lodged a declaration in the following terms:

> Australia has a federal constitutional system in which legislative, executive and judicial powers are shared or distributed between the Commonwealth and the constituent States. The implementation of the treaty throughout Australia will be effected by the Commonwealth, State and Territory authorities having regard to their constitutional powers and arrangements concerning their exercise.

A federal statement such as this does not affect Australia's obligations as a party to the Covenant. It draws attention to the division of powers under the federal system and indicates that the States also have a role in the implementation of the Covenant's obligations.

On 19 February 1991 the Minister for Justice and Consumer Affairs, Senator Tate, said in the course of debate on the Geneva Conventions Bill 1991 (Sen Deb 1991, pp 806–8):

The honourable senator asked for the relevant difference between reservations and declarations in relation to this particular protocol, and why the Government had chosen to go the declaration route rather than make reservations. By the way, the proposed declarations have been circulated to the Opposition, the Australian Democrats and the two Independents, although they have not yet been to the Executive Council.

...

Both declarations and reservations are binding in the sense that a declaration is a public, interpretative statement manifesting a government's understanding of the provisional term – in this case, of the protocol. It does not have to be accepted by other parties and does not purport to resile from a treaty obligation as does a reservation. I think that is the key: that a reservation would indicate that the Government purports to resile from an obligation which would otherwise be imposed on it by the international instrument concerned.

...

A future government cannot make a new reservation or declaration. It can withdraw a reservation or declaration at a later stage, but it cannot enter into further reservations or declarations in relation to the international instrument concerned.

An Australian court which had to deal with the offences provision of the Act, as it would then be, dealing with grave breaches under the optional protocol to the Geneva Convention, would properly be able to take into account the declaration as an aid to the interpretation of the relevant article. That would be an aid to its understanding, as we would claim – and that is why we speak of declarations rather than reservations – and interpretation of the article. The terms of the article, in a sense, always remain paramount. But the proper understanding or interpretation of them in a case of any perceived ambiguity could be resolved by the court in a way which the declaration suggests is the fair and proper interpretation and understanding of the article.

...

With an abundance of caution, for the information of Senator Harradine and for the convenience of future generations of parliamentarians and perhaps of courts – despite the fact that the declarations in relation to Protocol I have not been to the Executive Council, I think that it would be extremely prudent if I incorporated the proposed declarations in relation to Protocol I in the *Hansard* record. That would make it very clear that these declarations, having been provided to the Opposition, to the Australian Democrats and to the two Independents and, of course, being in the knowledge of the Government, would be in the understanding of this Parliament and certainly this chamber in its passing this particular piece of legislation.

DECLARATIONS IN RELATION TO PROTOCOL I

It is Australia's understanding that in relation to Article 5, with regard to the issue whether, and in what measure, Protecting Powers may have to exercise any functions within the combat zone (such as may be implied by provisions in Parts III and IV of the Protocol), the role of the Protecting Power will be of a like character to that specified in the First and Second Conventions and Part II of the Fourth Convention, which apply mainly to the battlefield and its immediate surroundings.

It is the understanding of the Government of Australia that in relation to Article 44 of Protocol I, the situation described in the second sentence of paragraph 3 can exist only in occupied territory or in armed conflicts covered by paragraph 4 of Article 1. The Government of Australia will interpret the word "deployment" in paragraph 3(b) of the Article as meaning any movement towards a place from which an attack is to be launched. It will interpret the words "visible to the adversary" in the same paragraph as

including visible with the aid of binoculars, or by infrared or image intensification devices.

In relation to Articles 51 to 58 inclusive it is the understanding of Australia that military commanders and others responsible for planning, deciding upon, or executing attacks, necessarily have to reach their decisions on the basis of their assessment of the information from all sources, which is available to them at the relevant time.

In relation to paragraph 5(b) of Article 51 and to paragraph 2(a)(iii) of Article 57, it is the understanding of Australia that references to the "military advantage" are intended to mean the advantage anticipated from the military attack considered as a whole and not only from isolated or particular parts of that attack and that the term "military advantage" involves a variety of considerations including the security of attacking forces. It is further the understanding of Australia that the term "concrete and direct military advantage anticipated", used in Articles 51 and 57, means a bona fide expectation that the attack will make a relevant and proportional contribution to the objective of the military attack involved.

It is the understanding of Australia that the first sentence of Article 52 is not intended to, nor does it deal with, the question of incidental or collateral damage resulting from an attack directed against a military objective.

On 5 March 1991 the Attorney-General, Mr Duffy, said in the course of an answer to a question without notice (HR Deb 1991, p 1258):

The second part of the honourable member's question related to the declaration under article 90. That article relates to the establishment of an international fact finding commission. That commission has now come into being following Canada's ratification late last year. Canada was the twentieth party to make the declaration, thereby bringing the commission into being under article 90(1) (b). The commission's role is to inquire into any alleged grave breach of the particular Geneva Convention and to facilitate the restoration of an attitude of respect for the conventions and protocols.

We as a government see considerable value in the commission and we are giving consideration to an article 90 declaration. However, before that can be done, the issue will have to be discussed with the States and Territories in accordance with normal practice, and those steps will be put in place at an early date.

Treaties – observance – International Labour Organisation Conventions – Australian compliance

On 3 September 1991 the Minister for Industrial Relations, Senator Cook, said in the course of an answer to a question without notice concerning ILO Convention No. 87 on Freedom of Association (Sen Deb 1991, p 1016):

We as a country are obligated under international law to ensure that national law and practice are in conformity with the freedom of association convention. That is an obligation imposed on us by our embrace of that

convention – a convention which we have ratified for 18 years and which has survived under several different types of government in this country.

Secondly, if Australia were to withdraw from the ILO, we would be a laughing stock in the world. We would be one of the few countries, and the only developed country, withdrawing from a world body of this sort; we would be a joke in our region; and we would be eliminated from influence in a significant agency of the United Nations. It would be futile, because our obligations under conventions would continue.

On 5 September 1991 the Minister issued a news release which read in part:

I am pleased to report that the Government will be in a position in the next 12 months, to ratify a number of ILO Conventions that enshrine important and fundamental labour standards.

This follows extensive consultation with the State Governments and Territories by a Federal Government Taskforce.

...

We expect to be in a position to successively ratify six Maritime Conventions in the current year.

These are:

ILO 23 Repatriation of Seamen 1926

ILO 58 Minimum Age (Sea) (Revised) 1936

ILO 73 Medical Examination of Seafarers 1946

ILO 92 Accommodation of Crews (Revised) 1949

ILO 133 Accommodation of Crews (Supplementary Provisions) 1970

ILO 66 Repatriation of Seafarers (Revised) 1987

Steps to ratify ILO 58 will proceed immediately upon the agreement of the Northern Territory Government.

Conventions 23 and 166 are for Commonwealth action only. Legislation to achieve compliance will be introduced in this sitting of parliament in an omnibus ILO Bill.

Consultations will begin shortly with the States and Territories on a legislative framework to give effect to the remaining three Maritime Conventions.

It is envisaged that this legislation will be ready to include in the omnibus ILO Bill.

A further Maritime Convention, ILO 53 Officers Competency Certificates 1936, is expected to be ratified early next year, following passage of NSW legislation and the agreement of the NSW Government.

All other States and Territories have advised that they comply with this Convention, or are in the process of confirming compliance.

The Taskforce is giving high priority to the ratification of four other Conventions:

ILO 135 Workers Representatives 1971

ILO 140 Paid Education Leave 1974

ILO 151 Labour Relations (Public Service) 1978

ILO 155 Occupational Health and Safety 1981

ILO 135 enshrines the rights of worker's representatives in a workplace to properly represent their members.

ILO 140 is fundamental in supporting the Government's policy emphasis on training for Australian workers – so important for the success of the restructuring process.

ILO 151 provides that public servants shall have the rights necessary for the normal exercise of freedom of association.

ILO 155 is the most important occupational health and safety Convention. It requires Australia to develop a national policy on occupational health, safety and the working environment.

On 11 September 1991 the Minister said in relation to a further question without notice on ILO Convention No. 87 (Sen Deb 1991, p 1016):

Convention 87 is the convention on freedom of association. That convention recognises exemptions in the case of the right to strike where essential services are involved. Therefore, the ILO is concerned to see that where essential services legislation applies it is legislation which genuinely covers real essential services and not legislation that is stretched to cover non-essential services, thus depriving particular workers in the non-essential area if covered by such legislation of their rights under the ILO convention.

The ILO committee of experts has made a direct request to Australia and referred to the New South Wales Government's essential services legislation. It has raised a number of questions about that legislation which go to its belief that the legislation covers non-essential areas and is not in conformity with the ILO freedom of association convention.

When I received that report from the ILO, I passed it onto the New South Wales Government, which has endorsed the particular convention and freely embraced its ratification. I was disappointed to see in the *Sydney Morning Herald* of 3 September a comment by the New South Wales Minister for Industrial Relations and Employment, Mr Fahey, that he did not accept the ILO's criticisms of the State legislation.

The ILO asked him to examine why that legislation is not in conformity with a convention that has been accepted by the New South Wales Government. He said that he does not accept the criticisms but that he has not yet conducted examinations, and I believe that he is obliged to do so.

According to this report, he also said, "The ILO is only for Third World countries". That seems to suggest that, if we are regarded as a first world country, we are exempt from observing international minimum labour standards. That is, of course, not true.

...

Mr Fahey is behaving like a petty despot in an authoritarian regime that flouts international standards. It does not reflect well on Australia's credibility in the world when standards embraced voluntarily by States and governments can be so described.

Treaties - implementation - Hague Convention on Trusts - Australian legislation

On 20 February 1991 the Attorney-General, Mr Duffy, introduced the Trusts (Hague Convention) Bill 1991 into Parliament, and explained the purpose of the Bill in part as follows (HR Deb 1991, pp 1013-15):

The purpose of this Bill is to implement and give effect in Australian law to the provisions of the Hague Convention on the law applicable to trusts and on their recognition. The Bill will provide machinery for identifying which country's law is to govern a particular trust; and will provide guidelines for the recognition of that trust in accordance with that law.

The convention was adopted at the fifteenth session of the Hague Conference on Private International Law in 1984 as part of its work in promoting the unification of private international law. As a member of the conference, Australia participated actively in its work on the convention. ...

The convention is largely for the benefit of common law countries such as Australia, in that it requires civil law countries to recognise a purely common law institution while conferring benefits on common law countries or their citizens who are likely to be beneficiaries of a trust. There will be no incentive for civil law countries to be party to the convention if common law countries are seen to lack interest in it. For this reason, early implementation of the convention in Australia is desirable, to enable accession in the near future. ...

The Bill will enable Australia to ratify the convention and, once the convention enters into force, to bring its provisions into force for Australia. The major advantage of the convention arises when property subject to a trust is located within the jurisdiction of a civil law contracting state to the convention. The practical effect of Australia acceding to the convention would be that the true ownership of Australian trust property in the territory of a civil law party would be recognised and respected.

At present, the law governing a trust with aspects extending over more than one jurisdiction is determined in Australia by common law rules of conflicts of laws. The convention is largely consistent with the Australian common law rules of conflicts of laws. Adoption of the convention would

not require amendment of existing Australian statute law and would not cause substantial changes to existing Australian law.

Treaties – termination of treaties – non-observance by other party – ground for termination – social security agreements with Greece and Turkey

On 10 May 1990 the Minister for Social Security, Senator Richardson, said in part in answer to a question without notice (Sen Deb 1990, Vol 139, p 238):

> Under the excellent work of my predecessor Australia set about rationalising agreements with other countries on the payment of our pensions and, indeed, the payment of theirs. We now have agreements signed, or about to be signed, with a range of countries which include Canada, Ireland, Austria, Malta, Italy, Spain and the Netherlands. Obviously we have been very active in the last few years. If one looks at the February economic statement one finds an announcement there of a saving by the Government on the non-payment of wives and widows pensions from 1 July next year for those who had not been in Australia during that 12-month period. That involved a saving across the board of about $30m. In the case of Greece and Turkey it involved a saving of about $14m.
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> To enable that saving to be achieved, it would require Australia giving notice to terminate the treaties it signed in 1972 with those two countries. Back in 1972 Australia signed treaties with Greece, Turkey, Italy, and Malta which were to cover the portability of pensions. The following year Australia made a further announcement on portability of pensions which went much further than the terms of the agreement with either Greece or Turkey. So we have in fact done much more than that treaty ever required us to do, and we propose to continue to do so.
>
> In the case of Greece and Turkey, however, neither of those countries has ever abided by those two treaties; so the Australian Government is now looking at giving 12 months notice to terminate. But we would not presume to do that without some adequate consultation with the Greek and Turkish communities in Australia to explain not only the decision to terminate those pensions and get the savings but also our determination to get comprehensive, shared responsibility agreements with Greece and Turkey, which, I might say, would mean inevitably, over time, more money being paid into those countries, particularly Greece, because, looking at the model agreements that we have signed with those countries I mentioned earlier on, there would be many people now in Greece who would be entitled to part and full time age pensions who are not receiving them now and are currently ineligible for benefits. So this is not simply a taking away; it will inevitably lead to many more people in Greece who spent considerable amounts of time in Australia being able to receive Australian pensions.

Arrangements other than treaties - memorandum of understanding - exchange of information on financial transactions

On 21 November 1991 the Attorney-General, Mr Duffy, issued a news release which read in part:

> The Attorney-General, Michael Duffy, signed a Memorandum of Understanding in Paris today which will facilitate the exchange of information between the Australian Cash Transaction Reports Agency and its French Counterpart, TRACFIN.
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> The Memorandum of Understanding was signed with the French Minister for the Economy, Finance and the Budget, Mr Pierre Beregovoy.
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> "This is the first such arrangement to be entered into by Australia", Mr Duffy said.
>
> "Under it, agencies will be able to provide information relevant to specific investigations being conducted in the other country.
>
> "The two countries can now work closely together to combat money-laundering and drug trafficking."