

Episode 85: Summary

Episode name: Extraterrestrial Jurisdiction: Regulating Outer Space for the Benefit of Everyone

Guest(s): Duncan Blake

What area(s) of law does this episode consider?

Developments in space law.

Why is this topic relevant?

The reality of space exploration in the 21st century is vastly different to the 20th - when mankind first touched the stars. Because a wider array of modern players operate in the field; including potential adversaries and, recently, corporations.

It can be tempting to set and forget the idea that space and space exploration will also require regulation, because it can feel like a problem for the future.

But preparing for exploration and conflict in space and, more broadly, understanding outer space and regulating it is an entire new segment of legal practice.

What sources of law are considered in this episode?

Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (**Outer Space Treaty**)

Space Resource Exploration and Utilization Act of 2015 (United States)

The Artemis Accords: Principles for cooperation in the civil exploration and use of the moon, mars, comets and asteroids for peaceful purposes

Duncan's Challenge

"I'll put a challenge out to whoever is listening - I would love someone to find a way to get the community broadly engaged in regulatory issues for space.

Because like I say outer space is for everyone. And the Australian Space Agency can hear from lawyers, can hear from space and tech entrepreneurs, but there's not really a good body for them to hear from the community at large.

And I would like there to be such a body."

What are the main points?

- Duncan is involved in a project known as the *Woomera Manual* (link below). The project aims to clarify the application of international law to military uses of outer space.
- The *Woomera Manual* - like the *San Remo*, *Harvard* and *Tallinn Manuals* before it - is not a source of international law. It's more like a compendium of what international law is.
- The space industry is growing. Duncan terms the change from government space agencies to commercial, "NewSpace".
- The legal work in this area is generally things like export control law, permits, licenses, and certificates to do with space activities.

- The Outer Space Treaty was a product of the Cold War competition between the Soviet Union and United States. The non-appropriation principle - the idea that you can't claim sovereignty over celestial bodies - is a consequence of that competition.
- Outer space is for everyone. We all depend on space for many modern conveniences - weather forecasting, agriculture, mining, utility networks.
- Commercialisation of space puts many of these conveniences at risk. Space is increasingly congested, competitive, and contested.
- Duncan's view is that we need to have a regulatory framework that deals with these sorts of things. If we don't, we will be put back decades.
- There is a stunning amount of hubris involved in commercial uses of space - for example, Elon Musk putting a car into space or an Israeli company crashing tardigrades into the moon.
- Duncan notes there is a risk of a failure to regulate prospectively rather than a traditional "*race to the bottom*" in the sense of a traditional removal of regulatory barriers for economic advantage - à la flags of convenience.
- Article VI of the Outer Space Treaty says that national governments have to be responsible for all national space activities, including commercial space activities.
- This was at the insistence of the Soviet Union - likely for political reasons - but according to Duncan it "turns out to be a very good thing".
- As a result, national regulators are responsible not just for regulating space activities off their shores but space activities of their nationals wherever those space activities occur.
- When it came time to negotiate a treaty for space, the United States wanted a much narrower treaty covering the moon. The Soviets insisted on a treaty for the whole of space.
- In some ways, the Outer Space Treaty mirrors the Antarctic Treaty. Article II of the Outer Space Treaty says; "*outer space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means*".
- The fact that governments do not have ownership makes it exceptionally difficult for private parties to claim ownership - who recognises and enforces your ownership?
- *Res nullius* and *res communis* are Roman law concepts which mean a thing owned by no one or a thing owned by everyone.
- Property as we understand it is a relatively new thing in human society. In Duncan's view we should be thinking more deeply about this concept in

relation to space.

- Particularly by looking at Indigenous knowledge about relationships to *terra firma*.
- The Artemis Accords are a non-binding multilateral agreement, and with the purpose of establishing “*a common vision via a practical set of principles, guidelines, and best practices to enhance the governance of the civil exploration and use of outer space with the intention of advancing the Artemis Program*”.
- There is a difference between being in place to help create a regulatory regime and being responsible for compliance.
- In Duncan’s in-house counsel anecdote, companies that were around during the development of their respective regulatory regimes “*don’t do compliance*” - they don’t need to.

What are the practical takeaways?

- Outer space is for everyone.
- Unchecked commercialisation is to the detriment of everyone.
- The industry is growing. There is a need for lawyers - and ethicists - in building out the frameworks of this new area of practice.
- We should think more deeply about approaches to property, including by drawing on Indigenous knowledge around relationships to land and property.
- Don’t be discouraged entering the practice area just because you haven’t been heavily involved in space technology specifically.
- There is regulation in the electromagnetic spectrum. There’s contracting. There are space laws specifically and there are export control laws issues.
- More and more tertiary education providers are engaging in space law education.

Show notes

[*The Artemis Accords: Principles for cooperation in the civil exploration and use of the moon, mars, comets and asteroids for peaceful purposes*](#)

[*Outer space is for everyone*](#)

[*Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies*](#)

[*Woomera Manual on the International Law of Military Space Activities and Operations*](#)