

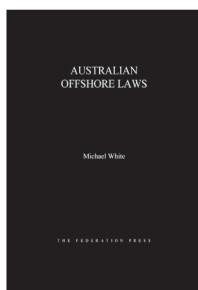
Australian Offshore Laws

Michael White

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The Book

Australian Offshore Laws brings together in one place a reference to all laws that apply to offshore Australian waters for the benefit of legal practitioners, regulators, academics and students. It demonstrates the unnecessary complexity of the Australian offshore legal regime and proposes, as a first step towards reform, a review of the Offshore Constitutional Settlement of 1979 (OCS 1979). It discusses the manner of present drafting of such laws as many Commonwealth, State, and Territory laws apply offshore but few are drafted in a manner which identifies their limits or recognises their interaction with other offshore laws of with the OCS 1979.

Contents

- Introduction and Background to Offshore Laws
- Offshore Constitutional Laws
- Offshore Petroleum, Mining and Installations Laws
- Offshore Criminal Laws
- Offshore Defence Laws
- Offshore Immigration Laws
- Offshore Fisheries Laws
- Offshore Customs, Quarantine and Excise Laws
- Antarctica and Southern Ocean Territories Laws
- Offshore Territories Laws
- Offshore Shipping Laws
- Offshore Geographical Areas
- Summary and Proposals for Reform
- Annex 1: Offshore Constitutional Settlement: A Milestone in Co-operative Federalism
- Annex 2: Offshore Constitutional Settlement: Selected Statements and Documents 1978-79

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List of Chapters

1.	Introduction and Background to Offshore Laws	1
2.	Offshore Constitutional Laws	15
3.	Offshore Petroleum, Mining and Installations Laws	45
4.	Offshore Criminal Laws	75
5.	Offshore Defence Laws	101
6.	Offshore Immigration Laws	130
7.	Offshore Fisheries Laws	165
8.	Offshore Customs, Quarantine and Excise Laws	217
9.	Antarctic and Southern Oceans Territories Laws	253
10.	Offshore Territories Laws	292
11.	Offshore Shipping Laws	320
12.	Offshore Geographical Areas	353
13.	Summary and Proposals for Reform	397

(For detailed Table of Contents, see over)

Contents

Preface	xvi
About the author	xxii
Memorandum Concerning the Proposed Maritime Powers Bill 2010	xxiv
Table of Maps	xxvi
Table of Cases	xxvii
Table of Statutes and Regulations	xxx
Table of International Instruments	xxxv
Chapter 1. Introduction and Background to Offshore Laws	1
1.1 Introduction	1
1.2 Colonial Period	2
1.2.1 Jurisdiction of English Courts	3
1.2.2 Early Courts in the Australian Colonies	4
1.2.3 Territorial Limits of the Colonies	5
1.2.4 Application of English Law in the Colonies	7
1.2.5 Legislative Power of the Colonies	7
1.2.6 Offshore Jurisdiction of the Colonies	8
1.2.6.1 Federal Council of Australasia	8
1.2.6.2 Criminal Jurisdiction of the Colonies	9
1.2.6.3 Fisheries Jurisdiction of the Colonies	10
1.2.6.4 Customs Jurisdiction of the Colonies	11
1.3 Federation in 1901	11
1.3.1 Commonwealth Offshore Legislative Power Post-Federation	12
1.4 Conclusions	14
Chapter 2. Offshore Constitutional Laws	15
2.1 Introduction	15
2.2 Offshore Petroleum Agreement 1967	17
2.3 The 1958 Conventions; the Seas and Submerged Lands Act 1973 and its High Court Case	19
2.4 Subsequent High Court Cases 1975-1979	22
2.5 Offshore Constitutional Settlement 1979	24
2.6 Roll Back Provisions Relating to Marine Pollution	31
2.7 Post 1979 High Court Cases	33
2.8 Offshore Zones	39
2.9 Conclusions	44
Chapter 3. Offshore Petroleum, Mining and Installations Laws	45
3.1 Introduction	45
3.2 Petroleum Aspects of the Offshore Constitutional Settlement 1979	47
3.3 Petroleum (Submerged Lands) Act 1967	49

CONTENTS

3.4	Offshore Petroleum and Greenhouse Gas Storage Act 2006	50
3.4.1	Introduction	50
3.4.2	Offshore Petroleum Areas and Coastal Waters	51
3.4.2.1	Coastal Waters of the States	52
3.4.2.2	Offshore Areas of the States	53
3.4.2.3	Applied Laws of the States	55
3.4.3	Courts' Jurisdictions	56
3.4.4	Safety Zones and Areas to be Avoided	56
3.4.5	Terrorism Issues	57
3.4.6	Occupation Health and Safety Issues	57
3.4.7	Greenhouse Gas Storage Amendments 2008	58
3.4.8	Administration	59
3.4.8.1	Joint Authority	59
3.4.8.2	Designated Authority	60
3.5	Offshore Minerals Act 1994	60
3.6	Sea Installations Act 1987	62
3.7	Timor-Leste and the Joint Petroleum Development Area	65
3.7.1	Background	65
3.7.2	Timor Sea Treaty 2002	67
3.7.3	Petroleum (Timor Sea Treaty) Act 2003	69
3.7.4	Treaty on Certain Maritime Arrangements in the Timor Sea 2006	70
3.7.5	Timor Sea Conclusions	72
3.8	General Conclusions	72
Chapter 4. Offshore Criminal Laws		75
4.1	Introduction	75
4.2	British Settlement in 1788	78
4.3	Two Significant Cases: <i>Bull v R</i> and <i>Oteri v R</i>	80
4.3.1	<i>R v Bull</i>	80
4.3.2	<i>Oteri v R</i>	80
4.4	Crimes Act 1914	82
4.5	Offshore Constitutional Settlement 1979 and Uniform Scheme for Crimes at Sea 1979	85
4.5.1	Offshore Constitutional Settlement 1979	85
4.5.2	Crimes at Sea Act 1979	87
4.6	Crimes (Ships and Fixed Platforms) Act 1992	88
4.7	Cooperative Scheme for Crimes at Sea Act 2000	89
4.7.1	Crimes at Sea Act 2000	89
4.7.2	Inner Adjacent Area	90
4.7.3	Outer Adjacent Area	91
4.7.4	Joint Petroleum Development Area	91
4.7.5	Jervis Bay Laws Otherwise Applied	92
4.7.6	Exceptions to the Adjacent Area	92
4.8	Terrorism and Offshore Laws	93
4.9	Police Offshore Powers	94
4.10	Some Leading Cases	95
4.10.1	The Pong Su Case	95
4.11	Conclusions	96

CONTENTS

Chapter 5. Offshore Defence Laws	101
5.1 Introduction	101
5.2 Defence Force Constitutional Framework	102
5.2.1 Defence and the Constitution	102
5.2.2 Call Out and the Constitution	103
5.2.3 Executive Power and the Constitution	106
5.3 Structure and Administration of the Defence Force	106
5.4 Extent of the Offshore Area	107
5.5 Ordinary Border Protection Powers	108
5.5.1 Introduction	108
5.5.2 Defence Force and Fisheries Powers	109
5.5.3 Defence Force and Customs Powers	109
5.5.4 Defence Force and Quarantine Powers	110
5.5.5 Defence Force and Immigration Powers	110
5.5.6 Defence Force and Offshore Installations Powers	110
5.6 Counter-Terrorism Operations	111
5.6.1 Activation in the Australian Offshore Area	112
5.6.2 Expedited Activation	114
5.6.3 Powers in the Australian Offshore Area	115
5.6.4 Special Powers	115
5.6.5 Powers in General Security Areas	117
5.6.6 Powers in Designated Areas	117
5.6.7 Other Powers	118
5.6.8 Defence Force and Aircraft Threats	119
5.7 Restrictions on the Use of Force	120
5.8 Defence of Superior Orders	122
5.9 Cooperation with Police	123
5.10 Military Commissions	123
5.11 Piracy	125
5.12 Salvage Claims	126
5.13 Conclusions	128
Chapter 6. Offshore Immigration Laws	130
6.1 Introduction	131
6.2 Immigration and the Australian Constitution	133
6.3 Australian Maritime Zones and Immigration	134
6.3.1 Territorial Sea	134
6.3.2 Contiguous Zone	135
6.3.3 Migration Zone	135
6.3.4 Refugees	136
6.3.5 Australia's Excised Offshore Places	137
6.3.6 Torres Strait and its Protected Zone	139
6.4 Offshore Laws in Relation to Illegal Immigration by Sea	140
6.4.1 Powers of Officials to Deal with Unlawful Immigrants	140
6.4.1.1 Detention, Removal and Deportation	140
6.4.1.2 Boarding at Sea	142
6.4.1.3 Hot Pursuit	144

CONTENTS

	6.4.1.4 Use of Force	144
	6.4.1.5 Detention, Arrest and Further Powers	145
6.4.2	Powers of the Australian Defence Force	146
6.4.3	Immigration Detention	147
6.4.4	Offshore Migration Offences	148
6.4.5	Health Issues	149
6.5	Review and Appeal Processes	149
6.6	The Rudd Government's Reforms	152
6.7	International Agreements	155
6.8	Related Commonwealth Acts	155
6.8.1	Australian Citizen Act 2007	155
6.8.2	Extradition Act 1988	155
6.8.3	Australian Passports Act 2005	156
6.9	Some Leading Cases	157
6.9.1	The Tampa Incident and the "Pacific Solution"	157
6.9.2	Validity of Arrest on Foreign Ship in Territorial Sea: <i>R v Disun</i>	160
6.9.3	Reasonable Suspicion: <i>Ruddock v Taylor</i>	160
6.9.4	Constitutional Power over Aliens: <i>Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs</i>	161
6.9.5	Minister's Personal Decision not Reviewable: <i>Singh v Minister for Immigration and Multicultural Affairs</i>	162
6.9.6	Permanent Detention is Possible: <i>Al-Khateb v Godwin</i>	163
6.10	Conclusions	164
 Chapter 7. Offshore Fisheries Laws		165
7.1	Introduction	166
7.2	Fisheries Zones, Boundaries and Arrangements with Australia's Neighbours	168
7.2.1	The Australian Fishing Zone	168
7.2.2	Indonesian Boundary Agreements	171
7.2.3	East Timor Boundary, The Joint Petroleum Development Area and Other Agreements	172
7.2.4	Torres Strait	174
7.2.5	Australian Antarctic Territory	174
7.2.6	Other Maritime Boundaries	175
7.3	Illegal, Unreported and Unregulated Fishing in Australia	177
7.4	Fisheries Management Act 1991	178
7.4.1	General Outline	178
7.4.2	Searches	180
7.4.3	Hot Pursuit	181
7.4.4	Use of Force	182
7.4.5	Protection from Civil or Criminal Proceedings	183
7.4.6	Offences	184
7.4.7	Powers of Defence and Police Personnel	186

CONTENTS

7.5	Forfeiture	187
	7.5.1 Introduction	187
	7.5.2 Forfeiture in the Face of Sale by Admiralty Court	188
	7.5.3 Forfeiture on Allegation of an Offence	191
7.6	Other Fisheries Acts	194
7.7	Some Leading Cases in Enforcement	194
	7.7.1 The Volga Litigation	194
	7.7.1.1 Forfeiture of the Vessel: <i>Olbers v Commonwealth</i>	195
	7.7.1.2 Stay Pending Trial: <i>Olbers v Commonwealth</i>	200
	7.7.1.3 Bail and Conviction of Crew: <i>Lijo v Director of Public Prosecutions (Cth)</i>	201
	7.7.1.4 Security for Costs: <i>Olbers v Commonwealth & Australian Fisheries Management Authority</i>	202
	7.7.1.5 Volga ITLOS Case: <i>Russia v Australia</i>	202
	7.7.1.6 Final Disposal of the Volga	204
	7.7.2 Viarsa 1 Litigation: <i>Ribot-Cabrera v R</i>	204
	7.7.2.1 Bail	205
	7.7.2.2 Viarsa 1 Trials	206
	7.7.2.3 Final Disposal of Viarsa 1	206
	7.7.3 Bunkers Case: FV Taruman	207
	7.7.4 Japanese Whaling: <i>Humane Society v Kyodo Senpaku Kaisha</i>	209
	7.7.5 South Australian Fishing Boundary: <i>Raptis v SA</i>	209
	7.7.6 The Chen Long Detention	210
	7.7.7 Trepang Fishing Vessels Detention	211
	7.7.8 Southern Bluefin Tuna Arbitration	212
	7.7.9 The Inter-Tidal Zone: <i>NT v Arnhem Land Aboriginal Land Trust</i>	213
7.8	Conclusions	214
 Chapter 8. Offshore Customs, Quarantine and Excise Laws		 217
8.1	Introduction	218
	8.1.1 Constitutional Basis for Customs, Quarantine and Excise	218
8.2	Customs Act 1901	220
8.3	Resources and Sea installations	222
	8.3.1 Control of Installations	222
	8.3.2 Prohibition of Direct Journeys	223
8.4	Goods	223
	8.4.1 Prohibited Imports	224
	8.4.2 Prohibited Exports	224
8.5	Narcotics	225
8.6	Incoming Vessels: Duties of Masters and Operators	226
8.7	Incoming Yachts: Duties	227
8.8	Customs Officers Powers	228
	8.8.1 Customs vessels	229

CONTENTS

8.8.2	Powers	230
	8.8.2.1 Request to board	231
	8.8.2.2 Hot Pursuit	232
	8.8.2.3 Use of force by Armed Vessels	233
	8.8.2.4 Power to Board and Search	234
	8.8.2.5 Powers of Detention and Search	235
	8.8.2.6 Powers of Arrest	236
8.8.3	Other Powers	237
8.8.4	Trade powers	238
8.8.5	Interaction of Customs Powers and UNCLOS	238
8.8.6	Conclusions on Powers	239
8.9	Forfeitures	239
8.10	Quarantine	240
	8.10.1 Quarantine Act 1908	241
	8.10.2 Quarantine Offshore Jurisdiction	242
	8.10.3 Application to Vessels and Installations	243
	8.10.4 Application to Persons and Goods	244
	8.10.5 Quarantine Powers	244
8.11	Australia's Excise Acts	245
8.12	Customs and Border Protection Command	246
8.13	Some Leading Cases	247
	8.13.1 When are Goods Imported	247
	8.13.2 Excise Duty on Diesel Fuel	248
	8.13.3 Customs Forfeiture in Light of Prior Sale to Third Parties	248
	8.13.4 Offence at Sea of Importing a Prohibited Drug	249
8.14	Conclusions	250
Chapter 9 Antarctica and Southern Ocean Territories Laws		253
9.1	Introduction	253
9.2	Australian Antarctic Territory	255
	9.2.1 Antarctic Exploration	255
	9.2.2 Dash for Territory	257
	9.2.3 The Antarctic Treaty 1959	258
	9.2.4 Convention for the Conservation of Antarctic Seals 1972	262
	9.2.5 Convention for the Conservation of Antarctic Marine Living Resources 1980	263
	9.2.6 Protocol on Environmental Protection to the Antarctic Treaty 1991	265
	9.2.7 Australian Maritime Claims	269
9.3	Australian Antarctic Territory Laws	270
	9.3.1 Introduction	270
	9.3.2 Australian Antarctic Territory Act 1954 (Cth)	271
	9.3.3 Antarctic Treaty Act 1960 (Cth)	272
	9.3.4 Antarctic Treaty (Environment Protection) Act 1980 (Cth)	273
	9.3.5 Antarctic Marine Living Resources Conservation Act 1981 (Cth)	274

CONTENTS

9.3.6	Environment Protection and Biodiversity Conservation Act 1999 (Cth)	274
9.3.7	Protection of the Sea (Prevention of Pollution from Ships) Act 1983 (Cth)	276
9.4	Macquarie Island	277
9.4.1	Sovereign Status	277
9.4.2	Applicable Legislation	280
9.5	Heard Island and McDonald Islands	281
9.5.1	Territorial Claim	281
9.5.2	Applicable Legislation	283
9.6	Australian Extended Continental Shelf	285
9.7	Whaling	287
9.8	Conclusions	290
Chapter 10 Offshore Territories Laws		292
10.1	Introduction and Constitutional Base	292
10.2	Coral Sea Islands Territory	296
10.2.1	Relevant Legislation and Applicable Law	298
10.2.2	Offshore Laws	298
10.3	Norfolk Island Territory	300
10.3.1	History	300
10.3.2	Administration and Governance	301
10.3.3	Judiciary	302
10.3.4	Offshore Laws	302
10.4	Lord Howe Island	304
10.4.1	History	305
10.4.2	Laws	305
10.5	Macquarie Island	306
10.6	Heard Island and McDonald Islands Territory	306
10.7	Indian Ocean Territories – Cocos (Keeling) Islands and Christmas Island	307
10.7.1	Geographical Location	307
10.7.2	History	308
10.7.2.1	Cocos (Keeling) Islands	308
10.7.2.2	Christmas Island	309
10.7.3	Relevant Legislation and Applicable Law	310
10.7.4	Administration and Governance	311
10.7.5	Judiciary	312
10.7.6	Offshore Laws	313
10.8	Ashmore and Cartier Islands Territory	313
10.8.1	Relevant Legislation and Applicable Law	315
10.8.2	Offshore Laws	316
10.8.3	Fisheries Agreement with Indonesia	316
10.9	Conclusion	318
Chapter 11 Offshore Shipping Laws		320
11.1	Introduction	320
11.2	Importance of International Conventions and Agreements	321
11.3	Navigation Act 1912 (Cth)	322

CONTENTS

11.4	Ship Ownership, Registration and Nationality	328
11.4.1	Ship Ownership	328
11.4.2	Shipping Registration Act 1981	329
11.4.3	Nationality	330
11.5	Admiralty and Arrest of Ships	331
11.6	Carriage of Goods by Sea	332
11.7	Marine Insurance	333
11.8	Collisions and Groundings	334
11.8.1	Collisions	334
11.8.2	Groundings	336
11.9	Shipwreck and Salvage	336
11.10	Underwater Cultural Heritage and Historic Shipwrecks	338
11.10.1	Introduction	338
11.10.2	International Conventions	338
11.10.3	Commonwealth Legislation	341
11.10.4	State Legislation	342
11.10.5	Conclusions on Underwater Cultural Heritage	344
11.11	Offshore Powers of Intervention in Marine Casualties	344
11.12	Pilotage and Towage	347
11.12.1	Pilotage	347
11.12.2	Towage	348
11.13	Marine Pollution	348
11.14	Port State Control	350
11.15	Conclusions	351
Chapter 12. Offshore Geographical Areas		353
12.1	Introduction	354
12.2	Great Barrier Reef Marine Park	355
12.2.1	Introduction	355
12.2.1.1	General Characteristics	355
12.2.1.2	Interaction of Commonwealth and Queensland Jurisdiction	357
12.2.2	Commonwealth Laws	362
12.2.2.1	Great Barrier Reef Marine Park Act 1975	362
12.2.2.2	Criminal Laws	363
12.2.2.3	Fisheries Laws	364
12.2.2.4	Marine Environment Protection	364
12.2.2.5	Environment Protection and Biodiversity Conservation Act 1999	366
12.2.2.6	Offshore Installations	366
12.2.2.7	Compulsory Pilotage	367
12.2.2.8	Compulsory Ship Reporting	368
12.2.2.9	Costs for Damage to the Reef	371
12.2.3	Queensland State laws	371
12.2.3.1	Transport Operations (Marine Safety) Act 1995	372
12.2.3.2	Transport Operations (Marine Pollution) Act 1995	373

CONTENTS

12.2.3.3	Environment Protection Act 1994	373
12.2.3.4	Fisheries Act 1994	375
12.2.4	Conclusions on Great Barrier Reef Laws	376
12.3	Torres Strait	376
12.3.1	Introduction and the Torres Strait Treaty 1978	376
12.3.2	Fisheries Regulation in the Torres Strait	377
12.3.3	Particularly Sensitive Sea Area	380
12.3.4	Shipping and Compulsory Pilotage	380
12.3.5	Conclusions on Torres Strait Laws	381
12.4	Offshore Marine Parks	382
12.4.1	Introduction	382
12.4.2	International Conservation Obligations	385
12.4.3	Commonwealth Reserves	385
12.4.4	Marine Protected Areas	386
12.4.5	Other Forms of Habitat Protection	387
12.4.5.1	World Heritage	387
12.4.5.2	Commonwealth and National Heritage	388
12.4.5.3	Historic Shipwrecks	388
12.4.5.4	Biosphere Reserves	388
12.4.6	State and Territory Marine Reserves	388
12.4.6.1	Queensland	388
12.4.6.2	New South Wales	389
12.4.6.3	Victoria	389
12.4.6.4	Tasmania	389
12.4.6.5	South Australia	390
12.4.6.6	Western Australia	390
12.4.6.7	Northern Territory	390
12.4.7	Conclusions on Offshore Marine Parks	390
12.5	Offshore Native Title	391
12.5.1	Introduction	391
12.5.2	Extension Offshore of Native Title Offshore	392
12.5.3	The Inter-Tidal Zone Case	395
12.5.4	Conclusions on Offshore Native Title	395
12.6	Conclusions	396
Chapter 13. Summary and Proposals for Reform		397
13.1	Introduction	397
13.2	Revision of the Offshore Constitutional Settlement 1979	403
13.3	Consolidation of Offshore Regulatory and Enforcement Powers	406
13.4	An Australian Coast Guard	407
13.5	Conclusions	409
Annex 1: Offshore Constitutional Settlement: A Milestone in Co-operative Federalism		411
Annex 2: Offshore Constitutional Settlement: Selected Statements and Documents 1978-79		427
Index		457

Preface

I have written this book for four reasons. The first was to bring together in one place a reference to all the laws that apply to offshore Australian waters in order to provide a starting point for the benefit of practitioners, regulators, academics and students who need to find and understand what offshore legislation is applicable to any one offshore situation or circumstance. I hope that it will also be useful for overseas scholars and regulators on how Australia has dealt with these difficult offshore jurisdictional issues.

The second reason was to demonstrate the complexity of the Australian offshore legal regime and to propose, as a first step towards reform, that the Offshore Constitutional Settlement 1979 be reviewed. That the division between the jurisdictions of the Commonwealth and the States should remain at three nautical miles from the baselines no longer has logic or utility. In the concluding chapter I discuss this and make some tentative suggestions for undertaking its review.

The third reason was that much of this disparate, uncoordinated and overlapping legislation about offshore regulation and enforcement, especially in relation to fisheries, immigration, defence powers and customs, should be consolidated into the one group of laws thereby the better to regulate and enforce them in the Australian offshore regions. I was delighted then that in September 2009, as this book was being finalised, the Commonwealth Attorney-General announced that the government proposed to address some of these aspects in a proposed Bill for 2010, entitled the “Maritime Powers Bill”.¹ This move is to be commended and I hope this book will go some way to add further to the discussion for this Bill and help shape its final form. It is further discussed in the Memorandum on p xxiv, in the concluding chapter and it is mentioned in various relevant chapters in the text.

The fourth and final reason I wrote this book was to stimulate interest in offshore constitutional law teaching, discussion and scholarly writing because this is a much neglected field. Many Commonwealth, State and Territory laws apply offshore but few are drafted in a manner that clearly identifies their role and application and few are discussed in any depth where lawyers meet. The importance of the constitutional law aspects of the Offshore Constitutional Settlement 1979 is usually overlooked, partly because it is little known, little understood and, unfortunately, little studied in universities or elsewhere.

¹ See the Memorandum on p xxiv.

PREFACE

The Offshore Constitutional Settlement 1979 was reached after High Court litigation between the Commonwealth and the States.² The High Court, in essence, decided that the Commonwealth had legislative competence from the low watermark and historic boundaries not, as they had contended, the States. Having won the battle the Commonwealth, in effect, returned the territory won because, as a result of the political settlement, the States were granted back jurisdiction and title out to three nautical miles, which was then the width of the territorial sea. For those who have to administer these waters; namely, the Local, State and Commonwealth government authorities, statutory bodies, harbour authorities and law enforcement agencies, the blurring of the jurisdictions is a source of constant concern and confusion and adds considerably to the overall costs of “red tape” and general governance.

The book attempts to address all of the major Australian laws that apply offshore. It begins with a chapter on the historical background to the Australian offshore jurisdiction by touching on the British laws that underpinned the Colonies and then those laws that applied on and after Federation in 1901. Chapter 2 then goes on to set out the development of Commonwealth offshore regulation of, first, petroleum, and then other activities, and deals with that major constitutional agreement, the Offshore Constitutional Settlement 1979.

These first two chapters set out the historical development but the chapters thereafter take each major aspect of offshore jurisdiction and mentions the current major legislation. Chapter 3 deals with offshore petroleum and other offshore installations and includes a section on the Timor Sea JPDA international agreements. Chapter 4 deals with offshore criminal laws and shows how they have developed to currently apply the State laws off their shores to the limits of the EEZ. Chapter 5 deals with the regulatory and enforcement aspects of defence laws and mentions how the core business of the Navy, that of defence, is much skewed to police work in fisheries and immigration. Chapter 6 addresses immigration and, of course, focuses on the arrival by “boat people” and mentions how genuine refugees coming by boat have been badly treated in the recent past.

Chapter 7 discusses regulation and enforcement in relation to offshore fisheries and mentions how some of the “automatic forfeiture” laws are quite inappropriate and in need of repeal. Chapter 8 deals with customs, quarantine and, to a lesser extent, excise laws. The content of the book then takes on more of a geographical approach as Chapter 9 deals with the laws in the Southern Ocean and the Antarctic, Chapter 10 deals with the laws applicable offshore to the many islands over which Australia has jurisdiction. Some surprises lie there and this whole area

² *New South Wales v Commonwealth (The Seas and Submerged Lands Act Case)* (1975) 135 CLR 337.

PREFACE

of suitable laws for the Australian offshore territories would benefit from government review and reform. Chapter 11 merely mentions the numerous areas of shipping laws that govern offshore shipping, navigation and trade as each aspect is too large and could not be addressed here. The book then treats the several geographical areas that had not been covered earlier; namely, the Great Barrier Reef Marine Park, the Torres Strait, offshore marine parks and finally, because it did not fit comfortably in the other chapters, offshore native title claims.

This brings up the final chapter, Chapter 13, which is directed to three main conclusions and recommendations for future government action that have been drawn from the areas set out previously. Chapter 13 is an important aspect of this book and it is pleasing that the government has announced that it proposes to address one aspect of it, although it remains to be seen with what success it does so. The main recommendations are that the Offshore Constitutional Settlement 1979 should be revisited, that the offshore regulatory and enforcement powers that are spread through quite a number of Acts should be consolidated and that the governance for enforcement of these offshore powers should be consolidated into the one government agency, which, I have tentatively suggested, be named the Australian Coast Guard.

There are two annexes. The first is the text of the Offshore Constitutional Settlement 1979 itself and the second is comprised of Selected Statements and Documents that explain and expand on the terms of this Settlement. Both annexes are available on the Commonwealth Attorney-General's website but they are included in hard copy here as well in order to make them more accessible to readers.

I should mention several more points before turning to the acknowledgements. Users of this book need to have in mind that it is only a starting point for research in that it identifies what legislation is likely to apply to any offshore situation. From there one would probably go to a detailed reading of the legislation, as amended to date, and the decided cases. Each chapter of this book could have been a treatise in itself and so this book aims only to identify the legislation and indicate some of the leading cases. Readers are particularly reminded to work from the latest legislation as legislative amendments pour out of the Commonwealth and State parliaments at a rapid rate.

This book completes the trilogy of books in which I have tried to make a contribution to Australian maritime law.³ When I first started this scholarly work in 1992 there was no Australian book on any aspect of maritime law. I was then at the Bar and when one had a case on maritime law there were no Australian legal works to use as a guide. Fortunately, this situation is now much improved and I hope this present contribution will further add to that improvement.

³ I refer to *Australian Maritime Law*, which I edit and which is currently in its second edition; and to *Australasian Marine Pollution Laws*, also in its second edition.

Acknowledgements

The pleasure of writing this book has been greatly enhanced by the assistance I have received from my research assistants, academic colleagues, practitioners and government regulators and administrators.

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PREFACE

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I also mention those government officers who have assisted in the complex area of the offshore petroleum laws. I thank Ms Clare McIntosh, Acting Manager, Legislation Review Team, in the then Department of Industry, Tourism and Resources, for assistance concerning the legislative change from the *Petroleum (Submerged Lands) Act 1967* to the *Offshore Petroleum Act 2006* (as it was then titled). Mr Peter Livingston, Manager, Legislation Review and Timor Sea Section, in the Department of Resources kept me well informed concerning the many legislative changes in this law over 2006-2007.

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I express my thanks to Geoscience Australia which has given me permission to publish many of the maps appearing in the book. That organisation has the responsibility for preparing many Australian offshore surveys and maps including the Australian baselines that are mentioned so often in the text. In particular the assistance of Mr Colin French from Geoscience Australia has been essential in having suitable maps for inserting in many chapters of this book, as has been his help with maps in my last book. I also note the assistance I always receive from the International Law section of the Commonwealth Department of Attorney-General. Mr Bill Campbell QC has once again helped with a

PREFACE

map and has also alerted me to a few developments, including the announcement by the Attorney-General of the proposed Maritime Powers Bill. I also thank Mr William Story who has been most helpful in giving me some background on what issues the Bill is likely to address.

My thanks are due to my publishers, The Federation Press, especially to Chris Holt, the Managing Director, who has extended this book by his suggestions that it cast a wider net than had originally been intended. Kathryn Fitzhenry, Federation Press Editorial Director, has given enormous assistance in the preparation of the manuscript and Dianne Young has been helpful in shaping its marketing. I have now worked with The Federation Press team on quite a number of books over many years and I am grateful to them all for their amiable cooperation.

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If readers have the impression from these acknowledgements that I have had a great deal of assistance, then they are quite correct. This work has involved a massive amount of research and the book could not have been written without their help. I conclude by noting that such merits as this book may have are due largely to the assistance I have received from many colleagues and fellow toilers but its errors and shortcomings, I regret having to admit, are entirely my own.

The steady stream of amendments to numerous pieces of legislation makes the dating of this work difficult but generally the legislation is current to about August 2009 but readers are reminded to have in mind the many amendments that regularly come from the Parliament, including the provisions of the proposed Maritime Powers Bill when, in due course, it sees the light of day.

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October 2009

About the author

Michael White was born in Brisbane, Queensland from where he joined the Royal Australian Navy at a young age and was educated at the Royal Australian Naval College, Flinders Naval Depot, Victoria, at sea in HMAS *Swan* and at the Britannia Royal College, Dartmouth, England. After his training he served as a seaman officer in the RAN for about 11 years in various establishments, ships and submarines in Asian, Pacific and European waters. He resigned as a Lieutenant-Commander in 1969 to study law. He studied at the University of Queensland where he obtained degrees in Commerce and in Law and, later, he was awarded a Doctorate of Philosophy (in law) by Bond University for his research thesis on the conventions and laws of marine pollution from ships.

He was admitted and practised as a barrister from 1974 and made Queen's Counsel in 1988. He concentrated on civil cases and with a special interest in maritime law. Dr White has been in marine inquiries in Papua New Guinea and Australia and has been engaged in cases involving arrest and other marine areas from time to time. He is familiar with marine laws of a number of countries and has been involved in drafting and advising on suitable marine laws and regulations to Commonwealth and State governments and agencies. He is a qualified mediator and has been engaged in mediations with maritime themes.

In 1999 he became a legal academic (Associate Professor) at the TC Beirne School of Law, University of Queensland, being the inaugural Executive Director of the Centre for Maritime Law (now the Marine and Shipping Law Unit). He retired from full time academia in 2004 and is an Adjunct Professor in the Centre for Marine Studies (marine science specialists including on the marine environment), and also the TC Beirne School of Law (Maritime and Shipping Law Unit), at the University.

Dr White is the author and/or editor of a number of books and articles on law and history, with co-authors and co-editors in some cases. The books he has written include *Australasian Marine Pollution Laws* (Federation Press, first and second editions), *Australian Submarines: A History*, *T.C. Beirne School of Law: 70th Anniversary* and *The Duckett White Family in Australia*. He is the editor or co-editor of a number of books, including *Australian Maritime Law* (Federation Press, first and second editions), *Sir Samuel Griffith: The Law and the Constitution*, *Queensland Judges on the High Court* and *We Were Cadet Midshipman*. He has written numerous book chapters and articles on various aspects of the law, especially maritime law, and also history, especially legal and submarine history. He is married to Margaret White and they have three adult children and live in Brisbane.



Dr Michael White

Memorandum on the Proposed “Maritime Powers Bill”

On 15 September 2009 the Commonwealth Attorney-General and the Minister for Home Affairs jointly announced that the government proposed a new “Maritime Powers Bill” to bring together the disparate powers set out in numerous current Acts by:

establishing comprehensive powers, including interdiction, boarding, search, seizure and retention of vessels; ensuring a common enforcement approach to promote coordination between agencies; and creating a mechanism to implement and enforce international agreements that have a maritime aspect.¹

The Media Release went on to mention that the Bill would unify powers to enforce Australia’s laws, including illegal fishing, customs, quarantine and drug trafficking. In a speech made on that same date the Attorney-General amplified this slightly in stating that operational agencies would not lose any powers, but duplicate powers would be repealed and, further, that the Bill would deal with high seas boarding and inspection under regional fisheries agreements and, finally, implementation of enforcement decisions of international bodies such as the United Nations Security Council.²

This is one of the proposals to which this book is directed as the author has been of this view for some years. Others have also had this view and over the past 12 months it has been the subject of some government inter-agency meetings so it is very appropriate that the Attorney-General has indicated that some reform is likely to occur.

Readers will note that it is not only in Chapters 7 (Fisheries) and 8 (Customs, Quarantine and Excise) and Chapter 4 (Criminal Laws) that reform and consolidation of laws is suggested, but it is also suggested in Chapters 5 (Defence) and 6 (Immigration). In the concluding chapter, Chapter 13, some detail is set out for the recommendations of the book because the text of the earlier relevant chapters had indicated that this was desirable.

1 Media Release dated 15 September 2009 “Reform of Maritime Enforcement Legislation”; see website <www.attorneygeneral.gov.au> and follow prompts to “Media Releases”.

2 Attorney-General, Hon Robert McClelland MP, speech to Port and Maritime Security Conference, Melbourne; see the website mentioned above and follow prompts in this case to “Speeches”.

MARITIME POWERS BILL

It is hoped, therefore, that this policy behind the proposed Bill will be assisted by the research that is contained herein and that when it finally comes into force it will address these shortcomings and not merely add to the complexity of offshore laws.

If the Bill becomes an Act before a new edition of this book is published a supplement will be published on the publisher's website (<www.federationpress.com.au>) discussing the impact of the Act and consequential changes to the chapters in the book.

Table of Maps

Map 3.1	Offshore Areas and Scheduled Areas	54
Map 3.2	Timor Sea showing JPDA	67
Map 4.1	Offshore Criminal Jurisdictional Areas of the States and the Northern Territory	90
Map 7.1	The Australian EEZ including the EEZ off the Australian Antarctic Territory	169
Map 7.2	Australia and Indonesia Treaty boundary including the MOU on Traditional Indonesian Fisher's Rights	172
Map 7.3	The Australian and East Timor Agreement on Boundaries and Petroleum Development	173
Map 7.4	The Torres Strait, Australian, West Irian (Indonesia) and Papua New Guinea Boundary and Fisheries Areas	175
Map 7.5	Australian, French and New Zealand Maritime Boundaries	176
Map 7.6	Solomon Islands Treaty Boundary	177
Map 9.1	Antarctica Showing Territorial Claims	259
Map 9.2	The Australian EEZ including the EEZ off the Australian Antarctic Territories	263
Map 9.3	Australia's Continental Shelf and EEZ	286
Map 10.1	Australian Current Offshore Territories	295
Map 10.2	Coral Sea Islands Territory	297
Map 10.3	The Territorial Sea and EEZ of the Coral Sea Islands	299
Map 10.4	The Territorial Sea and EEZ of Lord Howe Island and Norfolk Island	303
Map 10.5	Australian and the French (New Caledonia) and New Zealand Maritime Boundaries	304
Map 10.6	The Territorial Sea and EEZ of the Cocos (Keeling) Islands Territory and Christmas Island Territory	308
Map 10.7	The EEZ and Ashmore and Cartier Islands Region	314
Map 10.8	Australian and Indonesia Treaty boundary including the MOU on Traditional Indonesian Fishers' Rights	317
Map 12.1	The Great Barrier Reef and World Heritage Area	356
Map 12.2	Designated Shipping Areas in the GBR	369
Map 12.3	Australia's Maritime Zones in the Torres Strait	378
Map 12.4	Australia's Offshore Protected Areas	383

Table of Cases

- Ah Sheung v Lindberg [1906] VLR 323: 6.1
- Aliza Glacial ship *see* Bergensbank ASA v The Ship 'Aliza Glacial'
- Al-Kateb v Godwin (2004) 219 CLR 562: 6.9.6
- Ansett Transport Industries Pty Ltd v Commonwealth (1977) 139 CLR 54: 8.1.1
- Aruli v Mitchell [1999] WASCA 1042: 7.7.6
- Attorney-General for Canada v Cain [1906] AC 542: 6.1
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- Bergensbanken ASA v The Ship Aliza Glacial [1998] FCA 4: 7.5.2
- Berwick Ltd v Gray (1976) 133 CLR 603: 10.1, 10.2.1
- Bistradic v Rokov (1976) 135 CLR 552: 2.4
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- Bonser v La Macchia (1969) 122 CLR 177: 1.2, 2.3, 7.2.1
- BP Australia Ltd v Collector of Customs (WA) (1987) 163 CLR 106: 7.7.4, 8.13.2
- Burton v Honan (1952) 86 CLR 169: 8.13.3
- Bywell Castle (1879) 4 PD 219 CA: 11.8.1
- Caltex Oil (Aust) Pty Ltd v The Dredge 'Willemstadt' (1976) 136 CLR 529: 11.8.1
- 'Camouco' Case, The (Panama v France) ITLOS Case No 5: 7.7.1.6
- Case Concerning East Timor (*Portugal v Australia*) (1995) ICJ Rep 90: 3.7.1
- CEO of Customs v Labrador Liquor Wholesale Pty Ltd (2003) 216 CLR 161: 8.7
- 'Chaisiri Reefer 2' Case, The (Panama v Yemen) ITLOS Case No 9: 7.7.1.6
- Chan v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379: 6.5
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- Chia Gee v Martin (1905) 3 CLR 649: 6.1
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- Clunies-Ross, Re; Ex parte Totterdell (1989) 82 ALR 475: 10.7.3
- Commonwealth v Tasmania (*Tasmanian Dams Case*) (1983) 158 CLR 1: 2.7
- Commonwealth v Yarmirr (*Croker Island Case*) (2001) 208 CLR 1: 7.7.5, 7.7.9, 12.5.2
- Croft v Dunphy [1933] AC 156: 1.2
- Croker Island Case *see* Commonwealth v Yarmirr
- CSL Pacific Case *see* Re Maritime Union of Australia; Ex parte CSL Pacific Shipping Inc
- Director of Public Prosecutions (Cth) v Lijo [2002] WASC 154; [2003] WASCA 4: 7.7.1.3
- East Timor case *see* Case Concerning East Timor
- Fisher v The Oceanic Grandeur (1972) 127 CLR 312: 12.3.4
- Fortuna Seafoods v The Ship 'Eternal Wind' [2005] QCA 405: 11.7
- 'Grand Prince' Case, The (Belize v France) ITLOS Case No 8: 7.7.1.6
- Gibbs v Mercantile Mutual Insurance (Australia) Ltd (2003) 214 CLR 604: 11.8.1
- Griffiths v Northern Territory [2006] FCA 903: 12.5
- Groves v Commonwealth (1982) 150 CLR 113: 5.5.1
- Hematite Petroleum Pty Ltd v Victoria (1983) 151 CLR 599: 3.3
- Henry, Ex parte *see* R v Director-General of Social Welfare (Vic)
- Horta v Commonwealth [1994] 181 CLR 183: 2.7
- Humane Society International Inc v Kyodo Senpaku Kaisha Ltd [2004] FCA 1510: 7.7.4 [2006] FCAFC 116: 7.7.4 [2007] FCA 124: 7.7.4 [2008] FCA 3: 7.7.4, 9.7
- I'm Alone (Claim of the British Ship 'I'm Alone' v United States); Joint Interim and Final Reports of the Commissioners, 1933 and 1935, 29 *American Journal of International Affairs* 326 (1935): 5.7

TABLE OF CASES

- Ilam v Dando (1990) 109 A Crim Rep 47: 6.9.1
- Industrial Relations Act Case *see* Victoria v Commonwealth
- Jones v Queensland [1988] 2 Qd R 385: 2.5, 12.5
- Judiciary and Navigation Acts, In re (1921) 29 CLR 257: 2.2
- Koowarta v Bjelke-Petersen (1982) 153 CLR 1: 2.7
- Kruger v Commonwealth (1997) 190 CLR 1: 10.1
- Lamshed v Lake (1958) 99 CLR 132: 1.3.1
- Lane v Morrison [2009] HCA 29: 5.10
- Lardil Peoples v Queensland [2004] FCA 298: 12.5.2
- Lemonthyme and Southern Forests Case *see* Richardson v Forestry Commission
- Li Chia Hsing v Rankin (1978) 141 CLR 182: 2.7, 8.8.2
- Lijo v Commonwealth Director of Public Prosecutions *see* Director of Public Prosecutions (Cth)
- Mabo v Queensland (No 2) (1992) 175 CLR 1: 7.7.9, 9.2.2, 12.5.1
- McCarter v Brodie (1950) 80 CLR 432: 8.1.1
- MacDonnell Professional Fishermens Association Inc v South Australia (1989) 168 CLR 340: 2.5, 2.7
- Maritime Union of Australia, Re; Ex parte CSL Pacific Shipping Inc (*CSL Pacific Case*) [2003] 214 CLR 397: 2.7, 6.9.2, 11.3, 11.4.3, 11.12.1
- Mathews v Chicory Marketing Board (Vic) (1938) 60 CLR 263: 8.1.1
- Minister for Immigration and Ethnic Affairs v Mayer (1985) 157 CLR 290: 6.5
- Minister for Immigration and Ethnic Affairs v Singh (1997) FCR 288: 6.5
- Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273: 7.7.6
- Minister for Immigration and Multicultural Affairs v QAAH (2006) 231 CLR 1: 6.5
- Mok Gek Bouy v Minister for Immigration, Local Government and Ethnic Affairs (No 1) (1993) 47 FCR 1: 6.5
- 'Monte Confurco' Case, The (Seychelles v France) ITLOS Case No 6: 7.7.1.6
- MZXOT v Minister for Immigration and Citizenship (2008) 233 CLR 601: 6.2
- Nelson (No 1), Ex parte (1928) 42 CLR 209: 8.1.1
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- Newbery v R (1965) 7 FLR 34: 10.1, 10.2.1
- Newcrest Mining (WA) Ltd v Commonwealth [1997] 190 CLR 513: 2.7
- Northern Territory v Arnhem Land Aboriginal Land Trust [2008] HCA 29: 7.7.9
- O'Keefe v Caldwell (1949) 77 CLR 261: 6.1
- Olbers Co Ltd v Commonwealth (No 4) [2004] FCA 229: 7.5.3, 7.7.1.1 [2004] FCAFC 262: 7.5.3, 7.7.1.1, 8.8.5
- Olbers Co Ltd v Commonwealth [2005] HCA Transcript 228: 7.7.1.1
- Olbers Co Ltd v Commonwealth and AFMA [2002] FCA 1269: 7.7.1.4
- Olbers Co Ltd v Commonwealth and AFMA (No 2) [2003] FCA 177: 7.7.1.2
- Oteri v R [1976] 1 WLR 1272: 1.2.6.2, 4.3.2, 4.5.1, 4.11
- Parton v Milk Board (Vic) (1949) 80 CLR 229: 8.1.1
- Pearce v Florencia (1976) 135 CLR 507: 2.4, 2.7, 2.8, 7.1, 7.2.1
- Polyukovich v Commonwealth (1991) 172 CLR 501: 2.7
- 'Pong Su' (No 1), The [2004] VSC 482: 4.10.1
- 'Pong Su' (No 13), The [2005] VSC 38: 4.10.1
- Port MacDonnell Professional Fishermens Association Inc v South Australia (1989) 168 CLR 340: 2.5, 2.7
- Portugal v Australia *see* Case Concerning East Timor
- Potter v Minahan (1908) 7 CLR 277: 6.1
- Powers v Ma (1959) 103 CLR 478: 7.7.1.1
- R v Bull (1974) 131 CLR 203: 4.2, 4.3.1, 4.11, 8.13.4
- R v Director-General of Social Welfare (Vic); Ex parte Henry (1975) 133 CLR 369: 6.2
- R v Disun (2003) 27 WAR 146: 6.9.1, 6.9.2
- R v Keyn (1876) 2 Ex D 63: 2.3, 4.2, 12.5
- R v Olney [1966] 1 Qd R 187: 4.5.2
- R v Sharkey [1949] 79 CLR 121: 5.2.2
- Raptis v South Australia (1977) 138 CLR 346: 2.4, 7.7.5
- Readhead v Admiralty Marshall, Western Australia District Registry (1998) 87 FCR 229: 7.5.2
- Red Crusader (1962) 35 International Law Reports: 5.7
- Ribot-Cabrera v R [2004] WASCA 101: 7.7.2.1, 7.7.6
- Richardson v Forestry Commission (*Lemonthyme and Southern Forests Case*) (1988) 164 CLR 261: 2.7

TABLE OF CASES

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- Ruddock v Taylor (2005) 222 CLR 612: 6.9.3
- Ruddock v Vadarlis (*The Tampa Case; see also Vadarlis*) [2001] 110 FCR 491: 5.2.3, 6.9.1, 7.4.5
- 'Saiga' (No 1) Case, The MV (Saint Vincent and the Grenadines v Guinea) ITLOS Case No 1: 7.7.1.6
- 'Saiga' (No 2) Case, The MV (Saint Vincent and the Grenadines v Guinea) ITLOS Case No 2: 7.7.1.6
- Scandinavian Bunkering AS v Bunkers on Board Ship FV Taruman (*The Taruman*) [1998] 151 FCR 126: 7.7.3
- Seas and Submerged Lands Case *see* New South Wales v Commonwealth
- Shaw v Minister for Immigration and Multicultural Affairs (2003) 218 CLR 28: 6.2
- Shaw Savill and Albion Co Ltd v Commonwealth (1940) 66 CLR 344: 5.5.1
- Singh v Commonwealth (2004) 222 CLR 322: 6.2
- Singh v Minister for Immigration and Multicultural Affairs [2000] FCA 485: 6.9.5
- 'Sisters, The' (1876) 1 PD 117: 11.8.1
- Southern Bluefin Tuna Award: New Zealand v Japan; Australia v Japan (1999) : 7.7.8
- Strachan v Commonwealth (1906) 4 CLR 455: 10.1
- Tampa cases *see* Ruddock v Vadarlis
- 'Taruman', The *see* Scandinavian Bunkering AS v The Bunkers on Board Ship FV Taruman
- Tasmanian Dams Case *see* Commonwealth v Tasmania
- Trepang Fishing Vessels Detention (2008): 7.7.7
- Union Steamship Company of Australia Ltd v King (1988) 166 CLR 1: 2.7
- Vacuum Oil Co v Queensland (1934) 51 CLR 108: 8.1.1
- Vadarlis v Minister for Immigration and Multicultural Affairs High Court Special Leave Application, 27 November 2001: 6.9.1
- Vasiljkovic v Commonwealth [2006] 227 CLR 614: 2.7
- Vennell v Garner (1830) 1 Cr&M 21: 11.8.1
- Viarsa 1 cases *see* Olbers Co Ltd v Commonwealth
- Victoria v Commonwealth (1937) 58 CLR 618: 11.10.3
- Victoria v Commonwealth (*Industrial Relations Act Case*) [1996] 187 CLR 416: 2.7
- Victorian Council for Civil Liberties Incorporated v Minister for Immigration and Multicultural Affairs [2001] FCR 452: 5.2.3, 6.9.1, 7.4.5
- 'Volga' Case, The (Russia Federation v Australia) ITLOS Case No 11: 7.7.1.5
- Wacando v Commonwealth (1981) 148 CLR 1: 1.2.3, 2.7
- Western Australia v Ward (2002) 213 CLR 1: 12.5.2, 12.6
- Whim Creek Consolidated NL v Colgan [1991] FCA 31: 7.7.1.1
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- Wilson v Chambers & Co Pty Ltd (1926) 38 CLR 131: 8.13.1
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- Yorta Yorta Aboriginal Community v Victoria (2002) 214 CLR 422: 12.5.2

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Constitution: 6.9.5, 6.9.6, 8.2, 8.11, 10.1	Australian Maritime Safety Act 1990: 6.9.1
s 51(ix): 8.10.1	Australian Passports Act 2005: 6.8.3
s 51(xix): 6.2, 6.9.4	Border Protection (Validation and Enforcement Powers) Act 2001: 7.4.5, 8.8.2.4
s 51(xxvii): 6.2	Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Act 2005: 7.4.2, 7.4.5
s 51(xxviii): 6.2	Carriage of Goods by Sea Act 1991: 11.6
s 51(xxix): 1.3, 2.3, 2.4, 6.2	Christmas Island (Request and Consent) Act 1957: 10.4.2
s 51(vi): 5.5, 5.2.1	Christmas Island Act 1958: 10.1, 10.4.2, 10.4.3, 10.4.4, 10.4.5
s 51(x): 2.3	Coastal Waters (Northern Territory Powers) Act 1980: 2.5, 2.8
s 51(xxviii): 2.5	Coastal Waters (Northern Territory Title Act) 1980: 2.5, 2.8
s 61: 5.2, 6.9.1, 5.3	Coastal Waters (State Powers) Act 1980: 2.5, 2.8, 9.4.2, 11.10.4, 12.2.5
s 68: 5.3, 8.8.2	Coastal Waters (State Title Act) 1980: 2.5, 2.8
s 75: 6.2, 6.4.3, 6.5, 7.4.5, 8.8.2.4	Cocos (Keeling) Islands (Request and Consent) Act 1954: 10.4.2
s 75(v): 6.5, 7.4.5	Cocos (Keeling) Islands Act 1955: 10.1, 10.4.1, 10.4.2, 10.4.3, 10.4.4, 10.4.5
s 76: 11.5	Commonwealth Places (Application of Laws) Act 1970: 2.5, 4.4
s 77: 11.5	Coral Sea Islands Act 1969: 10.1, 10.6, 10.6.1
s 90: 8.10.5	Crimes (Ships and Fixed Platforms) Act 1992: 4.6, 4.11
s 109: 2.4, 2.6, 6.8	Crimes Act 1914: 4.4, 5.11, 8.8.6, 9.3.6, 12.2.2
s 119: 5.2.1, 5.2.2, 5.5	Crimes at Sea Act 1979: 2.5, 4.5.1, 4.5.2, 4.7.1
s 122: 2.5, 10.1	Crimes at Sea Act 2000: 3.4.2.3, 3.7.2, 3.7.3, 3.8, 4.6, 4.7.1, 4.7.2, 4.7.3, 4.7.4, 4.7.5, 4.7.6, 4.11
Commonwealth	Criminal Code: 4.8, 5.6.7, 5.8, 8.2, 8.3.2, 8.4.1, 8.5, 8.5.3, 8.8.2.5, 8.10.2, 9.3.6, 10.1, 10.6.1, 11.3, 12.2.2
Aboriginal and Torres Strait Islander Commission Act 1989: 12.3.2	Criminal Code Act 1995: 4.4
Aboriginal Land Rights (Northern Territory) Act 1976: 7.7.9	Customs Act 1901: 3.6, 4.3.1, 5.5.2, 5.5.3, 5.5.4, 7.4.4, 7.4.5, 7.7.4, 8.1, 8.2, 8.3, 8.3.2, 8.4, 8.4.1, 8.4.2, 8.5, 8.5.1, 8.5.3, 8.6.1, 8.7, 8.7.1, 8.7.2, 8.8.1, 8.8.2, 8.8.2.1, 8.8.2.2, 8.8.2.3, 8.8.2.4, 8.8.2.5, 8.8.2.6, 8.8.3, 8.8.4, 8.8.5, 8.8.6, 8.9, 8.10.1, 8.11, 8.13
Acts Interpretation Act 1901: 2.8, 5.2.2, 6.1, 7.4.1, 7.7.4, 7.7.5, 8.8.2, 9.1, 9.3.6, 10.1, 10.2, 10.2.2, 11.3, 12.2.1, 12.5	Customs (Import Licensing) Regulations: 8.13
Administrative Decisions (Judicial Review) Act 1977: 6.5, 6.9.5	
Administrative Review Act 1975: 6.5	
Admiralty Act 1988: 7.5.2, 7.7.2, 11.5	
Antarctic Marine Living Resources Conservation Act 1981: 7.2.5, 9.3.4	
Antarctic Treaty Act 1960: 9.3.2	
Antarctic Treaty (Environment Protection) Act 1980: 9.2.4, 9.2.6, 9.3.3, 9.6	
Ashmore and Cartier Islands Acceptance Act 1933: 10.1, 10.5, 10.5.1	
Australia (Request and Consent) Act 1985: 2.5	
Australia Act 1986: 2.5	
Australian Antarctic Territory Act 1954: 9.3.1	
Australian Antarctic Territory Acceptance Act 1933: 9.2.2, 9.3.1, 10.1	
Australian Capital Territory (Self- Government) Act 1988: 10.2.3	
Australian Citizenship Act 2007: 6.8.1	
Australian Federal Police Act 1979: 4.9	

TABLE OF STATUTES AND REGULATIONS

Customs (Prohibited Imports) Regulations 1956: 8.4.1, 8.4.2	Environment, Sport and Territories Legislation Amendment Act 1997: 10.6
Customs (Tariff Concession System Validation) Act 1999: 8.1	Excise Act 1901: 3.6, 7.7.4, 8.11, 8.13
Customs Administration Act 1985: 8.1	Excise Tariff Act 1921: 8.11
Customs Amendment Act (No 1) 2003: 8.1	Export Control Act 1982: 8.10.1
Customs and Excise Amendment (Diesel Fuel Rebate Scheme) Act 1999: 8.1	Extradition Act 1988: 6.8.2
Customs and Excise Legislation Amendment Act 1995: 8.1	Federal Court Act 1976: 3.4.3
Customs Depot Licensing Charges Act 1997: 8.1	Fisheries (Validation of Plans of Management) Act 2004: 7.6
Customs Legislation (Anti-Dumping Amendments) Act 1998: 8.1	Fisheries Act 1952: 2.3, 2.5, 7.2.1, 7.7.5
Customs Legislation Amendment (Application of International Trade Modernisation and Other Measures) Act 2004: 8.1	Fisheries Administration Act 1991: 7.6
Customs Legislation Amendment Act (No 1) 2002: 8.1	Fisheries Agreements (Payments) Act 1991: 7.6
Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001: 8.1	Fisheries Legislation Amendment Act (No 1) 1999: 7.4.4
Customs Securities (Penalties) Act 1981: 8.1	Fisheries Levy Act 1984: 7.6
Customs Tariff (Anti-dumping) Act 1971: 8.1	Fisheries Levy Act 1991: 7.6
Customs Tariff Act 1995: 8.1	Fisheries Management Act 1991: 2.8, 4.5.1, 5.5.2, 7.1, 7.2.1, 7.4.1, 7.4.2, 7.4.3, 7.4.4, 7.4.5, 7.4.6, 7.4.7, 7.5.1, 7.5.2, 7.5.3, 7.7.1, 7.7.1.1, 7.7.1.3, 7.7.2, 7.7.6, 7.8, 8.8.2.1, 8.9, 9.3.5, 9.4.2, 9.5.2, 12.2.4, 12.3.2
Customs Tariff Amendment (Greater Sunrise) Act 2007: 3.7.4	Fisheries Management (Macquarie Island Toothfish) Regulations 2006: 9.4.2
Customs Tariff Amendment Act (No 1) 2003: 8.1	Fisheries Management (Heard and McDonald Islands Fisheries) Regulations 2002: 9.5.2
Customs Tariff Amendment Act (No 5) 2001: 8.1	Great Barrier Marine Park (Environmental Management Charge - Excise) Act 1993: 12.2
Customs Undertakings (Penalties) Act 1981: 8.1	Great Barrier Marine Park (Environmental Management Charge - General) Act 1993: 12.2
Defence Act 1903: 3.4.5, 5.1, 5.2.2, 5.2.3, 5.3, 5.4, 5.6, 5.6.1, 5.6.2, 5.6.3, 5.6.4, 5.6.5, 5.6.6, 5.6.7, 5.6.8, 5.7, 5.8, 5.9, 5.11, 5.12, 5.13	Great Barrier Reef Marine Park Act 1975: 2.5, 12.2, 12.2.2, 12.2.6
Defence Force Discipline Act 1982: 5.1, 5.8, 5.10	Greater Sunrise Unitisation Agreement Implementation Act 2004: 3.7.2
Defence Force Discipline Appeals Act 1955: 5.1	Heard Island and the McDonald Islands Act 1953: 9.5.2, 10.1
Defence Legislation Amendment (Aid to the Civilian Authorities) Act 2000: 5.2.2	Historic Shipwrecks Act 1976: 2.4, 2.5, 11.3, 11.10.3, 11.10.4, 12.4.5.3
Defence Legislation Amendment (Aid to the Civilian Authorities) Act 2006: 5.2.2, 5.6, 5.6.8	Imported Food Control Act 1992: 8.10.1
Environment Protection (Sea Dumping) Act 1981: 2.6	Insurance Contracts Act 1984: 11.7
Environment Protection and Biodiversity Conservation Act 1999: 3.6, 7.2.5, 9.3.3, 9.3.5, 9.4.2, 9.5.2, 9.6, 12.2.1, 12.2.6, 12.4.1, 12.4.3, 12.4.4, 12.4.5, 12.4.5.1	Jervis Bay Territory Acceptance Act 1915: 4.7.5, 5.8, 10.1
Environment Protection and Biodiversity Conservation Regulations 2000: 12.4.3	Judiciary Act 1903: 3.4.3, 4.2, 8.10.5, 10.2.4
	Marine Insurance Contracts Act 1909: 11.7
	Maritime Legislation Amendment Act 1994: 2.8, 3.4.1
	Maritime Transport and Offshore Facilities Security Act 2003: 3.4.5, 4.8
	Maritime Transport Security Act 2003: 4.8

TABLE OF STATUTES AND REGULATIONS

Migration Act 1958 (Cth): 5.5.5, 6.1, 6.2, 6.3.3, 6.3.4, 6.3.5, 6.3.6, 6.4, 6.4.1, 6.4.1.1, 6.4.1.2, 6.4.1.3, 6.4.1.4, 6.4.1.5, 6.4.2, 6.4.3, 6.4.4, 6.4.5, 6.5, 6.6, 6.8, 6.8.1, 6.9.1, 6.9.2, 6.9.3, 6.9.4, 6.9.5, 6.9.6, 6.10, 7.4.1, 7.4.4, 7.4.5, 10.4.6	Occupational Health and Safety (Maritime Industry) Act 1993: 3.4.6
Migration Amendment (Abolishing Detention Debt) Act 2009: 6.6	Offshore Installations Act 1987: 12.2.1
Migration Amendment (Detention Arrangements) Act 2005: 6.6	Offshore Minerals (Exploration Licence Fees) Act 1981: 3.5
Migration Amendment (Excision from Migration Zone) Act 2001: 6.3.5	Offshore Minerals (Exploration Licence User Charge) Act 1994: 3.4
Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001: 6.3.5	Offshore Minerals (Mining Licence Fees) 1981: 3.5
Migration Amendment (Protection of Identifying Information) Act 2009: 6.6	Offshore Minerals (Registration Fees) Act 1981: 3.4
Migration Amendment Regulations 2005 (No 6): 6.3.5	Offshore Minerals (Retention Licence Fees) Act 1994: 3.4
Migration Amendment Regulations 2008 (No 5): 6.6	Offshore Minerals (Royalty) Act 1981: 3.5
Migration Legislation Amendment Act 1994: 6.9.4	Offshore Minerals (Works Licence Fees) Act 1981: 3.4
Migration Legislation Amendment Act (No 1) Act 2009: 6.6	Offshore Minerals Act 1994: 3.1, 3.5, 3.8, 10.6.2
Migration Regulations 1994: 6.3.4, 6.4.5, 6.6	Offshore Petroleum (Annual Fees) Act 2006: 3.4.1
Minerals (Submerged Lands) (Production Licence Fees) Act 1981: 2.5	Offshore Petroleum Amendment (Greater Sunrise) Act 2007: 3.7.4
Minerals (Submerged Lands) (Registration Fees) Act 1981: 2.5	Offshore Petroleum (Registration Fees) Act 2006: 3.4.1
Minerals (Submerged Lands) (Royalty) Act 1981: 2.5	Offshore Petroleum (Repeals and Consequential Amendments) Act 2006: 3.4.1
Minerals (Submerged Lands) (Works Authority Fees) Act 1981: 2.5	Offshore Petroleum Act 2006 and Offshore Petroleum and Greenhouse Gas Storage Act 2006: 2.2, 2.8, 3.4.1, 3.4.2, 3.4.2.1, 3.4.2.2, 3.4.2.3, 3.4.3, 3.4.4, 3.4.5, 3.4.6, 3.4.8.1, 3.4.8.2, 3.6, 3.8, 4.7.3, 8.2, 8.3, 10.6.1, 10.6.2, 11.10.4
Minerals (Submerged Lands) Act 1981: 2.5, 3.5	Papua New Guinea Act 1949: 10.1
Minerals (Submerged Lands) Exploration Fees Act 1981: 2.5	Papua New Guinea Independence Act 1975: 10.1
National Parks and Wildlife Act 1975: 9.4.2	Petroleum (Australia-Indonesia Zone of Cooperation) Act 1990: 2.7
Nationality and Citizenship Act 1948: 6.8.1	Petroleum (Submerged Lands) Miscellaneous Amendments) Act 1981: 11.10.4
Native Title Act 1993: 11.15, 12.5	Petroleum (Submerged Lands) (Exploration Permit Fees) Amendment Act 1980: 2.5
Nauru Independence Act 1967: 10.1	Petroleum (Submerged Lands) (Pipeline Licence Fees) Act 1980: 2.5
Nauru Island Agreement Act 1919: 10.1	Petroleum (Submerged Lands) (Royalty) Amendment Act 1980: 2.5
Navigation Act 1912: 2.4, 2.7, 3.4.6, 4.5.1, 5.12, 11.3, 11.9, 11.10.2, 11.10.3, 11.12.1, 11.14, 12.2.3, 12.2.5, 12.3.4	Petroleum (Submerged Lands) Act 1967: 2.2, 2.5, 2.8, 3.3, 4.5.2, 4.7.3, 4.7.6, 11.10.4, 12.2.5
Norfolk Island Act 1913: 10.1, 10.2.1, 10.2.2	Petroleum (Submerged Lands) Amendment Act 1980: 2.5
Norfolk Island Act 1957: 10.2.4	Petroleum (Timor Sea Treaty) Act 2003: 3.1, 3.7.2, 3.7.3, 8.3.2
Norfolk Island Act 1979: 10.2, 10.2.1, 10.2.2, 10.2.3, 10.2.4	Petroleum (Timor Sea Treaty) (Consequential Amendments) Act 2003: 3.7.3
Northern Territory (Self-Government) Act 1978: 10.2.3	
Northern Territory Acceptance Act 1910: 10.1	

TABLE OF STATUTES AND REGULATIONS

Petroleum Amendment (Greater Sunrise) Act 2007: 3.1	Constitutional Powers (Coastal Waters) Act 1980: 2.5
Protection of the Sea (Civil Liability Act) 1981: 11.11	Corporations (Queensland) Act 1990: 2.5
Protection of the Sea (Powers of Intervention) Act 1981: 11.11	Crimes at Sea Act 2001: 12.2.3.3
Protection of the Sea (Prevention of Pollution from Ships) Act 1983: 9.2.6, 9.3.6	Criminal Code: 4.5.2
Quarantine Act 1908: 5.5.4, 8.10.1, 8.10.2, 8.10.3, 8.10.4, 8.10.5	Environmental Protection Act 1994: 12.2.3.3
Racial Discrimination Act 1975: 2.7	Fisheries Act 1994: 7.1, 12.2.3.4, 12.4.6.1
Sea Installations Act 1976: 2.2	Marine Parks Act 2004: 12.2.3.3, 12.4.6.1
Sea Installations Act 1987: 3.1, 3.6, 3.8, 8.3	Marine Parks Regulation 2006: 12.2.3.4
Sea Installations Levy Act 1987: 3.6	Off-shore Facilities Act 1986: 2.5
Seas and Submerged Lands Act 1973: 2.1, 2.3, 2.4, 2.5, 2.8, 3.4.2, 6.3, 6.3.1, 6.3.2, 7.1, 7.2.1, 9.4.2, 9.6, 12.5	Offshore Minerals Act 1998: 3.5
Seat of Government Acceptance Act 1909: 10.1	Petroleum (Submerged Lands) Act 1982: 2.5, 3.3
Shipping Registration Act 1981: 4.2, 7.4.6, 11.4.1, 11.4.2	Queensland Heritage Act 1992: 11.10.4
Territories Law Reform Act 1992: 10.4.3, 10.4.5	Torres Strait Fisheries Act 1984: 12.3.2
Terrorism and Maritime Transport and Offshore Facilities Security Act 2003: 4.11	Torres Strait Islander Cultural Heritage Act 2003: 12.3.2
Torres Strait (Miscellaneous Amendments) Act 1984: 12.3.2	Torres Strait Islander Land Act 1991: 12.3.2
Torres Strait Fisheries Act 1984: 5.5.2, 7.2.1, 7.2.4, 7.4.1, 12.3.2	Transport Operations (Marine Pollution) Act 1975: 12.2.3.1
Transport Safety Investigation Act 2003: 11.8.2	Transport Operations (Marine Safety) Act 1995: 12.2.3.2
War Crimes Act 1945: 2.7	
New South Wales	
Application of Laws (Coastal Sea) Act 1980: 2.5	South Australia
Constitutional Powers (Coastal Waters) Act 1979: 25	Acts Interpretation Act 1915: 1.2
Crimes (Offences at Sea) Act 1980: 4.5.2	Constitutional Powers (Coastal Waters) Act 1979: 2.5
Fisheries Management Act 1994: 7.1, 12.4.6.2	Crimes (Offences at Sea) Act 1980: 4.5.2
Heritage Act 1977: 11.10.4	Fisheries Act 1982: 2.5
Lord Howe Island Act 1953: 10.3	Fisheries Management Act 2007: 12.4.1, 12.4.6.5
Marine Parks Act 1997: 12.4.1, 12.4.6.2	Fisheries Management (Aquatic Reserves) Regulations 2008: 12.4.6.5
Offshore Minerals Act 1999: 3.5	Historic Shipwrecks Act 1981: 11.10.4
Petroleum (Submerged Lands) Act 1982: 3.3	Northern Territory Surrender Act 1907: 10.1
Seat of Government Surrender Act 1909: 10.1	Offshore Minerals Act 2000: 3.5
Seat of Government Surrender Act 1915: 10.1	Off-shore Waters (Application of Laws) Act 1976: 2.5
Queensland	Petroleum (Submerged Lands) Act 1982: 3.3
Acts Interpretation Act 1954: 2.5, 12.4.6.1	
Coastal Protection and Management Act 1995: 12.2.3.3	Tasmania
	Constitutional Powers (Coastal Waters) Act 1979: 2.5
	Crimes (Offences at Sea) Act 1979: 4.5.2
	Historic Cultural Heritage Act 1995: 11.10.4
	Living Marine Resources Management Act 1995: 7.1, 9.4.2, 12.4.1, 12.4.6.4
	National Parks and Reserves Management Act 2002: 9.4.2
	Nature Conservation Act 2002: 9.4.2
	Offshore Waters Jurisdiction 1976: 2.5
	Petroleum (Submerged Lands) Act 1982: 3.3

TABLE OF STATUTES AND REGULATIONS

Victoria	
Constitutional Powers (Coastal Waters) Act 1980:	2.5
Crimes (Offences at Sea) Act 1978 (Vic):	4.5.2
Crown Land (Reserves) Act 1987:	12.4.6.3
Fisheries Act 1995:	7.1, 12.4.6.3
Heritage Act 1995:	11.10.4, 12.4.1
Marine Act 1982:	11.10.3
National Parks Act 1975:	12.4.6.3
Offshore (Application of Laws) Act 1982:	2.5
Petroleum (Submerged Lands) Act 1982:	3.3
Pipelines Act 1967:	3.3
Pipelines (Fees) Act 1967:	3.3
Western Australia	
Acts Interpretation Act 1918:	1.2
Conservation and Land Management Act 1984:	12.4.1, 12.4.6.6
Constitutional Powers (Coastal Waters) Act 1979:	2.5
Crimes (Offences at Sea) Act 1979:	4.5.2
Fish Resources Management Act 1994:	7.1, 12.4.1
Local Government Act 1995:	6.9.1, 10.4.4
Marine Archaeology Act 1973:	11.10.4
Offshore Minerals Act 2003:	3.5
Petroleum (Submerged Lands) Act 1982:	3.3
Australian Capital Territory	
Australian Capital Territory Supreme Court Act 1933:	9.3.1
Norfolk Island	
Supreme Court Act 1960:	10.2.4
United Kingdom	
Admiralty Offences (Colonial) Act 1849:	4.2, 4.3.2, 4.5.1
Australia Act 1986:	2.5
Australian Colonies Act 1861:	1.2
Australian Constitutions Act 1850:	1.2
Australian Courts Act 1828:	4.2
Australian Waste Lands Act 1855:	10.2.1
British Nationality Act 1948:	4.3.2, 4.5.1
British Nationality Act 1981:	4.5.1
Christmas Island Act 1958:	10.4.2
Cocos Islands Act 1955:	10.4.2
Courts (Colonial) Jurisdiction Act 1874:	4.2, 4.3.2
Criminal Law Act 1967:	4.3.2
Merchant Shipping (Liability of Shipowners and Others) Act 1958:	2.4
Merchant Shipping Act 1894:	2.4, 4.2, 4.3.2, 11.4.2
Murders Abroad Act 1817:	4.2
New South Wales Constitution Act 1855:	1.2
Offences at Sea Act 1799:	4.2, 4.3.2
Offences at Sea Act 1806:	4.2
Piracy Act 1698:	4.2
Straits Settlements (Repeal) Act 1946:	10.4.2
Territorial Waters Jurisdiction Act 1878:	4.2
Theft Act 1968:	4.3.2

International Conventions and Treaties

- Agreement on Maritime Delimitation between the Government of Australia and the Government of the French Republic 1983: 7.2.6, 10.2.5, 10.3.4
- Agreement between the Government of Australia (and on behalf of Papua New Guinea) and the Government of Indonesia concerning Administrative Border Arrangements at the Border between Papua New Guinea and Indonesia: 7.2.2
- Agreement between the Government of Australia and the Government of the Republic of Indonesia relating to Cooperation in Fisheries 1993: 7.2.2, 10.8.3
- Agreement for the Implementation of the United Nations Convention on the Law of the Sea Relating to the Conservation and Management of Straddling Stocks and Highly Migratory Fish Stocks 2001: 7.4.1, 7.4.4
- Agreement with Indonesia concerning Certain Boundaries between Papua New Guinea and Indonesia: 7.2.2
- Agreement with the Government of the Republic of Indonesia Establishing Certain Seabed Boundaries in the Area of the Timor and Arafura Seas Supplementary to the Agreement of 18 May 1971: 7.2.2
- Agreement with the Government of the Solomon Islands Establishing Certain Sea and Seabed Boundaries 1989: 7.2.6
- Antarctic Treaty 1959: 9.2.1, 9.2.3, 9.2.5, 9.2.6, 9.2.7, 9.3.2, 9.6, 9.8
- Convention for the Conservation of Antarctic Marine Living Resources 1980 (CCAMLR): 7.3, 9.2.5, 9.3.4, 9.3.5, 13.1
- Convention for the Conservation of Antarctic Seals 1972: 9.2.4, 9.3.4
- Convention for the Protection of the World Cultural and Natural Heritage: 2.7, 11.10.2
- Convention for the Safety of Life at Sea (SOLAS): 4.8, 11.8.1, 11.14, 12.2.3
- Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988: 4.6, 5.11
- Charter of the United Nations: 9.9, 10.1
- Convention on Biological Diversity 1992: 12.4.2
- Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean 2002: 7.4.6
- Convention on Conservation of Nature in the South Pacific: 12.4.2
- Convention on Fishing and the Conservation of the Living Resources of the High Seas:: 2.1, 2.3
- Convention on the Civil Liability for Oil Pollution Damage 1969: 2.6, 11.13, 11.14
- Convention on the Conservation of Southern Bluefin Tuna: 7.7.8
- Convention on the Continental Shelf 1958: 2.1, 2.2, 2.3, 2.8, 3.4.1
- Convention on the High Seas 1958: 2.1, 2.2, 2.3
- Convention on the Intervention on the High Seas of Cases of Oil Pollution Casualties 1969: 2.6
- Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970: 11.10.2
- Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972 (London Convention): 2.6, 11.14
- Convention on the Protection of the Underwater Cultural Heritage 2001: 11.10.2, 11.10.3, 11.10.5
- Convention on the Standards of Training, Certification and Watchkeeping for Seafarers 1978 (STCW Convention): 11.14
- Convention on the Territorial Sea and the Contiguous Zone 1958: 2.1, 2.3, 2.8, 3.4.1, 7.1
- Convention Relating to the Status of Refugees: 6.3.4, 6.4.1.1
- Indonesian Fisheries Cooperation and Maritime Boundary Agreements; see: 7.2.2
- International Convention for the Prevention of Pollution from Ships (MARPOL): 9.2.6, 9.3.6, 9.3.7, 11.3, 11.11, 11.14, 12.2.1, 12.3.3
- International Convention for the Regulation of Whaling 1946: 9.7
- International Convention on Load Lines 1966: 11.14

INTERNATIONAL CONVENTIONS AND TREATIES

- International Convention on Salvage 1989: 5.12, 11.3, 11.9, 11.10.2, 11.10.5
- International Convention on Tonnage Measurement of Ships 1969: 11.14
- International Convention on the Elimination of All Forms of Racial Discrimination: 2.7
- International Convention on the Protection of the World's Natural and Cultural Heritage 1972: 10.4.2, 11.10.2, 12.4.5.1, 12.2.1.1
- International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969: 11.11
- International Regulations for the Prevention of Collisions at Sea 1972: 11.3, 11.8.1
- International Unitisation Agreement for Greater Sunrise: 3.7.2, 3.7.4, 7.2.3
- Memorandum of Understanding regarding the Operations of Indonesian Traditional Fishermen in Areas of the Australian Exclusive Fishing Zone and Continental Shelf 1974: 7.2.2, 10.8.3
- Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf 1988 (SUA Protocol): 4.6, 5.11
- Protocol on Environmental Protection to the Antarctic Treaty 1991: 9.2.3, 9.2.6, 9.3.3, 9.3.4
- Protocol Relating to the Status of Refugees 1967: 6.3.4
- Timor Sea Treaty: 3.7.2, 3.7.3, 3.7.4, 3.8, 7.2.3
- Torres Strait Treaty: 6.3.6, 7.2.4, 8.10.1, 12.3.1
- Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea 2006 (CMATS): 3.7.4, 3.8, 7.2.3
- Treaty between Australia and the Government of Indonesia on the Zone of Cooperation an Area Between the Indonesian Province of East Timor and Northern Australia: 7.2.2
- Treaty between the Government of Australia and the Government of the French Republic on cooperation in the maritime areas adjacent to the French Southern and Antarctic Territories 2003: 9.6
- Treaty between the Government of Australia and the Government of the Republic of Indonesia
- Establishing an Exclusive Economic Zone Boundary and Certain Seabed Boundaries 1997: 7.2.2, 10.4.6, 10.5.2
- Treaty between the Government of Australia and the Government of New Zealand establishing Certain Exclusive Economic Zone and Continental Shelf Boundaries: 7.2.6, 10.2.5, 10.3.4
- Treaty on Fisheries Between the Governments of Certain Pacific Island States and the Governments of the United States of America: 7.4.1, 7.4.6
- Treaty of Tordesillas 1494: 9.2.2
- Treaty with the Independent State of Papua New Guinea Concerning Sovereignty and Maritime Boundaries in the Area Between the Two Countries, Including the Area Known as Torres Strait and Related Matters 1985 (Torres Strait Treaty): 7.2.3, 12.3.1
- Trusteeship Agreement for the Territory of New Guinea: 10.1
- Trusteeship Agreement for the Territory of Nauru: 10.1
- United Nations Convention on the Law of the Sea: 2.2, 2.3, 2.5, 2.8, 3.4.1, 3.4.2.1, 3.4.4, 4.5.1, 4.6, 5.6.3, 6.3, 6.3.1, 6.3.2, 6.4.1.2, 7.1, 7.2.1, 7.2.6, 7.4.3, 7.4.6, 7.7.1.5, 7.7.2.1, 7.7.6, 7.7.8, 8.8.2.1, 8.8.2.2, 8.8.5, 8.10.2, 9.2.2, 9.2.3, 9.2.6, 9.2.7, 9.3.3, 10.22, 11.2, 11.3, 11.4.3, 11.10.2, 11.14, 12.3.4, 11.13
- Art 2: 2.8
 - Art 3: 6.3.1
 - Art 4: 6.3.1
 - Art 5: 6.3.1
 - Art 6: 6.3.1
 - Art 8: 6.3.1
 - Art 9: 6.3.1
 - Art 21: 8.8.5
 - Art 24: 8.8.5
 - Art 30(1)(d): 11.10.2
 - Art 33: 2.8, 6.3.2, 8.8.5, 8.10.2
 - Art 51: 5.11
 - Art 52: 5.11
 - Art 53: 5.11
 - Art 55: 7.2.1, 7.4.6
 - Art 56: 2.8, 7.2.1, 9.2.7
 - Art 56(1): 2.8
 - Art 58: 7.7.7
 - Art 60: 3.4.4
 - Art 60(4): 3.4.4
 - Art 60(5): 3.4.4
 - Art 73: 7.7.6, 7.7.7
 - Art 73(2): 7.7.2.1
 - Art 73(3): 7.4.6

INTERNATIONAL CONVENTIONS AND TREATIES

Art 76: 2.8, 9.2.7	Art 105: 5.11
Art 76(8): 9.6	Art 110: 11.4.3
Art 77: 7.2.1, 7.4.1, 9.6	Art 111: 7.4.3, 8.8.2.1, 8.8.2.2
Art 77(1): 2.8	Art 149: 11.10.2
Art 77(4): 3.4.2	Art 192: 11.13
Art 78: 2.8	Art 208(1): 2.2
Art 82: 2.8	Art 237: 9.2.6
Art 86: 2.8, 6.4.1.2, 9.3.2	Art 292: 7.7.1.5
Art 87: 2.8, 9.3.2	Art 303(1): 11.10.2
Art 92: 5.11	Art 303(2): 11.10.2
Art 97: 5.11	Art 311: 9.2.6
Art 100: 5.11	Vienna Convention on the Law of
Art 101: 4.6	Treaties 1969: 9.2.6

Chapter 1

Introduction and Background to Offshore Laws

- 1.1 Introduction
- 1.2 Colonial Period
 - 1.2.1 Jurisdiction of English Courts
 - 1.2.2 Early Courts in the Australian Colonies
 - 1.2.3 Territorial Limits of the Colonies
 - 1.2.4 Application of English Law in the Colonies
 - 1.2.5 Legislative Power of the Colonies
 - 1.2.6 Offshore Jurisdiction of the Colonies
 - 1.2.6.1 Federal Council of Australasia
 - 1.2.6.2 Criminal Jurisdiction of the Colonies
 - 1.2.6.3 Fisheries Jurisdiction of the Colonies
 - 1.2.6.4 Customs Jurisdiction of the Colonies
- 1.3 Federation in 1901
 - 1.3.1 Commonwealth Offshore Legislative Power Post-Federation
- 1.4 Conclusions

1.1 Introduction

This book describes and analyses Australia's offshore laws by setting out those laws that have application offshore.¹ As mentioned in the authors'

1 Some aspects of Australian offshore jurisdiction have been explored in a number of texts. These works include RD Lumb, *The Law of the Sea and Australian Off-shore Areas* (University of Queensland Press, 2nd edn, 1978); R Cullen, *Australian Federalism Offshore* (Melbourne University Press, 2nd edn, 1988) and R Cullen *Federalism in Action: The Australian and Canadian Offshore Disputes* (Federation Press, Sydney, 1990). M Davies and A Dickey, *Shipping Law* (Lawbook Co, Sydney, 3rd edn, 2004), examine the shipping powers in Australia and provide an outline of legislative powers under the Constitution and M White, *Australasian Marine Pollution Laws* (Federation Press, Sydney, 2nd edn, 2007), Ch 6 deals with "Australian Offshore Jurisdictions – Petroleum and Constitutional Settlements". See BR Opeskin and BM Tsamenyi, "The Law of the Sea" in SKN Blay, RW Piotrowicz and BM Tsamenyi (eds), *Public International Law: An Australian Perspective* (Oxford University Press, 2nd edn, 2005), Ch 13 and D Rothwell, "Antarctica and International Law" ibid, Ch 15. For an historical development of offshore jurisdiction reference could be made to JK Oudendijk *Status and Extent of Adjacent Waters: A Historical Orientation* (Sijthoff, Leiden, 1970). Some discussion on Canada's offshore jurisdiction is contained in B Calderbank, AM MacLeod, TL McDorman and DH Gray, *Canada's Offshore Jurisdiction, Rights, and Management* (Association of Canada Land Surveyors, 3rd edn, 2006). It has valuable background about Canadian offshore jurisdiction relating to its application of UNCLOS although the book has a main focus on the surveying aspects offshore rather than a legal one.

preface, no book has attempted this before and the task has involved much new research and writing. The book concentrates mainly on the jurisdiction of these laws with the object that a reader will be able to ascertain the main legislation that applies to any offshore situation. Although the substantive law is touched on from place to place it is not feasible in this work to attempt to cover it all as that would require a multi-volume series. The best approach to the topic is to look at the historical background from which the present situation has arisen and to this object this and the next chapters are directed. The specific purpose of this first, short chapter is to give an idea of the relevant laws against the imperial British background during the Australian colonial period. The author has covered certain aspects in another work to which reference may be made for greater detail.²

1.2 Colonial Period

Historically under English law, the imperial Crown had dominion over the imperial territorial seas that lay offshore from its lands.³ The traditional view was that the adjacent seas were British territory, that these waters were the property of the Crown and that the legal seas themselves were part of the royal waste.⁴ The Crown's rights in and over the adjacent open seas adhered to it as a royal right of the Crown of England recognised by the common law. In the competition between the common law jurisdiction and the Admiral's jurisdiction, for the most part, the Admiral's jurisdiction prevailed offshore. This British approach is documented well by many excellent works and it is not further explored here.⁵

Of course the jurisdiction over any seas depended on the possession of the land so it is convenient to turn briefly to the Australian land situation. In 1770, Cook claimed the newly discovered east coast of Van Dieman's land for Britain. Then when the first fleet arrived to establish a British colony, Governor Phillip claimed it again on 26 January 1788 and thereby the British Crown asserted the right to control New South Wales and the areas to the west and east.⁶ This was formally reinforced on 7 February 1788 by Governor Phillip reading out his commission, the First Charter of Justice, which was contained in the letters patent issued to him by the Crown.

2 H Zelling and M White, "Constitutional Background and Jurisdiction of Courts" in M White (ed), *Australian Maritime Law* (Federation Press, Sydney, 2nd edn, 2000), Ch 1.

3 *New South Wales v Commonwealth* (1975) 135 CLR 337 at 363 per Barwick CJ.

4 Ibid at 438 per Stephen J.

5 See for example Hale, *De Jure Maris*; Selden *Mare Clausum* Lib 2 Ch 22 and 24; RG Hall, "Essay on the Rights of the Crown in the Sea-shores of the Realm" (1830); *New South Wales v Commonwealth* (1975) 135 CLR 337 at 487, 488 per Jacobs J.

6 P Parkinson, *Tradition and Change in Australian Law* (Law Book Co, 3rd edn, 2005).

1.2.1 Jurisdiction of English courts

Jurisdiction of the common law courts ended at the low water mark. In *R v Keyn*,⁷ the majority⁸ held the realm of England ended at low water mark and that the territorial sea, though the subject of admitted legislative jurisdiction, did not form part of England. In *Harris v Owners of SS Franconia*,⁹ the court applied this in a civil context and confirmed that “the territory of England and the sovereignty of the Queen”¹⁰ ended at the low water mark. Seaward from the low water mark the Admiralty courts had jurisdiction.

Following these cases, the British Parliament enacted the *Territorial Waters Jurisdiction Act 1878* (Imp) which clarified the limits of the criminal jurisdiction of Admiralty courts. This Act provided that an offence committed “on the open sea within the territorial waters of Her Majesty’s dominions” was an offence within the Admiral’s jurisdiction.¹¹ A person who committed such an offence in the territorial waters could be arrested, tried and punished whether or not the person was a British subject and even if the offence had been committed on board or by means of a foreign ship.¹² The Act defined “the territorial waters of Her Majesty’s dominions” as:

such part of the sea adjacent to the coast of the United Kingdom, or the coast of some other part of Her Majesty’s dominions, as is deemed by international law to be within the territorial sovereignty of Her Majesty; and for the purpose of any offence declared by this Act to be within the jurisdiction of the Admiral, any part of the open sea within one marine league of the coast measured from low-water mark shall be deemed to be open sea within the territorial waters of Her Majesty’s dominions.¹³

As a result, the common law courts had civil and criminal jurisdiction to the low water mark, but beyond this point the Admiralty courts had jurisdiction to a distance of “one marine league” (three nautical miles). The *Territorial Waters Jurisdiction Act 1878* (Imp) also defined the “jurisdiction of the Admiral” as including “the territorial waters adjacent to the United Kingdom, or any other part of Her Majesty’s dominions”.¹⁴

⁷ (1876) 2 Ex D 63. For an authoritative account of the colonial law see Hon Dr Bruce McPherson CBE *The Reception of English Law Abroad* (Queensland Supreme Court Library, 2007).

⁸ (1876) 2 Ex D 63 at 67 per Phillimore J; at 150 per Bramwell JA; at 150-151 per Kelly CB; at 195, 197, 199, 219 per Cockburn CJ; at 238 per Lush J; at 239 per Pollock B, at 239 per Field J.

⁹ (1877) 2 CPD 173.

¹⁰ Lord Coleridge CJ.

¹¹ Section 2.

¹² Section 2.

¹³ Section 7.

¹⁴ Section 7.

The Admiral consequently had jurisdiction over the territorial sea surrounding both the United Kingdom and its colonies, including the Australian colonies.

1.2.2 Early Courts in the Australian Colonies

By letters patent of 2 April 1787, the First Charter of Justice dealt extensively with the judicial system of the New South Wales colony. It established a Court of Civil Jurisdiction and a Court of Criminal Jurisdiction but made no reference to Admiralty law. Of course this was a penal colony and the law was administered by the naval and military officers and in a naval and military structure.

A Court of Vice-Admiralty was established under the terms of letters patent issued on 12 April 1787. The court had jurisdiction over a variety of matters relating to maritime trade. It dealt with actions commenced by seamen against the masters of ships with respect to wages and ill-treatment; salvage; collisions; damage to cargo and ships; marine insurance; charter parties and other contracts relating to maritime trade.¹⁵

The Second Charter of Justice, issued under letters patent dated 4 February 1814, dealt only with civil matters. It established a Supreme Court to replace the old Court of Civil Jurisdiction. In addition to its common law jurisdiction, the Supreme Court was also declared to be a Court of Equity with "equitable jurisdiction" and "full power and authority to administer justice" in the same manner as the High Court of Chancery.¹⁶ The Second Charter of Justice also established a Governor's Court and Lieutenant Governor's Court but these courts did not have equitable jurisdiction.

In 1823 the *Act for the Administration of Justice in New South Wales and Van Diemen's Land* passed into law, the Third Charter of Justice. The Act abolished the Supreme Court established under the 1814 Charter and established in its place two new Supreme Courts, one for the mainland and the other for Van Diemen's Land. Section 3 of the Act gave the Supreme Courts jurisdiction to "hear and determine all treasons, piracies, felonies, robberies, murders, conspiracies and other offences ... committed upon the sea". This jurisdiction extended beyond Australian waters to offences committed on British ships or by British subjects in the "islands of New Zealand, Otaheite or any other island, country or place, situate in the Indian or Pacific Oceans". After 1823, although the Court of

¹⁵ See A Castles, *An Australian Legal History* (Law Book Co, Sydney, 1982), pp 117-119. For more detail on the Vice-Admiralty courts in Australia, see H Zelling and M White, "Constitutional Background and Jurisdiction of Courts" in M White (ed), *Australian Maritime Law* (Federation Press, Sydney, 2nd edn, 2000).

¹⁶ See JM Bennett and A Castles, *A Source Book of Australian Legal History* (Law Book Co, Sydney, 1979).

INTRODUCTION AND BACKGROUND

Vice-Admiralty no longer dealt with criminal matters, it retained its jurisdiction to hear and determine traditional maritime cases.¹⁷

Most of the key provisions of the 1823 Act were re-enacted in the imperial *Australian Courts Act 1828*,¹⁸ as to which see under. When Queensland and Victoria became separate colonies from New South Wales, their Supreme Courts were modelled on that of New South Wales.¹⁹

1.2.3 Territorial Limits of the Colonies

As is well known, the territorial limits of the colonies of Victoria, South Australia, Western Australia, Tasmania and Queensland were granted by letters patent²⁰ outlining the lands, some of which were excised from New South Wales, to establish these new colonies. The lands in the offshore islands were specifically included.²¹ In this way, principles of domestic and international law regarding the formation of new colonies were applied. These proclamations did not claim the offshore seas as there was no need because it was established customary international law that the possession and control of the land gave rights offshore, although exactly what rights and for how far offshore they carried varied with the claims from country to country. The actual land territory of these colonies ended at the low water mark²² as the language of respective letters patent and other grants, read in the light of the common law principles, evinced an intention to claim expressly only the land, mainland and islands, not the seas surrounding the islands.²³ The prerogative of the Crown in and over the sea was not transferred to the Crown in right of the colony but remained with the imperial Crown although the colonial Parliaments were granted some jurisdiction over those offshore seas.

The geographic boundary of the colony of New South Wales and its connection with Norfolk Island underwent certain changes after Governor Phillip established a settlement in January 1788.²⁴ The commission to

17 See A Castles, *An Australian Legal History* (Law Book Co, Sydney, 1982), pp 216-217.

18 9 Geo IV, c 83.

19 See A Castles, *An Australian Legal History* (Law Book Co, Sydney, 1982), p 151.

20 New South Wales, 2 April 1787; Tasmania, 16 July 1825; Western Australia, 4 March 1831; South Australia, 19 February 1836; Victoria, *Australian Constitutions Act 1850* (13 & 14 Vict, c 59) and letters patent dated 23 June 1863; Queensland, 6 June 1859 issued under *New South Wales Constitution Act 1855* s 7 and letters patent dated 13 March 1862 issued under *Australian Colonies Act 1861* s 2, annexing the present Northern Territory. The letters patent of 30 May 1872 transferred to the colony those islands lying offshore within 60 miles of the colony. Certain islands in the Torres Strait were also included by proclamation of 18 July 1879.

21 *New South Wales v Commonwealth* (1975) 135 CLR 337 at 459 per Mason J.

22 *Bonser v La Macchia* (1969) 122 CLR 177 at 185 per Barwick CJ.

23 *New South Wales v Commonwealth* (1975) 135 CLR 337 at 482, 483 per Jacobs J.

24 See MH McLelland, "Colonial and State Boundaries in Australia" (1971) 45 ALJ 671.

Governor Bourke by letters patent dated 25 June 1831 described the colony of New South Wales as “also including Norfolk Island, lying in or about latitude 29 degrees 3 minutes south and 168 degrees of east longitude ...”. In this way, Norfolk Island was expressly declared to be part of the colony of New South Wales. However, on 29 September 1844, Norfolk Island was severed from New South Wales and annexed to the colony of Van Diemen’s Land.²⁵ By an Order in Council dated 24 June 1856 made pursuant to the *Australian Waste Lands Act 1855*,²⁶ Norfolk Island was separated from the colony of Tasmania, and was constituted as a distinct and separate colony from 31 October 1856, this being the date of the proclamation of the New South Wales Order in Council.²⁷

The connection between the colony of New South Wales and Lord Howe Island was also documented at this time. The *New South Wales Constitution Act 1855* stated the territorial limits of the colony as “also including Lord Howe Island, being in or about the latitude of 31 degrees 30 minutes south and the 159th degree of east longitude ...”.²⁸ After federation, Lord Howe Island did not become a territory of the Commonwealth but remained a dependency of New South Wales.²⁹

The coastal limits of Queensland were also being clarified at this time. By deed poll dated 22 August 1872,³⁰ the Governor of Queensland, exercising powers conferred upon him by letters patent dated 30 May 1872,³¹ transferred to the colony of Queensland “all the islands lying and being within sixty miles of the coast of the said Colony”. By proclamation dated 18 July 1879,³² the Governor of Queensland exercised powers under letters patent dated 10 October 1878 and declared “certain islands in Torres Straits and lying between the continent of Australia and island of New Guinea” as part of the colony of Queensland and subject to the colony’s laws.³³ The federal movement in 1890s and the *Commonwealth of Australia Constitution Act* resulted in the issuing of letters patent dated 29 October 1900, which established the office of Governor of the State of Queensland and described the geographic limits of the State of Queensland.³⁴ However, they did not contain any recital of the letters patent

25 By letters patent dated 24 October 1843.

26 Section 5.

27 For the current status of Norfolk Island, see Chapter 10.

28 Section 46.

29 See Chapter 10.

30 See

<http://ozcase.library.qut.edu.au/qhlc/documents/QldBoundaries_Proclamation-coast-islands-1872_QGG-24-08-1872.pdf>.

31 See <http://ozcase.library.qut.edu.au/qhlc/documents/LP_LettersPatent_30-05-1872.pdf>.

32 See <www.legislation.qld.gov.au/LEGISLTN/CURRENT/Q/QldCoastIsPr.pdf>.

33 For further discussion on the Torres Strait, see Chapters 7, 10 and 12.

34 See <http://ozcase.library.qut.edu.au/qhlc/documents/lp_qgg_proclamation_1-JAN-1901.pdf>.

INTRODUCTION AND BACKGROUND

dated 18 July 1879, thus omitting the islands lying in the Torres Strait from the State of Queensland. As a result, letters patent dated 10 June 1925 revoked the letters patent of 29 October 1900, reconstituted the office of the Governor of Queensland and confirmed the geographic limits of Queensland included the territories and islands in the Torres Strait.³⁵

1.2.4 Application of English law in the Colonies

From the British point of view the common law considered imperial territorial seas as those areas of the seas that washed on to the shores of the imperial colonial territories,³⁶ so it followed that the imperial legislature and executive had dominion over these waters off the coasts of the Australian colonies.³⁷ The *Australian Courts Act 1828* removed any doubts about the application of English law as it provided that all laws and statutes in force in England at the date of the enactment of the legislation should be applied in the courts of New South Wales and Van Diemen's Land so far as they were applicable.³⁸ This Act³⁹ and similar Acts were applied to all the Australian colonies.⁴⁰

1.2.5 Legislative Power of the Colonies

New South Wales was granted full responsible government in 1855. This change to full responsible government (its own Parliament with full, as opposed to the earlier limited, legislative powers) effected no change in ownership of the Crown lands. The Crown held them in right of the colony although some measure of control passed to the colonial government.⁴¹ The colonies did not acquire property in or legislative power over the territorial seas by statute or executive act⁴² so the colonies had no proprietary rights in or legislative power over the territorial sea, its sub-jacent soil or superadjacent airspace or in the continental shelf and

35 See also MH McLelland, "Colonial and State Boundaries in Australia" (1971) 45 *ALJ* 45. For a full discussion of the various stages of the Queensland colonial boundaries, see *Wacando v Commonwealth* (1981) 148 CLR 1, especially per Gibbs CJ.

36 *New South Wales v Commonwealth* (1975) 135 CLR 337 at 362 per Barwick CJ.

37 Ibid at 362-363 per Barwick CJ.

38 9 Geo IV, c 83, s 24.

39 The *Australian Courts Act 1828* applied to New South Wales and then also to Queensland and Victoria at the time that they were erected into separate colonies.

40 English law was received in the colony of South Australia at the date of settlement of the colony which was designated as 28 December 1836: *Acts Interpretation Act 1915* (SA) s 48. In Western Australia, English law was taken to be received 1 June 1829: *Interpretation Act 1918* (WA) s 43.

41 *Williams v Attorney-General (NSW)* (1913) 16 CLR 404 at 439 per Isaacs J; cited in *New South Wales v Commonwealth* (1975) 135 CLR 337 at 439 per Stephen J.

42 Ibid at 368 per Barwick CJ.

incline.⁴³ Further, the territorial sea is a creature of international law and the Australian colonies were not members of the “community of nations” so in the eyes of international law any rights over the territorial sea vested in Great Britain. The imperial Parliament retained legislative competence out to the three mile limit, the distance then claimed for its territorial sea, and beyond.⁴⁴

However, in the process of transfer of jurisdiction to the colonies they were granted offshore jurisdiction by the imperial Parliament and were then competent to make laws which operated extraterritorially, meaning beyond their land margins, in and on the seas and this, for some purposes, was not limited to the three-mile belt of the territorial sea.⁴⁵ This legislative power of the colony was derived from the plenary nature of the power to make laws for the “peace, order and good government” of the territory assigned to the colony.⁴⁶ The earlier concept was that the colonial legislature could not legally exercise its jurisdiction beyond territorial limits of three miles from shore except over its own residents.⁴⁷ This was a doctrine of incompetence over non-residents rather than extraterritorial incompetence. The subsequent development of the doctrine of extraterritorial incompetence was subsequently revoked in 1933 in *Croft v Dunphy*.⁴⁸ The formula “peace, order and good government” was held to give the colonial government plenary powers such as those in the imperial Parliament. Against this background, therefore, the Australian colonies passed laws and their courts made decisions concerning laws that applied over the land and, where appropriate, over the offshore seas.

1.2.6 Offshore Jurisdiction of the Colonies

1.2.6.1 Federal Council of Australasia

In 1885, the imperial Parliament, in order to bring some cohesion amongst the various colonies in the Australasian region, created the Federal Council of Australasia. The colonies of Victoria, Queensland, Tasmania and Western Australia and the province of South Australia as well as that of Fiji participated in the Council. New South Wales and New Zealand did not participate and South Australia withdrew from the Council in 1890. The Council had “legislative authority” with respect to a

43 Ibid at 371 per Barwick CJ.

44 Ibid at 467 per Mason J.

45 *Bonser v La Macchia* (1969) 122 CLR 177 per Barwick CJ; adopted by Jacobs J in *New South Wales v Commonwealth* (1975) 135 CLR 337 at 495.

46 Ibid.

47 Imperial Law Office Comment on British Guiana, February 1855 in Sir JD Harding, Sir AE Cockburn and Sir R Bethell, *Forsyth, Cases and Opinions on Constitutional Law* (Stevens & Haynes, 1869), p 24.

48 [1933] AC 156; also see *Giles v Tumminello* [1963] 2 SASR 96.

INTRODUCTION AND BACKGROUND

range of matters. Those matters relevant offshore were relations with Pacific islands, the influx of criminals, fisheries and “any matter which ... the legislatures of the colonies ... shall think fit to refer to the Council”.⁴⁹ Other matters were subsequently included within the Federal Council’s jurisdiction, including defence and “the establishment of an effectual system of federal quarantine”.⁵⁰ The federal-like nature of the Council meant the Australian colonies could potentially, collectively, extend their jurisdiction with respect to certain issues offshore beyond three nautical miles. As will be seen below, legislation of this very nature was passed with respect to fisheries.

1.2.6.2 *Criminal Jurisdiction of the Colonies*

The reach of colonial jurisdiction over crimes at sea remained unclear for many years.⁵¹ The imperial *Offences at Sea Act 1536* provided that “treasons, felonies, robberies, murders and confederacies” committed within the jurisdiction of the Admiral were to be tried in the realm as though the crime had been committed on land. This meant that trials for the commission of crimes at sea would use common law methods; judges and juries rather than the civil law procedure of Admiralty courts. However, because of concern the Act may only apply to the United Kingdom and did not extend to the colonies, further legislation in 1700,⁵² amended in 1717,⁵³ authorised colonial trials for offences at sea to use common law procedures. Subsequent legislation clarified colonial jurisdiction over crimes at sea. First, there was the *Offences at Sea Act 1806*.⁵⁴ This was followed by the *Admiralty Offences (Colonial) Act 1849*,⁵⁵ which clarified that any person charged with the commission of an offence at sea or at a place within the Admiral’s jurisdiction was to be tried as though the offence had been committed within the local jurisdiction of the colony’s criminal courts. Similarly, the *Courts (Colonial) Jurisdiction Act 1874*⁵⁶ provided that colonial courts were empowered to pass sentence as though the crime had been committed in the colony.⁵⁷

49 *Federal Council of Australasia Act 1835* (Imp).

50 Section 2(a).

51 See Hon Dr BH McPherson *The Reception of English Law Abroad* (Queensland Supreme Court Library, 2007), pp 437-439.

52 *Piracy Act 1700*.

53 *Piracy Act Amendment Act 1717*.

54 See <http://ozcase.library.qut.edu.au/qhlc/documents/qr_crim_offences_1806_46_Geo3_c54.pdf>.

55 See <http://ozcase.library.qut.edu.au/qhlc/documents/qr_crim_admiralty_1849_12-13_Vic_c96.pdf>.

56 See <www.statutelaw.gov.uk/content.aspx?LegType=All+Primary&PageNumber=95&NavFrom=2&parentActiveTextDocId=1052717&activetextdocid=1052719>.

57 See also *Oteri v R* [1976] 1 WLR 1272.

From the middle of the 19th century, British colonies were able to legislate with respect to crimes committed offshore within the colony's territorial waters provided the laws did not conflict with existing imperial legislation. This was articulated in the Colonial Office Circular of 1842,⁵⁸ in which Britain declared all colonial Acts that sought to regulate, prevent or punish crimes at sea to be valid, provided the operation of the Act did not exceed one marine league (three nautical miles), and related to matters of local interest. The circular specifically listed matters of pilotage, quarantine, customs duties and fisheries as falling within this jurisdiction. However, if the Act purported to apply beyond three nautical miles, the Act would be null and void. From 1842 onwards, the colonies of Australia could thus pass criminal legislation with application beyond the low water mark.

However, as mentioned above, Barwick CJ in *New South Wales v Commonwealth* did not accept the accuracy of these opinions of the Crown law officers and stated his belief that the boundary of the colonies ended at the low water mark and that beyond this point the colonies had no legislative rights.⁵⁹ His Honour believed the territorial seas were not "source or subject of colonial power or authority".⁶⁰ He viewed legislation applying beyond the low water mark as extraterritorial and passed under the "peace, order and good government" power. This statement can be reconciled with the 1842 circular only if one concludes that the legislation that the colonies did pass was valid under the "peace, order and good government" power and provided the law pertained to a matter connected with the colony's affairs.

For the current status of Australia's offshore criminal jurisdiction, see Chapter 4 and, for discussion of the still current operation of the offshore jurisdiction under the "peace, order and good government" provisions, now in the States, see *Pearce v Florenca* and the subsequent cases that rely on it in Chapter 2.

1.2.6.3 *Fisheries Jurisdiction of the Colonies*⁶¹

During those colonial times when it was accepted that colonial laws could not extend for more than three miles offshore some colonial legislatures attempted to bypass this limitation. For example, by attempting to encompass all of Shark Bay within the territorial waters of the colony of

⁵⁸ Cited in G Marston "Historical Aspects of Colonial Criminal Legislation Applying to the Sea" (1980) 14 *UBC Law Review* 299.

⁵⁹ In *New South Wales v Commonwealth* (1975) 135 CLR 337 Barwick CJ carried the majority, but others considered the colonial law officers were correct in the opinion they held; one of which was Stephen J at 443.

⁶⁰ *Ibid* at 371 per Barwick CJ.

⁶¹ The author particularly wishes to acknowledge the assistance gained from W Gullett, *Fisheries Law in Australia* (LexisNexis, Sydney, 2008), especially his treatment in Chapter 2 of the fisheries jurisdiction of the Australian colonies.

INTRODUCTION AND BACKGROUND

Western Australia, the *Shark Bay Pearl Fisher Act 1886* (WA) purported to apply beyond the three nautical mile territorial sea limit offshore. Similarly, the 1835 *Whale Fisheries Act*⁶² of the colony of Tasmania purported to apply on the high seas out to 20 miles from the shore.

When the imperial Parliament created the Federal Council of Australasia in 1855 one of its delegated powers was that of legislating with respect to "fisheries in Australasian waters beyond territorial limits"⁶³ meaning beyond the land limits. The high seas in those days commenced at three nautical miles and in international law states had no jurisdiction to legislate with respect to free-swimming fish in the high seas but they could claim property rights in sedentary species on the sea bottom along their coasts. As a result, the Federal Council enacted legislation under its fisheries power which applied to sedentary species, namely, pearl oysters, beche-de-mer and "any other fish or shell of the like kind".⁶⁴ Under this regime the individual colonies thus had jurisdiction with respect to all fisheries to three nautical miles and beyond this point the Federal Council regulated fisheries pertaining to sedentary species.

1.2.6.4 *Customs Jurisdiction of the Colonies*

The *New South Wales Constitution Act 1855* did not directly address the offshore jurisdiction of the New South Wales legislature. The Act did confer upon the New South Wales legislature power to impose duties of customs on the importation into the colony of any "goods, wares or merchandise whatsoever".⁶⁵ This provision applied despite any imperial Acts in force to the contrary. Laws of the New South Wales Parliament with respect to customs thus potentially applied offshore and, because they only applied to the colony, they prevailed over pre-existing imperial Acts. The present situation in relation to customs is discussed in Chapter 8.

1.3 Federation in 1901

Then on 1 January 1901 the Australian colonies federated into the Commonwealth of Australia and formed one indissoluble union by the operation of the Australian Constitution, which was established under an Act of the imperial Parliament. The colonies had previously, or in the case of Western Australia subsequently, held referenda and agreed to

62 An act for the regulation and protection of the whale fisheries and for extending to this island the statute for recovering seamen's wages.

63 *Federal Council of Australasia Act 1855* (Imp) s 15(c).

64 *Queensland Pearl Shell and Beche-de-mer Fisheries (Extra-territorial) Act 1888* (FCA) s 2; *Western Australia Pearl Shell and Beche-de-mer Fisheries (Extra-territorial) Act 1889* (FCA) s 2. These Acts were repealed by the *Pearl Fisheries Act 1952* (Cth).

65 See <www.foundingdocs.gov.au/area.asp?aID=3>.

this federation. The Constitution of 1900 repealed the *Federal Council of Australasia Act 1885* but did not “affect any laws passed by the Federal Council of Australasia and in force at the establishment of the Commonwealth”.⁶⁶ The offshore legislative competence previously shared by the imperial Parliament and colonial legislatures was then acquired by the Commonwealth.⁶⁷

The jurisdiction over the colonies’ offshore waters was not addressed by the Constitution itself.⁶⁸ Neither did the Constitution address whether the legislative competence of the colonies terminated at the low water mark or whether they had jurisdiction over the territorial seas. As federation itself effected no change in title of the offshore seas and subjacent seabed, but only the locus of legislative competence and sovereignty, then the situation was not directly affected by the colonies federating.⁶⁹ So the question of whether the Australian Commonwealth or the States had offshore jurisdiction lay dormant for many years after federation although there was the odd skirmish in the High Court about it.

1.3.1 Commonwealth Offshore Legislative Power Post-Federation

After Federation, the Commonwealth had power to legislate offshore. The Constitution conferred upon the Federal Parliament power to make laws with respect to certain subject matters.⁷⁰ Many of these heads of power provided a basis upon which the Federal Parliament could pass legislation applicable offshore.⁷¹ For example, the Federal Parliament has the power to make laws with respect to “trade and commerce with other countries and among the States”⁷² and this power extends to navigation and shipping;⁷³ “naval and military defence”;⁷⁴ “lighthouses, lightships, beacons and buoys”;⁷⁵ “quarantine”;⁷⁶ “fisheries in Australian

66 Constitution s 7.

67 *New South Wales v Commonwealth* (1975) 135 CLR 337 at 443 per Stephen J.

68 The early drafts of the Constitution that were preserved by Sir Samuel Griffith after the 1891 Constitutional Convention in Sydney and which are lodged with the Dixson Library, State Library of New South Wales, are conveniently collected in the appendices in M White and A Rahemtula (eds), *Sir Samuel Griffith: The Law and the Constitution* (Law Book Co, Sydney, 2002).

69 *New South Wales v Commonwealth* (1975) 135 CLR 337 at 443 per Stephen J.

70 Section 51 gives the “Parliament … power to make laws for the peace, order, and good government of the Commonwealth with respect to …” specific subject matters.

71 For further discussion on these powers, see H Zelling and M White, “Constitutional Background and Jurisdiction of Courts” in M White (ed), *Australian Maritime Law* (Federation Press, Sydney, 2nd edn, 2000), Ch 1, pp 18-22.

72 Section 51(i).

73 Section 98.

74 Section 51(vi).

75 Section 51(vii).

76 Section 51(ix). See further Chapter 8.

INTRODUCTION AND BACKGROUND

waters beyond territorial limits";⁷⁷ "insurance other than State insurance; also State insurance extending beyond the limits of the State concerned";⁷⁸ "foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth";⁷⁹ "the people of any race for whom it is deemed necessary to make special laws";⁸⁰ "immigration and emigration";⁸¹ and "external affairs".⁸²

As discussed in Chapter 2, in *New South Wales v Commonwealth* the High Court had to consider the scope of the external affairs power amongst other things. It was held the external affairs power extends to matters or things geographically situated outside Australia and confers upon the Federal Parliament the power to make laws with respect to the territorial sea and its solum. Mason J stated:

Once it is accepted that the boundaries of the Colonies terminated at low-water mark there is in my opinion no reason why the Commonwealth's power to make laws with respect to "external affairs" (s 51(xxix)) should not be regarded as conferring upon it a plenary power to legislate upon the topic of the territorial sea and its solum.⁸³

Mason J continued that the control and regulation of the territorial sea and its solum "is an aspect of the external sovereignty of Australia and Australia's external relationships with other nations" and thus falls within the scope of s 51(xxix).⁸⁴

In addition to the heads of power mentioned above, the Federal Parliament has other sources of power under which it can pass legislation applicable offshore. There are many of them but one example is the incidental power to legislate on matters incidental to the exercise of power under s 51.⁸⁵ The Commonwealth can also make laws conferring original jurisdiction on the High Court in any matter of Admiralty and maritime jurisdiction.⁸⁶ Finally, the territories power is a plenary power and not restricted to matters in s 51⁸⁷ so the Commonwealth Parliament can pass laws applicable offshore under s 122 if there is a connection between the law and the territory concerned.

⁷⁷ Section 51(x). See further Chapter 7.

⁷⁸ Section 51(xiv).

⁷⁹ Section 51(xx).

⁸⁰ Section 51(xxvi).

⁸¹ Section 51(xxvii). See further Chapter 6.

⁸² Section 51(xxix).

⁸³ *New South Wales v Commonwealth* (1975) 135 CLR 337 at 470 per Mason J.

⁸⁴ Ibid at 471 per Mason J.

⁸⁵ Section 51(XXXIX).

⁸⁶ Section 76(iii).

⁸⁷ Section 122. See *Lamshed v Lake* (1958) 99 CLR 132; *Newcrest Mining (WA) Ltd and BHP Minerals Ltd v Commonwealth* (1997) 190 CLR 513.

1.4 Conclusions

The various steps that saw the development of the Australian offshore suite of laws are addressed in the subsequent chapters of this book. Suffice to say for this chapter that after federation in 1901 nothing happened for many decades but then they were marked by the Commonwealth steadily becoming more active in international matters and entering into major international conventions. The next chapter, Chapter 2, sets out the steps in the constitutional development of the offshore jurisdiction between the Commonwealth and the States and it is this framework that presently underpins the whole offshore legal structure. In the chapters following that, the details are given of the offshore laws over particular aspects; namely, offshore petroleum and mining, criminal laws, offshore defence, immigration, fisheries, customs, the Antarctica and Southern Ocean region, shipping laws, certain other offshore geographical jurisdictional areas. This book ends with a chapter on a summary of the current position, which position is highly complex and quite unsatisfactory, and it makes proposals for reform and the way forward for a less complex Australian maritime offshore jurisdiction.

Chapter 2

Offshore Constitutional Laws

- 2.1 Introduction
- 2.2 Offshore Petroleum Agreement 1967
- 2.3 The 1958 Conventions; the Seas and Submerged Lands Act 1973 and its High Court Case
- 2.4 Subsequent High Court Cases 1975-1979
- 2.5 Offshore Constitutional Settlement 1979
- 2.6 Roll Back Provisions relating to Marine Pollution
- 2.7 Post 1979 High Court Cases
- 2.8 Offshore Zones
- 2.9 Conclusions

2.1 Introduction

Australia is a federation of six States with the addition of the Commonwealth in the 1901 federation and two subsequent self-governing Territories, so there are now nine Parliaments available to pass legislation that can have some effect in the Australian offshore jurisdiction.¹ Because of this federal structure the question of sovereignty and jurisdiction over Australian offshore seas under the federal constitutional structure is complex. This chapter addresses this federal constitutional aspect of maritime offshore jurisdiction,² with the subsequent chapters of the book highlighting some key aspects in more detail.³ To lead into these federal

1 The nine Parliaments are those of the Commonwealth of Australia, six States (New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia), and two Territories (Australian Capital Territory and the Northern Territory). The Australian Capital Territory has part of Jervis Bay as part of its legislative responsibility, but little marine environmental legislation is passed by the Australian Capital Territory Parliament so it will rarely be mentioned.

2 For New Zealand it is different, as it is a unitary state and not subject to the same complications as a federal one. The offshore jurisdiction in New Zealand is given effect in the *Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act 1977* and the offshore zones are in accordance with UNCLOS and customary international law.

3 This chapter sets out the main steps but, of course, there are other authors who have touched on various aspects. *International Law in Australia* (Law Book Co, Sydney, 1965), Ch 11, DP O'Connell examines imperial practice in relation to sovereignty and jurisdiction over Australian coastal waters and describes the historical development of maritime boundaries of the British dominions and Australia as well as the extraterritorial maritime jurisdiction of the Australian States. In *International Law in Australia* (Law Book Co, Sydney, 1984), Ch 15, RD Lumb examines the legal developments, legislation and decisions after the publication

aspects it is appropriate now to set out some of the major steps along the way to the current situation and then follow up with more detail throughout the rest of this chapter.

The question of whether the Australian Commonwealth or the States had offshore jurisdiction lay dormant after federation. The first major development to challenge this dormancy arose from the need to regulate the exploration and exploitation of offshore oil and gas and this challenge gave rise to the Offshore Petroleum Settlement in 1967. Then the Commonwealth gave legislative effect in the 1970s to the four 1958 international conventions⁴ in the *Seas and Submerged Lands Act 1973* (Cth) which claimed Commonwealth sovereignty from the low water mark or historic boundaries at time of federation. This offshore area, from the low water mark to the outer limit of the territorial sea, was claimed by the States and they made the issue a major constitutional one. The States' objection was that as colonies it was they who had offshore jurisdiction and federation with its consequent creation of the Commonwealth had not altered this position. The Commonwealth won the subsequent test case in 1975 in the High Court.⁵

However, it did not suit the Commonwealth to have to administer the small craft and other detail relating to activities close inshore, so the States and the Commonwealth agreed on the Offshore Constitutional Settlement 1979.⁶ Under this settlement the States were given legislative

(cont)

of the first edition, and applies these to a consideration of the Australian maritime zones, their relation to the international conventions and customs, issues of jurisdiction and sovereignty over the territorial sea, continental shelf and EEZ, and the consequences for resources exploration, navigation and shipping, crimes at sea and the conservation and protection of the marine environment. RD Lumb, *The Law of the Sea and Australian Offshore Areas* (University of Queensland Press, 2nd edn, 1978), considers the offshore zones under international law in relation to the Australian constitutional structure. R Cullen, *Federalism in Action: The Australian and Canadian Offshore Disputes* (Federation Press, Sydney, 1990) examines the effect of regionalism in Australia and Canada on the division of powers in regard to the territorial sea and continental shelf. The book contains a digest of the relevant case law and the Offshore Constitutional Settlement. M Davies and A Dickey, *Shipping Law* (Law Book Co, Sydney, 3rd edn, 2004), Ch 2 contains a brief examination of the Commonwealth's legislative powers under the Constitution, the scope of the Commonwealth's and States' powers to legislate extraterritorially, and the terms of the Offshore Constitutional Settlement.

- 4 The particular convention was the *Convention on the Territorial Sea and the Contiguous Zone 1958*, as this convention provided for the territorial sea to extend from the low water mark, or some other basis for the baselines, as appropriate. The other three conventions were the *Convention on the High Seas 1958*, the *Convention on the Continental Shelf 1958*, and the *Convention on Fishing and the Conservation of the Living Resources of the High Seas 1958*.
- 5 *New South Wales v Commonwealth (Seas and Submerged Lands Act Case)* (1975) 135 CLR 337.
- 6 For greater detail on all of these points, see M White, *Australasian Marine Pollution Laws* (Federation Press, Sydney, 2nd edn, 2007), Ch 6 "Australian Offshore Jurisdictions – Petroleum and Constitutional Settlements".

powers and title out to the limit of the territorial sea (which was then three nautical miles), if they chose to exercise it.⁷ Legislation was passed by the Commonwealth, the States and the Northern Territory to give effect to this agreement. Subsequently Australia played an active part in the next major international convention on the offshore zone, UNCLOS,⁸ and this convention made major changes to the zones offshore and also allowed a 12-mile wide territorial sea. Because of their importance to the topic, these zones under UNCLOS are briefly described towards the end of this chapter.

This then is a summary and the rest of this chapter will expand on this and give some detail of the Offshore Petroleum Agreement 1967, then the High Court cases up to the Offshore Constitutional Settlement 1979, and discuss the subsequent cases. After that follows the description of the present offshore maritime zones under UNCLOS.

2.2 Offshore Petroleum Agreement 1967

Oil and gas exploration grew slowly from a single oil bore in South Australia in 1892⁹ up to BHP permits, through its subsidiary Hematite Petroleum Pty Ltd ("Hematite"), to explore some 158,000 kilometres in offshore areas from the South Australian, Tasmanian and Victorian governments in the 1960s. Then by 1967 Hematite and its partner in the exploration, Esso Exploration Australia Inc ("Esso"), had made major finds in the Gippsland Basin off the Victorian coast. Other finds followed. At this stage, although there was general Commonwealth legislation encouraging exploration and exploitation of minerals, including oil and gas, there was no Commonwealth legislation exercising specific jurisdiction over the offshore areas.¹⁰ This legislation came from the various States, with many differences in their regimes, which was not at all satisfactory.

In the meantime on the international scene and the law of the sea conventions there was increasing interest in offshore oil and gas. Of the four conventions in 1958 the *High Seas Convention* 1958 required States to control it in general terms,¹¹ and the *Continental Shelf Convention* 1958 obliged States to take appropriate means to protect living resources of the sea from harmful agents around continental shelf installations.¹²

⁷ Australia extended the outer limit of its territorial sea to 12 miles from the baseline in 1990, but under the agreement the powers of the States remained at the limit of the three mile limit, where it still remains.

⁸ *United Nations Convention on the Law of the Sea* 1982, Montego Bay, Jamaica; [1994] ATS 31.

⁹ *Off Shore Oil and Natural Gas: Exploration and Legislation* (Victorian Government Printer, 1968).

¹⁰ See generally R Cullen, *Federalism in Action. The Australian and Canadian Offshore Disputes* (Federation Press, Sydney, 1990), Chs 3, 4.

¹¹ Article 24.

¹² Article 5(1).

(UNCLOS 1982 later made similar provisions requiring States to adopt laws and regulations to prevent pollution from seabed activities and artificial islands in their offshore jurisdiction.)¹³

In 1962 the Commonwealth Minister for National Development and the State Ministers for Mines decided to refer the matter of a cooperative approach on the subject of offshore petroleum regulation to the Standing Committee of Commonwealth and State Attorneys-General (SCAG). No government was confident as to the outcome of any litigation on the vexed question of jurisdiction over the territorial sea and the continental shelf and advisory opinions from the High Court were not available,¹⁴ so they were reluctant to go down the litigation path. In the result they agreed on the terms of the 1967 Australian Offshore Petroleum Agreement. This provided that the Commonwealth and the States would each introduce complementary legislation to establish a regime within which offshore petroleum exploration and exploitation could be undertaken and the royalties would be shared.¹⁵

The agreement summarises its terms in the heading and preamble. The heading states:

Agreement relating to the Exploration for, and the Exploitation of, the Petroleum Resources, and certain other Resources, of the Continental Shelf of Australia and of certain Territories of the Commonwealth and of certain other Submerged Land.

And the preamble continues:

WHEREAS in accordance with international law Australia as a coastal state has sovereign rights over the continental shelf beyond the limits of Australian territorial waters for the purpose of exploring it and exploiting its natural resources;

AND WHEREAS Australia is a party to the *Convention on the Continental Shelf* signed at Geneva on 29th April, 1958, in which those rights were defined;

AND WHEREAS the exploration for and the exploitation of the petroleum resources of submerged lands adjacent to the Australian coast would be encouraged by the adoption of legislative measures applying uniformly to the continental shelf and to the sea-bed and subsoil beneath territorial waters;

AND WHEREAS the Governments of the Commonwealth and of the States have decided, in the national interest, that, without raising questions concerning, and without derogating from, their respective constitutional powers, they should co-operate for the purpose of

13 Article 208(1).

14 *Re Judiciary and Navigation Acts* (1921) 29 CLR 257.

15 For a fuller description of these events, see R Cullen, *Federalism in Action. The Australian and Canadian Offshore Disputes* (Federation Press, Sydney, 1990), Ch 3.

ensuring the legal effectiveness of authorities to explore for or to exploit the petroleum resources of those submerged lands:

AND WHEREAS the Governments of the Commonwealth and of the States have accordingly agreed to submit to their respective Parliaments legislation relating both to the continental shelf and to the seabed and subsoil beneath territorial waters and have also agreed to co-operate in the administration of that legislation.

NOW IT IS HEREBY AGREED as follows ...

The agreement basically provides for a cooperative approach amongst the Commonwealth and the States with the one set of laws covering the activities the terms of which was to be decided by joint committees on which all interested government entities had a say. The second clause of the recitations to the Offshore Petroleum Agreement 1967 recited that "Australia" had rights over the continental shelf beyond the territorial sea and the fifth clause recited that the agreement was made without raising concerns about the parties' "respective constitutional powers". So the fifth clause merely preserved rights to be fought over later if the need arose. More detail about the agreement is set out in Chapter 3.

The legislation resulting from the Petroleum Agreement 1967 was a combination of Acts passed by the Commonwealth and State Parliaments, details of which are addressed in Chapter 3. Suffice to say for present purposes is that the main Act was the *Petroleum (Submerged Lands) Act 1967* (Cth). This Act was repealed and replaced in 2006 by the *Offshore Petroleum Act 2006*, the offshore aspects of which are also set out in Chapter 3. The claims to offshore jurisdiction in the 2006 Act did not change substantially from the 1967 Act, although many of the regulatory aspects did change.¹⁶ The *Offshore Petroleum Act* was substantially amended and its name changed in 2008, also addressed in Chapter 3.

This completes the general background to the Offshore Petroleum Agreement 1967 and it is now appropriate to take up these and other developments in more detail, so attention will now be paid to those wider aspects of offshore constitutional issues.

2.3 The 1958 Conventions; the Seas and Submerged Lands Act 1973 and its High Court Case

The first United Nations Conference on the law of the sea was held in Geneva in 1958, known as UNCLOS I, following preliminary drafting done by the International Law Commission. As mentioned above, the

¹⁶ Readers may note that sea installations, which are treated differently from oil and gas installations, are dealt with under the *Sea Installations Act 1976* (Cth), and are addressed in Chapter 3.

conference agreed on four conventions, which were the *Continental Shelf Convention*, the *Convention on the High Seas*, the *Convention on the Territorial Sea and the Contiguous Zone* and the *Convention on Fishing and the Conservation of the Living Resources of the High Seas*.¹⁷ All of these conventions reveal their purpose from their titles but the one of immediate interest is the *Territorial Sea and Contiguous Zone Convention*, as it dealt with the maritime zones adjacent to the coastline of the coastal state; which zones were internal waters, territorial sea and contiguous zone. It gave the coastal state its rights and obligations in these zones, but that convention did not deal with the very contentious aspect as to the width of the territorial sea. The parties to the conference were unable to come to any agreement on this as there were so many disparate points of view.

The United Nations organised a second conference to deal with this issue in 1960, but it was short and unsuccessful (known as UNCLOS II). There the parties were still too far apart on the question of the width of the territorial sea for any consensus to emerge. The matter was then dropped until the United Nations organised the third law of the sea conference (known as UNCLOS III), which had its first session in 1973 and then continued, sometimes desultorily, until a final agreement emerged in the *United Nations Convention on the Law of the Sea* at Montego Bay, Jamaica, on 10 December 1982 (UNCLOS). The international scene and UNCLOS will be returned to later but there were important Australian domestic legal developments and for these one needs to go back in time.

In 1969 a test case in the High Court in *Bonser v La Macchia*¹⁸ arose from a fisherman who had been fishing some six miles offshore from Sydney who was charged with using unlawful nets, an offence under the *Fisheries Act 1952* (Cth). The defence to the charge was that this Commonwealth Act did not extend beyond the territorial sea, then only being three miles wide, and six miles offshore was not "Australian waters" under the Constitution.¹⁹ The court was against this argument and held that the fisheries law was valid beyond the then outer limit of the territorial sea. In the judgments there was some discussion of the question of the inner limits of the territorial sea and whether the Commonwealth or the States had jurisdiction over those waters but as these aspects were not part of the ratio of the case they carried no great weight.²⁰

17 These four 1958 conventions and their effect on Australian law were the subject of the excellent book by the late Professor RD Lumb, *The Law of the Sea and Australian Off-Shore Areas* (University of Queensland Press, 2nd edn, 1978).

18 (1970) 122 CLR 177. The earlier case of *R v Keyn* (1876) 2 Ex D 63 had raised some of the basic issues about when the British laws extended offshore but had not definitively settled it for present purposes.

19 The Constitution gives power to the Commonwealth with respect to "51(x) ... fisheries in Australian waters beyond territorial limits".

20 The Solicitor-General for New South Wales expressly submitted that it was undesirable for the court to decide what was the inner margin of Australian waters: *Bonser v La Macchia* (1970) 122 CLR 177 at 180.

In another development, the Senate Select Committee established to follow on from the Offshore Petroleum Agreement 1967²¹ had included in its recommendations that the Parliament should deal with the offshore jurisdiction issue apart from petroleum.²² Then a Bill on the subject was introduced by the Gorton government in 1970 and, after some stops and starts, legislation was passed finally in the *Seas and Submerged Lands Act* 1973 under the Whitlam government.²³ Judicial challenge eventuated from the States because this Act claimed Commonwealth sovereignty from the low water mark or recognised closing lines. The Commonwealth claim is exemplified by the preamble to that Act:

WHEREAS a belt of sea adjacent to the coast of Australia, known as the territorial sea, and the airspace over the territorial sea and the bed and subsoil of the territorial sea, are within the sovereignty of Australia:²⁴

AND WHEREAS Australia is a party to the *Convention on the Territorial Sea and the Contiguous Zone* a copy of which in the English language is set out in Schedule I:

AND WHEREAS Australia as a coastal state has sovereign rights in respect of the continental shelf (that is to say, the sea-bed and the subsoil of certain submarine areas adjacent to its coast but outside the area of the territorial sea) for the purpose of exploring it and exploiting its natural resources:

AND WHEREAS Australia is a party to the *Convention on the Continental Shelf* a copy of which in the English language is set out in Schedule 2:

BE IT THEREFORE ENACTED ...

21 By resolution passed on 8 November 1967 the Senate established the Select Committee to inquire and report on a number of matters, including on aspects of the legislation, administration, royalties etc arising from the agreement.

22 The history of the legislation is excellently set out by R Cullen, *Federalism in Action: The Australian and Canadian Offshore Disputes* (Federation Press, Sydney, 1990), Ch 4. See also M Haward, "The Australian Offshore Constitutional Settlement" (1989) 13 *Marine Policy* 334; D Rothwell and S Kaye, "Australia's Legal Framework for Integrated Oceans and Coastal Management" in M Haward (ed), *Integrated Oceans Management: Issues in Implementing Australia's Ocean Policy* (CRC for Antarctica and the Southern Ocean, Research Report 26 May 2001, Hobart), pp 11-31.

23 The full background story of the petitions by States regarding their offshore jurisdiction over the territorial sea to the Privy Council, to thwart the Whitlam government's attempts to sideline their constitutional position, is fully set out by A Twomey *The Chameleon Crown: The Queen and Her Australian Governors* (Federation Press, Sydney, 2006), Ch 10 "The Seabed Petitions"; and see also A Twomey, "Keeping the Queen in Queensland – How Effective is the Entrenchment of the Queen and Governor in the Queensland Constitution?" (2009) 28 *UQLJ* 81.

24 This assertion paraphrases Arts 1 and 2 of the *Convention on the Territorial Sea and the Contiguous Zone* 1958.

As can be seen from the text of the preamble, the Commonwealth claim was for jurisdiction from, in effect, the low water mark or established boundary of the States at federation, ie port limits etc.²⁵ This claim from the low water mark directly usurped the traditional understanding of the States that it was they who had jurisdiction from the low water mark. So the States all challenged the Commonwealth in a major constitutional case in the High Court, *New South Wales v Commonwealth (Seas and Submerged Lands Act Case)* in 1975.²⁶

The result of the High Court challenge was that the claims of the Commonwealth were upheld in the *Seas and Submerged Lands Act Case* and this gave the Commonwealth full power over the sea from the low water mark or historic boundaries. The whole court held that the provisions of the Act relating to the continental shelf were within the legislative power of the Commonwealth under s 51(xxix) of the Constitution (the external affairs power); and a majority held that the provisions relating to the matters other than the continental shelf were also within s 51(xxix) on the ground that they gave effect to the *Convention on the Territorial Sea and the Contiguous Zone*. Three justices upheld the Commonwealth claim on the further ground that the external affairs power was not limited to authorising laws with respect to Australia's relationships with foreign countries but extended to any matter, thing, person or activity external to Australia. To put the issue beyond doubt, a majority also held that the boundaries of the former Australian colonies ended at the low water mark and that they had no sovereign or proprietary rights in respect of the territorial sea or the subadjacent soil or superadjacent airspace.

The *Seas and Submerged Lands Act Case* settled the major point for present purposes, which was that the Commonwealth had jurisdiction to seaward from the low water mark or historic boundaries and not from the outer edge of the territorial sea (three miles from the coast as it then stood). The extent of the external affairs power under the Constitution was the basis for one of the major arguments that was upheld, but as is shown by the High Court cases mentioned under, the full extent of this constitutional power is still not finally defined.

2.4 Subsequent High Court Cases 1975-1979

In the years after the 1975 *Seas and Submerged Lands Act Case* there was a series of High Court cases that dealt with the offshore jurisdiction. These cases are best dealt with chronologically, beginning with one decided only the following year. To the surprise of many people, this next High

²⁵ Article 3 of the convention provides: "Except where otherwise provided in these articles, the normal baseline for measuring the breadth of the territorial sea is the low water line along the coast as marked on large scale charts officially recognized by the coastal State".

²⁶ (1975) 135 CLR 337.

Court case was a win for the States' claims. In *Pearce v Florencia*²⁷ in 1976, the issue was whether the Western Australian *Fisheries Act* applied about two miles offshore. The magistrate dismissed the prosecution case for taking fish unlawfully on the grounds that the Western Australian Act had no force, based on the *Seas and Submerged Lands Act Case* that the Commonwealth had jurisdiction from the low water mark or historic boundaries. This minor fishing case was removed from the Magistrates Court in Western Australia into the full panoply of the High Court in Canberra which held, in one of its rare unanimous decisions, that the Western Australian Act did apply because it was within the plenary power of the Western Australian Parliament to make laws for the "peace, order and good government" of the State and that it was not inconsistent with the Commonwealth *Seas and Submerged Lands Act 1975*. This is the "nexus provision", which is still good law, the point of which is that, provided a State law is not inconsistent with a Commonwealth law,²⁸ it can have effect offshore where sufficient nexus is shown between the Act, the activities complained of and the relevant coastal state.

It is appropriate to mention at this stage that the constitutional basis for much of the Commonwealth jurisdiction over what otherwise may have been the jurisdiction of the States, including offshore, lies in s 51(xxix) of the Constitution, the "external affairs power".²⁹ Under this power, in combination with other powers, the Commonwealth, in a series of cases over quite a few years, had its legislative power over the States much extended.

Also in 1976, in *Bistradic v Rokov*,³⁰ the issue in the High Court was the amount of the upper limit of liability which could be claimed against a shipowner. Mr Bistradic claimed damages for personal injuries in a ship and the defendant claimed to limit the amount to which it could be liable in reliance on the British *Merchant Shipping Act 1894* (Imp) which limit was a very low amount. However, the British Act had been amended by the *Merchant Shipping (Liability of Shipowners and Others) Act 1958* (UK), raising the upper amount quite considerably, and the issue was whether the amending Act applied in Australia as well as in the United Kingdom. The majority held that it did not because the 1958 United Kingdom amending Act was not expressed to apply in Australia and nor did it apply by reasonable inference. The result was that the original British Act applied in Australia but the amendment to it did not.

27 (1976) 135 CLR 507.

28 If the Commonwealth law covers the field and the State law is inconsistent with it then the State law is invalid to the extent of its inconsistency: Constitution s 109.

29 The constitutional provision is: "Section 51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:- ... (xxix) External affairs; ...".

30 (1976) 135 CLR 552.

In 1977 the Commonwealth jurisdiction offshore was confirmed in *Robinson v Western Australian Museum*³¹ where the Western Australian Acts were held invalid when they purported to vest possession of all offshore historic shipwrecks in the Western Australian Maritime Museum. The *Gilt Dragon*, an old Dutch wreck, was just under three miles offshore. The High Court judges' reasons were divided but the majority held, in effect, that the Western Australian law did not operate over this wreck. There was no sufficient nexus and, some held, there was no State jurisdiction offshore, others held that the Western Australian legislation was inconsistent with the Commonwealth *Navigation Act 1912* and still others dissented. One may mention that this jurisdiction over historic shipwrecks was subsequently restored to the States, if they chose to exercise it, for the first three miles offshore in the Offshore Constitutional Settlement 1979 and its subsequent legislation. The Commonwealth *Historic Shipwrecks Act 1976* also covers this jurisdiction.³²

In *Raptis v South Australia*,³³ in another 1977 decision, a fisherman had held a Commonwealth fishing licence but not one from the South Australian government while prawning off the South Australian coast and had his catch seized by the South Australian fisheries inspector. The issue was exactly where the South Australian State boundary lay in the several gulfs and bays off South Australia. The argument ranged far and wide over the common law, international law, historic bays and the history of the early legislation proclaiming the limit of the colony. The majority of the court held that the South Australian boundaries did not include the relevant bays and other waters so the South Australian legislation did not apply and, further, that it was inconsistent with the Commonwealth legislation (in contravention of s 109 of the Constitution).

This completes the recitation of the major High Court cases that have touched on the extent and shape of the offshore maritime jurisdiction up until the Offshore Constitutional Settlement made in 1979 and it is to this that attention will now be directed.

2.5 Offshore Constitutional Settlement 1979

Having established in 1975 the point in the *Seas and Submerged Lands Act Case* that the Commonwealth's jurisdiction ran from the low water mark or historic boundaries, the Commonwealth, now under a new government, and the States agreed that it was more convenient for the States to be given this jurisdiction back.

31 (1977) 138 CLR 283.

32 See also M White, "Salvage, Towage, Wreck and Pilotage" in M White (ed), *Australian Maritime Law* (Federation Press, Sydney, 2nd edn, 2000), Ch 9; and also M White, "Australian Laws-Commonwealth", in M White, *Australasian Marine Pollution Laws* (Federation Press, Sydney, 2nd edn, 2007), Ch 7 especially s 7.8.

33 (1977) 138 CLR 346.

The beginning of the formal process began when the Standing Committee of the Attorneys-General met in Hobart on 5 March 1976 and formed three sub-committees which constructed a proposed legal framework. Much negotiation followed and their work culminated in the Premiers Conference of 29 June 1979 where the Offshore Constitutional Settlement 1979 was finalised (the OCS 1979).³⁴ The agreement, published under the title of "Agreed Arrangements", covered quite a long list of matters, but the major ones which touch on the present topic are:

- (a) the Commonwealth was to give each State the same powers with respect to the territorial sea adjacent to its coasts as it would have if the waters were within the limits of the State;
- (b) the Commonwealth would pass legislation to vest in each State proprietary rights and title in respect of the seabed of the adjacent territorial sea, with reservations for national purposes such as defence, etc;
- (c) these State powers were limited to three miles breadth. (This was the then territorial sea but the OCS 1979 agreement provided that it stayed at three miles when the Commonwealth proclaimed the territorial sea to be 12 miles);
- (d) the Offshore Petroleum Agreement 1967 was confirmed in that the States would regulate petroleum in the area within three miles of the low water mark or historic boundaries and the Commonwealth outside that area, but with a statutory Joint Authority for each State's adjacent waters and special conditions were agreed for Western Australia;
- (e) offshore mining for minerals other than petroleum were to be under a similar arrangement to that for offshore petroleum;
- (f) offshore fisheries would give legislative responsibilities to the States out to three miles and to the Commonwealth beyond that, but this was to be flexible and could be varied by agreement for particular circumstances;
- (g) historic shipwrecks would come under the Commonwealth Act for those States that agreed to it and for those areas beyond State jurisdiction;³⁵
- (h) the *Great Barrier Reef Marine Park Act 1975* (Cth) would continue to apply and govern the GBR rights and title in the seabed, with

³⁴ See the pamphlet entitled "Offshore Constitutional Settlement. A Milestone in Co-operative Federalism" (AGPS, Canberra, 1980). For discussion and greater detail see R Cullen, *Federalism in Action. The Australian and Canadian Offshore Disputes* (Federation Press, Sydney, 1990), para 4.3. A further useful document is "Offshore Constitutional Settlement: Selected statements and documents 1978-79" (Commonwealth of Australia, 1980). These documents are included as Annexes 1 and 2 in this book.

³⁵ *Historic Shipwrecks Act 1976* (Cth); see *Robinson v Western Australian Museum* (1977) 138 CLR 283 where the High Court held that an old Dutch ship found on the seabed 2.87 miles off the Western Australian coast was not within the Western Australian Act, as no sufficient nexus had been shown. The Commonwealth Act, when it came into force, then regulated such activities.

- the Commonwealth and Queensland governments agreeing on joint consultative arrangements, including for those parts of it that were internal Queensland waters;
- (i) other marine parks in the State waters' jurisdiction (territorial sea of three miles) would be controlled by the States and the Commonwealth would establish and control park area beyond that;
 - (j) in relation to criminal law, State laws would apply to offences committed in the territorial sea and intrastate shipping and otherwise Commonwealth laws were to apply, but the Commonwealth would pass legislation to apply the criminal laws of the adjacent State or Territory (the "applied law");³⁶
 - (k) in relation to shipping and navigation, which broadly covered regulation of construction, surveys, certification, ship's crews and qualifications, the States would be responsible for intrastate trading vessels and the Commonwealth for interstate and overseas ones. The States would also be responsible for commercial fishing vessels, except overseas voyaging ones, for vessels on internal and inland waterways, and for pleasure craft. The Commonwealth would take responsibility for offshore mobile drilling rigs and offshore industry vessels;
 - (l) in relation to ship-sourced marine pollution, it was agreed that the arrangements that existed before the High Court decision in the *Seas and Submerged Lands Case* should be continued, with the Commonwealth legislation having a savings clause to allow the States to legislate to implement certain aspects of marine pollution conventions if they should wish to do so;
 - (m) as the Northern Territory was just entering into self-government, it was to be treated as a State for the purposes of the OCS 1979;
 - (n) in relation to Jervis Bay, the Commonwealth and New South Wales were to enter into an agreement concerning it;³⁷
 - (o) in conclusion, it was agreed that there would be continuing discussions on land-based marine pollution, marine pollution through dumping and about the protection of whales.

The concluding paragraph of the settlement was a statement that the Commonwealth and the States should cooperate and that past attitudes of confrontation and of centralising Commonwealth power have resulted in polarisations and in all interests suffering. The very last sentence provided: "The offshore arrangements have laid the basis for a permanent workable and beneficial solution of problems that have beset the nation

³⁶ For the application of the *Crimes at Sea Act 1979* (Cth) and how the offshore criminal jurisdiction developed, see Chapter 4.

³⁷ The southern part of Jervis Bay land and some of the southern bay waters were and are Commonwealth territory. It had been contemplated at the time of federation that Jervis Bay would become a port for the Australian Capital Territory and, for this reason, this land and its adjacent waters were established with the Australian Capital Territory as part of the Commonwealth territory.

for a decade or more". One might add that if only this sentiment had worked out, as to which see the author's conclusions to the contrary. (The OCS 1979 is set out in Annex 1 to this book.)

The agreement was given effect in a number of Acts passed by the States under the constitutional power for the State to request and the Commonwealth to consent to pass legislation.³⁸ The Commonwealth then responded by passing two substantive Acts one of which related to the States' powers and the other to States' titles over the area and amended a number of other related Acts.³⁹

The first of the two substantive Acts was the *Coastal Waters (States Powers) Act 1980* (Cth), under s 5 of which the States were given legislative powers over adjacent waters as if the "coastal waters of the State ... were within the limits of the State, including laws applying in or in relation to the sea-bed and subsoil beneath, and the airspace above...". Beyond the coastal waters the States had powers over subterranean mining that was adjacent to the land of the State and also over ports, harbours and other shipping facilities, installations and dredging.⁴⁰ Finally, the States were given powers relating to fisheries beyond the coastal waters as may be agreed by arrangement with the Commonwealth.⁴¹

The drafting technique used for delineating the waters to which the agreement was to apply was to refer to the "adjacent" waters to the State, which were defined and set out in Sch 2 to the *Petroleum (Submerged Lands) Act 1967*, which Act is mentioned above and more fully dealt with in Chapter 3. This accommodated the requirement that the relevant waters only related to those waters offshore from the respective State coastline. The width of the relevant waters was accommodated by describing them as "coastal waters" which were defined as the then

³⁸ The "request and consent" power in s 51(XXXVIII) of the Constitution provides: "The Parliament shall, subject to this Constitution, have the power to make laws for the peace, order and good government of the Commonwealth with respect to:- ... (XXXVIII) The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, ...". The State Acts requesting this were the *Constitutional Powers (Coastal Waters) Act 1979* (NSW); *Constitutional Powers (Coastal Waters) Act 1980* (Qld); *Constitutional Powers (Coastal Waters) Act 1979* (SA); *Constitutional Powers (Coastal Waters) Act 1979* (Tas); *Constitutional Powers (Coastal Waters) Act 1980* (Vic); *Constitutional Powers (Coastal Waters) Act 1979* (WA). There was no need for a similar request by the Northern Territory as it was a Territory and not a State and the Commonwealth had the power to pass legislation affecting it anyway.

³⁹ These Acts were the *Coastal Waters (State Powers) Act 1980*; *Coastal Waters (Northern Territory Powers) Act 1980*; *Coastal Waters (State Title) Act 1980*; *Coastal Waters (Northern Territory Title) Act 1980*; *Seas and Submerged Lands Amendment Act 1980*; *Petroleum (Submerged Lands) Amendment Act 1980*; *Petroleum (Submerged Lands) (Royalty) Amendment Act 1980*; *Petroleum (Submerged Lands) (Exploration Permit Fees) Amendment Act 1980*; *Petroleum (Submerged Lands) (Pipeline Licence Fees) Act 1967*; and the *Crimes at Sea Act 1979*.

⁴⁰ Section 5.

⁴¹ Section 5(c).

territorial sea, except that if its width be extended wider than three miles, as it later was, the States' powers in the coastal waters still remained only out to the three mile limit. The "coastal waters" were also defined to include the waters to the landward side of the baseline of the territorial sea which are the "internal waters" from an international law point of view. There was no need to deal with "inland" waters, such as ports, rivers and dams, as they were clearly States' waters and never the subject of a claim by the Commonwealth.

The resulting *Coastal Waters (State Powers) Act 1980* had various savings provisions which confirmed (a) the continuing status of the territorial sea under international law, including the right to innocent passage; (b) that the Act did not affect the situation in relation to the outer limits of the State; (c) derogate from the existing power to make laws having extraterritorial effect, or (d) give force to a State law to the extent of its inconsistency with the Commonwealth laws.⁴²

The other substantive Commonwealth Act to give effect to the OCS 1979 was the *Coastal Waters (State Title) Act 1980*. It gave title in the coastal waters to the same extent as the *Coastal Waters (State Powers) Act 1980*. Its main provision, under s 4, was that the States were vested with the same right and title to the seabed beneath the coastal waters and the water column and air space above it as if they were within the limit of the States. This vesting of title in the States was to give way to any pre-existing title in another person or to the right of the Commonwealth to use the area for communications, safety of navigation, quarantine or defence or to authorise the construction and use of undersea pipelines and, finally, the title was subject to the operation of the *Great Barrier Reef Marine Park Act 1975*.⁴³ To accommodate that Australia's marine surveys may make changes to the baseline from which the territorial sea was measured, the Act provided that if the baseline was to change then the title vested in the State moved with that change, either in or out.⁴⁴

The *Titles Act* had certain other provisions, which included that the seabed on which Commonwealth installations were then placed was not affected except if the Commonwealth later so gazetted; that innocent passage for ships passing through the territorial sea was retained, and the *Commonwealth Places (Application of Laws) Act 1970* still applied in areas where applicable. A savings clause confirmed that the Act was not to be taken as extending the limits of any State or derogate from any other right or title otherwise lying with the States.⁴⁵

⁴² Sections 6, 7.

⁴³ Section 4.

⁴⁴ Section 4(4). Revision of the baseline does occur from time to time, usually with minor changes being made.

⁴⁵ Section 7.

The situation of the Northern Territory, not being a State, was dealt with by its own separate two Acts.⁴⁶ This was because the Northern Territory, in its capacity as a “territory” of the Commonwealth, was under the legislative jurisdiction of the Commonwealth⁴⁷ and so the Northern Territory did not need to pass legislation requesting the Commonwealth to pass this legislation as the Commonwealth already had that power under the Constitution. Of these two Acts the *Coastal Waters (Northern Territory Powers) Act 1980* had some variations from the terms of the Act for the States. The main provision for the Northern Territory was that the legislative powers of the Legislative Assembly of the Territory extended to making laws as if the coastal waters were within the limits of the Territory, including the relevant seabed, subsoil and airspace. However, the Northern Territory was given powers to make laws concerning mining from the land, ports, harbours and other shipping facilities beyond the outer limits of these coastal waters. The Act also provided for the Northern Territory to make laws relating to fisheries beyond the coastal waters where there was an arrangement with the Commonwealth.⁴⁸ The Northern Territory Act had the same savings about innocent passage etc as the States’ Act.

Now the States and the Northern Territory had the jurisdiction over offshore title and powers it was necessary that the States pass legislation giving effect to the OCS 1979 and this they each did with their own Acts. The first set of Acts applied the OCS 1979 and the second set, which included the Northern Territory, applied their other relevant Acts offshore.⁴⁹

46 *Coastal Waters (Northern Territory Title) Act 1980* (Cth) and *Coastal Waters (Northern Territory Powers) Act 1980* (Cth).

47 Constitution s 122: “The Parliament may make laws for the government of any territory ...”.

48 Section 5.

49 *Constitutional Powers (Coastal Waters) Act 1979* (NSW); *Constitutional Powers (Coastal Waters) Act 1980* (Qld); *Constitutional Powers (Coastal Waters) Act 1979* (SA); *Constitutional Powers (Coastal Waters) Act 1979* (Tas); *Constitutional Powers (Coastal Waters) Act 1980* (Vic); *Constitutional Powers (Coastal Waters) Act 1979* (WA). The Acts mentioned above are those directly related to the OCS 1979 and the other Acts giving effect to the States’ laws offshore are: *Application of Laws (Coastal Sea) Act 1980* (NSW); *Off-shore Waters (Application of Laws) Act 1976* (SA), which was amended after 1976 to give effect to subsequent changes; *Offshore Waters Jurisdiction 1976* (Tas), *Offshore (Application of Laws) Act 1982* (Vic), *Off-shore (Application of Laws) Act 1982* (WA); *Off-Shore Waters (Application of Territory Laws) Act* (NT). These application Acts gave effect to all laws, civil and criminal, except where some other legislation was to the contrary effect. They are each slightly different so readers should refer to each separate Act as may be appropriate. The situation in Queensland is slightly different. Instead of passing a single Act, the *Acts Interpretation Act 1954* (Qld) defines “coastal waters of the State” to include waters adjacent to the State of Queensland and which lie to the landward side of Australia’s territorial sea. Application of Queensland laws is achieved by separate provisions in various Acts: *Jones v Queensland* [1998] 2 Qd R 385 at 389. For example, see *Petroleum (Submerged Lands) Act 1982* (Qld) s 14; *Off-shore Facilities Act 1986* (Qld) s 7. More recent Acts use the term “coastal sea”, eg *Consumer Credit Code 1994* (Qld) s 37; *Corporations (Queensland) Act 1990* s 55(11).

As mentioned above, the OCS 1979 made provision for offshore mining (quite apart from petroleum), which they termed “minerals” in the legislation, under which the basic cooperative structure for the Offshore Petroleum Agreement 1967 was kept, ie that the States regulate it out to three miles and the Commonwealth outside of that. To give effect to this the Commonwealth Parliament passed a different group of Acts.⁵⁰

The OCS 1979 also made provision for agreement to be reached between one or more States and the Commonwealth on the subject of fisheries. By agreement between the Commonwealth and South Australia (SA), the power to regulate the South Australian rock lobster fisheries in some southern Commonwealth waters was passed to South Australia. This lead to an attack on the *Fisheries Act 1952 (Cth)*, the *Fisheries Act 1982 (SA)*, the *Petroleum (Submerged Lands) Act 1967 (Cth)* and the *Coastal Waters (State Powers) Act 1980 (Cth)* in the High Court in *Port MacDonnell Professional Fishermens Association Inc v South Australia*,⁵¹ which case is further mentioned under.

The powers of the States to legislate extraterritorially were confirmed and strengthened when the last colonial legislative links with the imperial Parliament were removed with the *Australia Act 1986 (Cth)* and the *Australia Act 1986 (UK)*.⁵² By s 2 the States were given full power to make laws having extraterritorial effect for their own peace, order and good government, a power that the High Court had upheld in *Pearce v Florena*⁵³ but which was now expressly provided for in the legislation.

The width of the Australian jurisdiction offshore, in international terms, varied over the years with the variation of what width was accepted internationally. Under s 7 of the *Seas and Submerged Lands Act 1973 (Cth)* the Governor-General was given power, consistently with the *Convention on the Territorial Sea and the Contiguous Zone 1958*, to declare the outer limits of the whole or any part of the territorial sea. In 1990 the outer limit of the territorial sea was declared to be extended to 12 miles, but this did not extend the jurisdiction of the States beyond the three mile limit previously agreed under the 1979 Offshore Constitutional Settlement, and in 1994 Australia established an exclusive economic zone (EEZ) around its coast of 200 miles, adopting the UNCLOS 1982 pro-

50 These were the *Minerals (Submerged Lands) Act 1981*; *Minerals (Submerged Lands) Exploration Fees Act 1981*; *Minerals (Submerged Lands) (Production Licence Fees) Act 1981*; *Minerals (Submerged Lands) (Registration Fees) Act 1981*; *Minerals (Submerged Lands) (Royalty) Act 1981*; *Minerals (Submerged Lands) (Works Authority Fees) Act 1981*.

51 (1989) 168 CLR 340, mentioned above.

52 The Commonwealth Act requesting, and consenting to, the United Kingdom Parliament passing the *Australia Act 1986* was the *Australia (Request and Consent) Act 1985*; Act No 143 of 1985, assented to on 4 December 1985.

53 (1976) 135 CLR 507.

visions in this regard.⁵⁴ In relation to fisheries jurisdiction, in 1967 the Commonwealth had already extended its fisheries claim out from the three mile territorial sea to a 12 nautical mile fishing zone and then it later extended the fisheries zone to 200 nautical miles.⁵⁵

The earlier provisions about the territorial sea were based on the four 1958 conventions but after UNCLOS came into force generally and for Australia on 16 November 1994 the new convention suited Australia very well because its offshore jurisdiction was much extended. The *Seas and Submerged Lands Act 1973* was amended, therefore, to give the UNCLOS provisions full effect. Considerable important litigation ensued but before turning to that it is necessary to mention the "roll back" provision in relation to ship-sourced marine pollution in the Commonwealth legislation that arose from the OCS 1979.

2.6 Roll Back Provisions relating to Marine Pollution

As has been mentioned, under the OCS 1979 the States were handed back the jurisdiction relating to marine pollution from ships out to the three mile limit if they wished to exercise it, but this was not exclusive as the Commonwealth still had jurisdiction for ship-sourced marine pollution matters which it could exercise if one or more of the States did not. The OCS 1979 provided that the Commonwealth would prepare legislation giving effect to the ship-sourced oil pollution conventions⁵⁶ and "a saving clause is to be inserted to allow the States to legislate to implement certain aspects of the (Civil Liability Convention) if they wish to do so". This savings aspect has come to be known as the "roll back" provision, as the Commonwealth environmental law rolls back if the State legislates to give effect to the same convention. So the Commonwealth has included roll back provisions in its relevant legislation with the result that the Commonwealth jurisdiction initially applies from the baseline but rolls back to apply only from the three mile limit if the State or the Northern Territory passes similar legislation. The conventions to which it is applied have been extended from the *Civil Liability Convention 1969* to the whole suite of conventions regulating protection of the marine environment from pollution from ships.

⁵⁴ See Note 2 to the Commonwealth print of the *Seas and Submerged Lands Act 1973* where it is noted that the gazettal extending the territorial sea was made in 1990, claiming the 200 nautical mile EEZ in 1994 and the contiguous zone 1999.

⁵⁵ See Chapter 7 for discussion of fisheries laws.

⁵⁶ At that time they were the *Convention on the Intervention on the High Seas of Cases of Oil Pollution Casualties 1969* and the *Convention on the Civil Liability for Oil Pollution Damage 1969*. These have long been superseded and for these and other pollution conventions and laws about pollution from ships see M White, *Australasian Marine Pollution Laws* (Federation Press, Sydney, 2nd edn, 2007).

An example of this roll back provision is in the *Environment Protection (Sea Dumping) Act 1981* (Cth),⁵⁷ which provides:

9. (1) Where the Minister is satisfied that the law of a State or of the Northern Territory will, on and after a particular date, make provision for giving effect to the Convention in relation to coastal waters of that State or of the Northern Territory (whether or not the Convention extends to the whole of those coastal waters), the Minister shall, by notice published in the *Gazette*, declare that, on and after that date, this Act does not apply in relation to the coastal waters of that State or the Northern Territory, as the case may be.⁵⁸

All the States and the Northern Territory have legislation relating to oil spills and other marine environmental matters that give effect to the relevant international conventions. The validity of these provisions has never been challenged directly and interesting points are raised concerning the applicability of the laws concerning marine pollution out to the three mile limit and in the internal waters to bays, harbours and other waterways but there is not space to explore them here.

The relevant Commonwealth Acts provide that they “shall be read and construed as being in addition to, and not in derogation of or in substitution for, any other law of the Commonwealth or any law of a State or Territory” and that the Acts apply “both within and outside Australia and extend to every external Territory”.⁵⁹ It seems fairly clear that if the State does pass a clear and valid Act that gives effect to a relevant convention then the roll back should be gazetted so that the Commonwealth Act does not apply. If, however, the Commonwealth refuses to do so, perhaps believing the State legislation is not effective, then there is a collision of legislation. It seems likely that this brings into operation s 109 of the Constitution,⁶⁰ so the State legislation is thereby invalid. If the issue relates to the internal waters of the State, as the Commonwealth claims expressly exclude these waters, it seems clear the State law applies. There is still the unsettled area between the high and low water mark, and which Parliament has jurisdiction over this area will need to await either a cooperative agreement or legislation that is tested in the High Court. This overlapping jurisdiction on marine pollution points to the continuing need for cooperation among the Commonwealth and the States and the Northern Territory.

⁵⁷ This Act gives effect to the *London Convention*, as to which see M White, *Australasian Marine Pollution Laws* (Federation Press, Sydney, 2nd edn, 2007).

⁵⁸ Section 9. The section then goes on to provide that the declaration shall have the effect that the Act shall be read as not including a reference to coastal waters, with certain exceptions that are not immediately relevant.

⁵⁹ The “Savings of Other Laws” section is usually s 5 and the “Operation of the Act” section is usually s 6.

⁶⁰ Section 109 provides that when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

2.7 Post 1979 High Court Cases

Offshore jurisdiction springs, of course, from the land. Which of the offlying islands form part of the Commonwealth or the State is, therefore, important. In 1981, in *Wacando v Commonwealth*⁶¹ the issue was whether Darnley and other Torres Strait Islands were within the State of Queensland. The plaintiffs wished to establish certain fishing and other commercial activities in the offshore waters and maintained they were not bound by the Queensland laws as the adjacent land was not within the State of Queensland. The argument turned on details about the effectiveness of certain colonial laws and letters patents to incorporate these islands into the Queensland colony. The High Court held that they were within the State and so were bound by its laws. In the course of his judgment, Gibbs CJ set out a brilliant authoritative and clear history of the colonial laws relating to the outer maritime boundaries of this part of Australia.

The next year, in 1982 in *Koowarta v Bjelke-Petersen*,⁶² the purchase of a large area of land by the Aboriginal Land Fund Commission was refused permission by the Queensland minister because it was to an Aboriginal group. The refusal by the State minister, pursuant to a Queensland State government policy, was claimed to be discriminatory, in contravention of the terms of the *Racial Discrimination Act 1975* (Cth). The State then submitted that the terms of the Commonwealth Act were beyond the legislative powers of the Commonwealth Parliament. The High Court held that the relevant terms of the Act were valid as they were passed in support of the *International Convention on the Elimination of All Forms of Racial Discrimination*, to which Australia was a party. Once again the decision was based on the ambit of the external affairs powers under the Constitution and it was a seminal case as to the extent of those powers. The judgments were long and detailed and do not warrant detailed analysis here, but the key issue was what was the outer limit of the external affairs power? There was considerable concern that as nearly every Commonwealth government circumstance relating to offshore jurisdiction has some relationship with matters external to Australia, there was almost no topic on which the Commonwealth could not pass legislation. In other words, if there was no limit on what the Commonwealth Parliament could pass legislation the federation could be destroyed.

The outer extent of the external affairs power in the Constitution next came to prominence in 1983 in the highly politically charged case of *Commonwealth v Tasmania (Tasmanian Dams Case)*.⁶³ This was not an offshore jurisdiction case as the issue was that the Tasmanian government

61 (1981) 148 CLR 1.

62 (1982) 153 CLR 168.

63 (1983) 158 CLR 1. In this case the court upheld the power of the Commonwealth legislation in support of an international convention.

wished to construct a dam for hydro-electric generation of electricity and this entailed flooding part of the pristine wilderness of the Gordon River in western Tasmania. The area had been declared a World Heritage Area under the *Convention for the Protection of the World Cultural and Natural Heritage*, to which Australia was a party, and the Commonwealth legislation and regulations prohibited flooding this river. The High Court split 4-3, with the majority upholding the power of the Commonwealth legislation in support of an international convention. The powerful dissentents, Gibbs CJ, Wilson and Dawson JJ, were concerned that the Australian federal structure should not be undermined by the over-extension of this external affairs power. Deane J approached the matter with circumspection and held that these matters should be determined case by case but in this case he favoured the Commonwealth position.

Then only five years later the same State was back battling the Commonwealth in the High Court over the application of the same heritage convention, but this time over the preservation of some important forests; in 1988 in *Richardson v Forestry Commission (Lemonthyme and Southern Forests Case)*.⁶⁴ However, the main fight had been lost by the States in the *Tasmanian Dams Case* and the court applied that case in holding that the Commonwealth legislation was within Commonwealth power.

The various issues have been sufficiently identified to set the background for the remaining cases. Also in 1988, in *Union Steamship Company of Australia Ltd v King*,⁶⁵ State workers' compensation provisions extending to an interstate ship were upheld. The issue was whether the New South Wales Act should cover the workers' compensation claim by Mr King, or the Commonwealth one, even though the ship was registered on the New South Wales shipping register. There were two main issues; of which the first was whether there was sufficient nexus for the peace, order and good government of the State for the New South Wales Act to apply. Of course *Pearce v Florenca* had confirmed the principle that it could, but that case did not decide the limits of what was sufficient nexus for its application. The second issue was one not yet mentioned in detail, which was whether the Commonwealth Act covered the field so that it left no room for the State legislation to have effect without it being inconsistent and so struck down. On both issues the High Court unanimously found for New South Wales, so the State legislation was held to apply to a ship operating at sea offshore but registered in that State. The court held that the test of the relevant connection between the circumstances of the legislation and the State should be liberally applied so that even a remote and general connection would suffice.

⁶⁴ (1988) 164 CLR 261.

⁶⁵ (1988) 166 CLR 1.

In 1989, in *Port MacDonnell PFA Inc v South Australia*,⁶⁶ the issue was over the sea boundaries of an offshore area arising from the agreement between the Commonwealth and the State of South Australia that the South Australian fisheries laws about rock lobsters would apply to this area extending out to the limits of the Australian Fisheries Zone (which was 200 miles ie the same as the EEZ). Readers will note that the offshore "adjacent areas" of the various States had arisen first under the petroleum legislation, which arrangement had been confirmed in the OCS 1979. The issue in this case was whether the agreement made between the Commonwealth and the South Australian governments could include waters that were offshore but adjacent to the State of Victoria although beyond the three mile limit. The court made two relevant decisions:

- (a) the seas that were offshore ie adjacent to Victoria, were not part of the South Australian adjacent waters for the purposes of this legislation and so they did not come within the South Australian fisheries laws; and
- (b) that the South Australian legislation over fisheries was valid as being for the peace, order and good government and there was sufficient nexus, so it did apply to the balance of the offshore seas under the agreement despite it covering waters beyond the South Australian three mile limit.

The importance of the Commonwealth external affairs power under the Constitution has been mentioned a number of times and the 1991 case of *Polyukovich v Commonwealth*⁶⁷ did not have any maritime connection but is relevant as it dealt with the extent of this power. The accused, who had immigrated to Australia from Europe, had been charged with serious war crimes alleged to have been committed in Europe some 50 years earlier during World War II under the then new, and controversial, amendment to the *War Crimes Act 1945* (Cth). It had extended Commonwealth jurisdiction to actions carried out overseas and also retrospectively. Declarations were sought on Mr Polyukovich's behalf in the High Court to strike down certain provisions of the Act as being beyond the legislative power of the Commonwealth. The Commonwealth argument relied upon the defence power and the external affairs power under the Constitution.

In his judgment Mason CJ said that the "external affairs should be construed with all the generality that the words admit and that, so construed, the power extends to matters and things, as well as relationships, outside Australia".⁶⁸ Brennan J, who was one of the dissenting judges in that particular case on its facts, also held a wide view to the external affairs power to like effect.⁶⁹ The court held, by a majority, that the

66 (1989) 168 CLR 340.

67 (1991) 172 CLR 501.

68 Ibid at 528.

69 Ibid at 551-552.

legislation was valid and similar views to those of Mason CJ and Brennan J were expressed by the other members of the court.⁷⁰

There have been other and more recent cases dealing with the external affairs power, some of them with maritime involvement. In *Horta v Commonwealth*⁷¹ the issue was the validity of legislation that gave effect to the Australian and Indonesian agreement over petroleum in the Timor Gap.⁷² Those who pursued independence for East Timor included Mr Ramos Horta, later its Prime Minister, and others who sued the Commonwealth for a declaration that the agreement was invalid. The basis of the applicants' arguments was that East Timor had been occupied unlawfully by force of arms, and so the agreement made with Indonesia over what are, lawfully, East Timorese waters and seabed is invalid. Hence, the Australian legislation is invalid. Most of the grounds of argument attacked the executive power and the external affairs power of the Commonwealth. The court held, unanimously, that the legislation was valid under the external affairs power as being characterised as a law with respect to the Timor Gap, exploration for and exploitation of its petroleum resources and with respect to a treaty with a foreign country. In doing so it applied *Polyukovich's* case. Further, the court held that, even if the treaty were invalid in international law, the issue of validity of treaties was not justiciable before the Australian domestic courts.

In 1996 the *Industrial Relations Act Case*⁷³ was concerned with the validity of the Act but as the Act gave effect to some ILO conventions and recommendations the argument included submissions on the external affairs power. The court held unanimously that the power extended to places, persons, matters or things physically external to Australia and was not confined to treaty obligations. In doing so it applied the major earlier cases, confirmed them and extended the test in that for such laws not to be categorised as relating to a treaty the legislation had to be substantially inconsistent with it.⁷⁴

70 The "suite of powers" available to the Commonwealth are discussed by J Crawford, "The Constitution and the Environment" (1991) 13 *Syd LR* 11. The place and extent of customary international law, as opposed to international law as settled by convention, is still a question to be settled in the ambit of the foreign affairs power.

71 (1994) 181 CLR 183.

72 Treaty between Australia and the Republic of Indonesia on the Zone of Co-operation in an Area between the Indonesian Province of East Timor and Northern Australia, 1989. The legislation was the *Petroleum (Australia-Indonesia Zone of Cooperation) Act 1990* (Cth). The Timor Sea and petroleum in the area are discussed in Chapter 4.

73 *Victoria v Commonwealth* (1996) 187 CLR 416.

74 In chronological terms the next case was *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 but its connection was with the validity of mining in the Kakadu National Park, in the Northern Territory, and the argument and decision of the court merely confirmed the previous law and added little to the jurisprudence on the external affairs power.

The *CSL Pacific* case⁷⁵ in 2003 was an important case in the shipping law world in that the High Court was called on to decide what shipping laws should be applied to foreign registered vessels operating on the Australian coast. The *Navigation Act 1912* (Cth) prohibited ships from operating in and around Australian ports (the coasting trade) unless they were licensed and it required such ships to apply Australian pay and working conditions. Unlicensed, which meant foreign registered ships, could carry coasting trade only with a special government permit to do so. The CSL Pacific ships had been Australian flagged and crewed but they were re-flagged in Panama and returned to the Australian coast with foreign crews, with lower pay and conditions. Three unions, including the Maritime Union of Australia, not surprisingly, started in the Industrial Relations Commission for the Australian award conditions to be applied and this resulted in a test case to the High Court. For present purposes the court made three major decisions:

- the legislation did not interfere with the right of “innocent passage” of foreign ships through Australian waters under public international law;
- the “internal economy” rule, that the law on board a ship was that of the flag state and not of the coastal state, did not remove jurisdiction of the Australian Industrial Relations Commission from hearing the matter; and
- Australian law could certainly be applied to a foreign vessel in its jurisdiction but whether the law actually applied was a matter of individual circumstance and legislation and this was for the Commission to decide.

It can be seen from the *CSL Pacific* case that it was settled that Australian laws could apply to foreign vessels in its jurisdiction, but the legislation and other circumstances had to be clear that it meant to and actually did apply. This situation was fairly well established in international law and this case settled, therefore, that this was the Australian domestic law as well.

In a 2006 case, *Vasiljkovic v Commonwealth*,⁷⁶ the issue was whether extradition was valid in the *absence* of a treaty, which was a bit of a turnaround from the many cases relying on a treaty. The court held that a regulation declaring Croatia to be an extradition country, even though there was no Australian-Croatian treaty to this effect, could still be a valid exercise of the external affairs power.

⁷⁵ *Re Maritime Union of Australia; Ex parte CSL Pacific Shipping Inc* (2003) 214 CLR 397.

⁷⁶ (2006) 227 CLR 614; [2006] HCA 40.

A second case in 2006 was *XYZ v Commonwealth*⁷⁷ where the issue was the validity of Australian legislation prohibiting an Australian citizen or resident from engaging in sexual intercourse with a minor in an overseas country. The majority⁷⁸ held that it was, on the grounds that the legislation was justified by the external affairs power and confirmed that matters or things geographically external to Australia came within those powers. The dissentients, however,⁷⁹ held that the geographical externality principle did not apply where that was the sole basis for the connection and that this basis alone was not concerned with Australia's relationship with foreign countries or international organisations. It may be seen from the *XYZ* case that, although there were powerful dissents, the external geographical connection was held to be sufficient validity for the legislation under the external affairs power.

These series of cases in the High Court have settled quite a lot of the jurisprudence concerning what laws apply offshore. It may be seen that the limits of the external affairs power have been much explored and they keep on extending. Legislation is valid if it relates to any international agreement, to foreign countries or to any matter or thing geographically external to Australia. It seems there is no limit to this because so many current activities have some foreign element. Many current activities derive from international conventions or have some other link with external affairs so this gives great flexibility to the Commonwealth in this area. The critical point is that the outer limits of the external affairs power have yet to be determined by the High Court. If there are no limits this will destroy the nature of the Australian federation as set out in the Constitution. Foremost amongst these issues are those that touch on maritime affairs⁸⁰ and only future test cases, or perhaps the unlikely event of a change to the Australian Constitution, will determine what those outer limits will be. Until then the areas of the application of Australian laws offshore will continue to be extremely wide.

This concludes the survey of High Court cases, but before drawing this discussion to a close by setting out conclusions and mentioning suggested proposals for reform, it is necessary to mention the complex zoning system that applies offshore.

77 (2006) 227 CLR 532; [2006] HCA 25.

78 Ibid per Gleeson CJ and Gummow, Kirby, Hayne and Brennan JJ.

79 Ibid per Callinan and Heydon JJ.

80 For completeness, it is noted that the evidential issue as to how the baseline of the low water mark is established was decided by the High Court in *Li Chia Hsing v Rankin* (1978) 141 CLR 182, where a fisherman charged with offending Commonwealth fishing laws challenged whether the baseline could be established from a chart. The court held that it was a question of fact and it could be established by a chart or by evidence of the actual position of the low water mark on the coast itself.

2.8 Offshore Zones

Australia's offshore legal jurisdiction is now based on UNCLOS, to which convention Australia is a party and to which it gives effect. The simple one zone of a territorial sea in earlier times has developed into a much more complex zoning system. The basic principle is that the jurisdiction granted to a coastal state commences with total sovereignty and reduces as the distance offshore increases. In short the powers granted to a coastal state of total sovereignty in the internal waters and territorial sea, except for innocent passage, steadily decrease in the zones that are further offshore until in the high seas a coastal state has no more rights or obligations than a non-coastal state.

Before proceeding further with discussion of the zones, there is an important point to be made about distinguishing between the international approach to offshore zones and the Australian domestic approach. In international law and practice a sovereign state only recognises and deals with another sovereign state and the details of internal organisation and power sharing within that state are not relevant. It is simple for unitary states as only the one legal entity exists, but when it comes to federations, such as Australia, the United States, Canada, etc, it becomes more complex. When this principle of law and state practice is transferred to jurisdiction over the offshore areas, the internal States have their rights and obligations fully recognised in domestic law but in international law the other sovereign states do not recognise them at all.⁸¹

The *Seas and Submerged Lands Act 1973*, as originally enacted, gave effect to the *Convention on the Territorial Sea and the Contiguous Zone* 1958 and the *Convention on the Continental Shelf* 1958 so the Act in giving effect to the provisions in these two conventions established the internal waters, a territorial sea, a contiguous zone and the continental shelf. By the *Maritime Legislation Amendment Act 1994* the Act was amended to repeal the provisions of the *Convention on the Territorial Sea and the Contiguous Zone* and the *Convention on the Continental Shelf* and give effect to UNCLOS.

The effect of these changes is that the Commonwealth then and now is entitled to, and does, proclaim:⁸²

⁸¹ Even though in Australia the internal waters are under State jurisdiction for most purposes, sovereignty over the internal waters is claimed for international purposes by the Commonwealth: *Seas and Submerged Lands Act 1973* s 10. It also claims sovereignty over the territorial sea: s 6.

⁸² The zonal phrases quoted are taken from the long title to the *Seas and Submerged Lands Act 1973*, as amended, which reflects the terms in UNCLOS. The preamble to the Act expands on these claims and then the body of the Act itself sets out the detail about them.

- (a) its “sovereignty” over the internal waters and territorial sea (12 miles);⁸³
- (b) rights of “control” over the contiguous zone (24 miles);⁸⁴
- (c) its “sovereign rights” over the EEZ (200 miles) with regard to exploring and exploiting natural resources;⁸⁵
- (d) its “sovereign rights” over the continental shelf beyond the EEZ for the purpose or exploring and exploiting the natural resources in the seabed and subsoil (but not the water column or the airspace);⁸⁶ and
- (e) its rights on the high seas.⁸⁷

These various offshore rights on the part of the Commonwealth are not to be confused with those for the States and the Northern Territory which only extend for three miles out from the baselines. This was provided in the *Coastal Waters (State Powers) Act 1980* and the *Coastal Waters (State Title) Act 1980*, and the similar Acts for the Northern Territory,⁸⁸ as has already been fully discussed.⁸⁹

It is convenient now to give some more brief detail about each of these zones that one meets in the international conventions and relevant domestic legislation. It is worth noting that Australia’s offshore jurisdiction is different with each zone.

The phrase “internal waters” refers to the landward side of the baseline and over which Australia proclaims its sovereignty under the *Seas and Submerged Lands Act 1973*.⁹⁰ In UNCLOS, Art 8 provides that waters on the landward side of the baseline form part of the internal waters. UNCLOS also provides that a coastal state has sovereignty over its internal waters. Domestically there are some Commonwealth internal waters,⁹¹ but most of the waters to the landward side of the low water

⁸³ UNCLOS Art 2. This sovereignty over the internal waters and the territorial sea includes the seabed, the subsoil and the airspace, but it is repetitious to keep stating this.

⁸⁴ Article 33.

⁸⁵ Article 56(1)(a). The coastal state only has jurisdiction with regard to artificial islands, installations and structures, marine scientific research and protection and preservation of the marine environment in the EEZ: Art 56(1)(b). It also has “other rights and duties as provided elsewhere in UNCLOS”: Art 56(1)(c).

⁸⁶ Articles 77(1) and 78.

⁸⁷ Part VII.

⁸⁸ *Coastal Waters (Northern Territory Powers) Act 1980* and *Coastal Waters (Northern Territory Title) Act 1980*.

⁸⁹ For discussion of the jurisdiction of the States, see generally RD Lumb, “Australian Coastal Jurisdiction” in KW Ryan (ed), *International Law in Australia* (Law Book Co, Sydney, 2nd edn, 1984), Ch 15; also RD Lumb, *The Law of the Sea and Australian Offshore Areas* (University of Queensland Press, Brisbane, 2nd edn, 1978), Ch 2.

⁹⁰ Section 10.

⁹¹ Such as Jervis Bay and other such internal waters over which the Commonwealth retains jurisdiction.

mark or the baseline lie within the jurisdiction of the States and the Northern Territory. The Commonwealth does not claim jurisdiction over waters or any bay, gulf, etc that were at the time of federation recognised as within the boundary limits of that State. After federation that limit remained as the boundary for that State and the waters on its landward side are internal waters.⁹²

From a domestic point of view, the phrases "coastal waters" and "coastal waters of a State" derive from the Offshore Constitutional Settlement 1979 and its legislative effect in the *Coastal Waters (State Powers) Act 1980* (and equivalents). The term "territorial sea" covers the waters out to three miles adjacent⁹³ to the respective States and the sea on the landward side of it not otherwise within the limits of a State. In other words, the States' "coastal waters" includes waters out to three miles offshore from the baselines adjacent to any State. As mentioned above, pursuant to the *Seas and Submerged Lands Act 1973*, the Commonwealth and the States have joint jurisdiction over the seas from the baselines out to three miles but the Commonwealth legislation is subject to the roll back provision relating to ship-sourced pollution. Of course if it is specifically agreed, or if the State establishes a nexus between the legislation and peace, order and good government of the State (and the legislation is not struck down as being in contravention of s 109 of the Constitution),⁹⁴ the State still has jurisdiction over that activity or persons.

As mentioned above the territorial seas run from the baselines out for 12 miles, which area of sea includes, of course, some of the coastal waters. Under s 7 of the *Seas and Submerged Lands Act 1973* (Cth) the Governor-General was given power, under the *Convention on the Territorial Sea and the Contiguous Zone*, to declare the outer limits of the whole or any part of the territorial sea. In 1990 the Commonwealth extended the outer limit of the territorial sea from three to 12 miles,⁹⁵ but this did not extend the jurisdiction of the States beyond the three mile

⁹² Section 14.

⁹³ The "adjacent area" is defined in the *Petroleum (Submerged Lands) Act 1976* s 5A and Sch 2. Basically it is that area outside the territorial sea and within the continental shelf that is not otherwise excluded, which exclusions include any Joint Petroleum Development Area (currently there is only one, which is the JPDA in the Timor Sea with Timor-Leste). The PSLA 1967 was very poorly drafted in this regard and the *Acts Interpretation Act 1901* (Cth) s 15B(4) is much clearer, as is the *Coastal Waters (State Powers) Act 1980* (Cth) s 3 and the *Acts Interpretation Act 1954* (Qld) s 36. The phrase, however, changed in the *Offshore Petroleum Act 2006* (Cth) to "coastal seas" and this is reflected progressively in Commonwealth, State and Territory legislation as noted above. For detailed description of this see Chapter 3, including that the last-mentioned Act is now the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*.

⁹⁴ The nexus was established by the High Court decision in *Pearce v Florencia* (1976) 135 CLR 507, mentioned above.

⁹⁵ *Government Gazette* No S 297, 13 November 1990; see Note 2 to the *Seas and Submerged Lands Act 1973*.

limit previously agreed under the Offshore Constitutional Settlement 1979. The Act was amended to rely on UNCLOS as the international convention while Australia makes its offshore claims.

The contiguous zone is contiguous to the territorial sea and its outer limit may not exceed 24 miles from the baselines,⁹⁶ which means that it extends 12 miles beyond the territorial sea and is contiguous to it. Under UNCLOS there is power in a coastal state to control the contiguous zone as may be necessary to prevent infringement of “customs, fiscal, immigration and sanitary laws” within its territory or territorial sea and to punish for offences committed in its territory or territorial sea.⁹⁷ The rationale behind this is to allow the coastal state to prevent persons of ill intent hovering just outside its territorial sea. Of course the power is limited to the four aspects mentioned above. The Commonwealth has given domestic effect to this jurisdiction in the *Seas and Submerged Lands Act 1973*⁹⁸ and it declared its contiguous zone in 1999.⁹⁹

The Exclusive Economic Zone (EEZ) runs from the baselines out for 200 miles.¹⁰⁰ Again, pursuant to the provision of UNCLOS, there is power for a coastal state to control certain activities out to the 200 nautical mile limit from the baselines, and this the Commonwealth has done in proclaiming its sovereign rights and jurisdiction in the EEZ in the *Seas and Submerged Lands Act 1973*.¹⁰¹ In the EEZ the coastal state has sovereign rights but only in relation to exploring and exploiting, conserving and managing the natural resources, whether living or non-living. This covers the seabed and subsoil, the water column and the airspace.¹⁰² For commercial purposes this means that Commonwealth controls fisheries and offshore oil and gas. The coastal state also has jurisdiction, but only jurisdiction and not sovereignty, over the other matters set out in Art 56(1)(b).¹⁰³

The outer continental shelf was established pursuant to the 1958 convention¹⁰⁴ and was continued and clarified in UNCLOS. The continental shelf is, in fact, a geographical concept of a natural prolongation the land out under the sea. UNCLOS extends the coastal state’s rights in the

96 UNCLOS Art 33(2).

97 Article 33(1).

98 The Commonwealth has “declared and enacted that Australia has a contiguous zone”: s 13A.

99 *Government Gazette* No S 148, 14 April 1999; Note 2 to the *Seas and Submerged Lands Act 1973*.

100 UNCLOS Pt V.

101 Section 10A.

102 UNCLOS Art 56.

103 These are artificial islands, installations and structures, marine scientific research, protection and preservation of the marine environment and other rights and duties provided for in the convention.

104 *Convention on the Continental Shelf 1958*, Geneva, 29 April 1958.

seabed and subsoil to the natural resources beyond the EEZ to the outer limits set out in Art 76. This is a complex formula but in no case may it extend beyond 350 nautical miles from the baselines.¹⁰⁵ It is emphasised that the coastal state only has sovereign rights for the purpose of "exploring and exploiting its natural resources" in the outer continental shelf¹⁰⁶ and there is a formula for payment of some of the benefits of exploitation of these resources to the developing states.¹⁰⁷ The *Seas and Submerged Lands Act 1973*¹⁰⁸ proclaims Australia's rights in the outer continental shelf.

Because the formula for establishing the outer limits of the continental shelf beyond the EEZ is complex UNCLOS established a Commission on the Limits of the Continental Shelf to receive, comment and make recommendations on coastal states' claims.¹⁰⁹ The Commission has received a claim from Australia, amongst others, and it approved Australia's claim in 2008.¹¹⁰

Archipelagic waters were little known, at least beyond Indonesia and the Philippines, in international law until UNCLOS was agreed and the archipelagic states finally had their status established and recognised. The concept applies to states with many islands so that the baselines may be drawn around the islands as they may be run from the outermost points of the island, reefs and land across the intervening waters and the whole area be enclosed and recognised. UNCLOS Pt IV sets out the complex formula for establishing the archipelagic baselines and the territorial sea, contiguous zone, EEZ etc are measured outward from it in the usual way. Express provision is made within the archipelagic waters for shipping lanes which go beyond the mere innocent passage provisions in the territorial sea. Australia has not claimed an archipelagic status, but many of the states in the Asia Pacific region have done so, such as Indonesia, the Philippines and most of the Pacific Island nations. The concept can also apply to heavily indented coastlines, such as Norway, so that its baselines are drawn outside the outer islands.

The high seas are not expressly defined in UNCLOS but basically are those seas not included in the EEZ.¹¹¹ Whilst there are general obligations to protect and preserve the marine environment on the high seas the

105 UNCLOS Pt VI.

106 Article 77(1).

107 Article 82.

108 Section 11.

109 UNCLOS Art 76, Annex II and the Statement of Understanding adopted on 29 August 1980, the UNCLOS III; generally see United Nations Division of Ocean Affairs and Law of the Sea website: <www.un.org/Depts/los/index.htm>.

110 The Commission on the Limits of the Continental Shelf website has full details, see <www.un.org/Depts.los/index.htm> and follow prompts to the Commission. Australia lodged its claim on 15 November 2004.

111 UNCLOS Pt VII, especially Art 86.

rights of coastal states are very limited and, with some exceptions, the obligations lie on the flag states to control their flagged ships on the high seas. UNCLOS provides for freedom on the high seas of navigation, over-flight, fishing, etc.¹¹² This is subject to the other rights and obligations in international law. Australia's *Seas and Submerged Lands Act 1973* does not make any claim to any rights in the high seas as these are available under UNCLOS and customary international law.

The Australian Fisheries Zone (AFZ) should be mentioned and it is sufficient for present purposes to state that the AFZ is defined in terms of the waters comprising the EEZ, under the *Fisheries Management Act 1991*.¹¹³

2.9 Conclusions

In this chapter an attempt has been made to set out a general outline of Australia's offshore jurisdiction as seen through Australian domestic and constitutional law as well as the international law. The resulting picture shows that the present position has developed from a lengthy and complicated series of international treaties, Australian legislation and High Court cases. It is complex and confusing. The rights given to the States under the OCS in 1979 came about not from a wish to develop a simple and effective offshore jurisdiction, but from the accident of history that in the 1970s the Australian territorial sea was three miles wide. There is no logical reason for the States to have jurisdiction out to three miles; it was just the situation that was inherited from the British law and to which the parties found convenient to return in the turmoil of the Offshore Constitutional Settlement 1979. It is inefficient and expensive for both industry and government to have the demarcation between the Commonwealth on the one hand and the States on the other at three nautical miles. This is a theme that will be developed in the concluding chapter of this book.

This chapter has not, however, given anything more than the background for this development of the general offshore jurisdiction. There are numerous special areas and activities that have their own offshore laws. The following chapters will survey the Australian offshore jurisdiction through these various areas and activities; namely, petroleum and mining, crime, defence, immigration, fisheries, customs, the Antarctic and Southern Ocean territories, a wide range of miscellaneous areas and, finally, particular offshore geographical areas. The final chapter of the book draws some conclusions and makes recommendations for reform of this situation.

¹¹² Article 87.

¹¹³ *Fisheries Management Act 1991*, s 4. See Chapter 7 for discussion of fisheries law.

Chapter 3

Offshore Petroleum, Mining and Installations Laws

- 3.1 Introduction
- 3.2 Petroleum Aspects of the Offshore Constitutional Settlement 1979
- 3.3 Petroleum (Submerged Lands) Act 1967
- 3.4 Offshore Petroleum and Greenhouse Gas Storage Act 2006
 - 3.4.1 Introduction
 - 3.4.2 Offshore Petroleum Areas and Coastal Waters
 - 3.4.2.1 Coastal Waters of the States
 - 3.4.2.2 Offshore Areas of the States
 - 3.4.2.3 Applied Laws of the State
 - 3.4.3 Courts' Jurisdictions
 - 3.4.4 Safety Zones and Areas to be Avoided
 - 3.4.5 Terrorism Issues
 - 3.4.6 Occupational Health and Safety Issues
 - 3.4.7 Greenhouse Gas Storage Amendments 2008
 - 3.4.8 Administration
 - 3.4.8.1 Joint Authority
 - 3.4.8.2 Designated Authority
- 3.5 Offshore Minerals Act 1994
- 3.6 Sea Installations Act 1987
- 3.7 Timor-Leste and the Joint Petroleum Development Area
 - 3.7.1 Background
 - 3.7.2 Timor Sea Treaty 2002
 - 3.7.3 Petroleum (Timor Sea Treaty) Act 2003
 - 3.7.4 Treaty on Certain Maritime Arrangements in the Timor Sea 2006
 - 3.7.5 Timor Sea Conclusions
- 3.8 General Conclusions

3.1 Introduction

This chapter deals with the offshore laws that apply to offshore petroleum and greenhouse gas storage under the sea, offshore mining, to those other offshore installations not connected with these two industries and also to the Timor Sea petroleum agreements between Australia and Timor-Leste (East Timor).

In relation to the offshore petroleum industry and its laws, Chapter 2 sets out the constitutional background, origins and basic outline of the Offshore Constitutional Settlement 1979. It did not, however, particularly focus on the petroleum industry so this chapter begins by expanding on relevant offshore petroleum aspects. The legislation over offshore petroleum has had a turbulent past few years with major changes. The details are set out more fully under, but in summary the *Petroleum (Submerged Lands) Act 1967* was subjected to a long and thorough review and the result was the subject of consultations with industry, discussion papers and workshops for some five years. Then in 2006 the *Offshore Petroleum Act 2006* was passed by the Parliament but it was not brought into force for another two years, as further issues relating to it were discussed and the Act amended to deal with matters arising from these discussions. Then the government resolved that the legislation required for injection into the seabed of captured greenhouse gases, as part of the global warming campaign, should be amendments to the *Offshore Petroleum Act 2006* and not a whole new Act. So the 440-page amendment, the *Offshore Petroleum Amendment (Greenhouse Gas Storage) Act 2008*, was passed and then brought into force in the latter part of 2008.

The petroleum laws do not, however, deal with mining other than petroleum, which mining is covered by the *Offshore Minerals Act 1994*. The jurisdiction over other, non-petroleum and non-mining offshore installations, such as the tourist platforms in the Great Barrier Reef, are dealt with in the *Sea Installations Act 1987*.

Finally, the chapter deals with a unique area in the Australian offshore jurisdiction, which is that part of the Timor Sea that is the subject of several agreements between Australia and Timor-Leste (East Timor) for the exploration and development of oil and gas in that area. These agreements provide for a cooperative approach in which the petroleum companies can explore and exploit the vast amount of undersea gas, and some oil, in that area. This comes under the *Petroleum (Timor Sea Treaty) Act 2003* and under the *Petroleum Amendment (Greater Sunrise) Act 2007*, both of which are described under. The chapter ends with some conclusions about the complexity of this raft of legislation.

The legislation mentioned in this chapter is lengthy in total and, when combined with the regulations, could accurately be described as massive. This chapter could not, of course, address all aspects so, in conformity with the purpose of the book, it will concentrate on the jurisdiction and mention the areas covered by the various Acts with sufficient description to give the reader an indication as to the laws themselves. To gain any substantial understanding of these Acts, readers will need to consult the details of the various Acts, their numerous amendments, their Regulations and the courts' judgments arising from them.

3.2 Petroleum Aspects of the Offshore Constitutional Settlement 1979

The basic structures of the Offshore Petroleum Agreement 1967 (OPA 1967) and the Offshore Constitutional Settlement 1979 (OCS 1979) have been set out in Chapter 2 and it is only necessary, therefore, to give some more detail and then to set out where that 1967 agreement and the 1979 settlement have led. The 1979 OCS is Annex 1.

The main foundations of the OPA 1967 were that the Commonwealth and the States and the Northern Territory (the States) would agree on a Common Mining Code, which would be applied by suitable legislation agreed on and enacted by all parties ie the Commonwealth and all of the States.¹ No changes would be allowable except by agreement.² Each State would administer the petroleum activity offshore adjacent to its coast through its "Designated Authority",³ royalties would be shared but other money would remain with the States.⁴ The Commonwealth would have an overriding power when it came to consider matters related to its responsibilities under the Constitution, such as trade and commerce, external affairs, taxation, defence, lighthouses and other navigational aids, fisheries and post and telegraphs.⁵ In these cases it would consider the interests of the States but its decision would be final. In short, it was a cooperative arrangement with close consultation and all parties being bound by the majority, except for the particular Commonwealth responsibilities. A return to a similar model will be the subject of some discussion in the final chapter of this book where possible reforms are considered.

Under the OPA 1967 the States only had jurisdiction "in relation to the adjacent area of the (relevant) State". This term, "adjacent area" was one of the main drafting tools used in the subsequent legislation to link any particular State only to those waters offshore from its own coasts, designated as the "adjacent waters". However as will be seen shortly, that term has now been changed into the term "offshore area" although the laws of the relevant State only apply to the waters adjacent to its coastline, unless the act otherwise provides.

¹ For discussion on the powers under the Constitution for the "request and consent" in relation to offshore mining and petroleum laws, see M Crommelin, "Offshore Mining and Petroleum: Constitutional Issues" (1981) 3 *Australian Mining and Petroleum LJ* 191. Richard Cullen's two books are most helpful on this topic: R Cullen, *Federalism in Action: The Australian and Canadian Offshore Disputes* (Federation Press, Sydney, 1990) and R Cullen, *Australian Federalism Offshore* (University of Melbourne, Melbourne, 1985).

² Clause 25.

³ Clause 9.

⁴ Clause 22.

⁵ These are the Commonwealth powers enumerated in the Constitution s 51.

The distance offshore to which the States' jurisdiction should extend also need to be decided. Under the 1967 agreement and also under the 1979 settlement the jurisdiction of the States extended offshore for three nautical miles. The terms of the 1979 settlement were as follows:

Offshore Petroleum arrangements inside the outer limit of the 3 mile territorial sea: This will be regulated by State legislation alone, administered by State authorities, in recognition of the fact that local matters within the territorial sea are primarily matters for the States. However, the common mining code will be retained as far as practicable, and existing permits and licences, and appropriate arrangements will be made for "transitioning" existing permits to the extent that they fall within the outer limit of the territorial sea.⁶

So the States regulated offshore petroleum up to three miles in waters adjacent to their coastlines and further offshore the industry was regulated by the Commonwealth legislation. Day-to-day administration was to come under the Designated Authority, which was run by the States, but new Joint Authorities would be established, comprised of the relevant State and Commonwealth ministers, for each adjacent State area. This Joint Authority would decide matters of policy, in effect, but if there was disagreement then the Commonwealth's view would prevail. Royalties in the offshore area would be shared. For the waters offshore from Western Australia a special arrangement would be made.⁷

On comparing the provisions made in the OPA in 1967 with those of the OCS made in 1979, it may be seen that the OCS 1979 made virtually no changes to the 1967 agreement. The States alone continued to regulate out to three miles and in doing so they would endeavour to do so in accordance with the Common Mining Code, as would the Commonwealth beyond that area. The State law applied of its own right and the States enjoyed the royalties and bore the expenses. Beyond the three mile limit the Commonwealth legislation applied.⁸

As to minerals other than petroleum, the OCS 1979 provided that it would be the same as for petroleum, but that a Common Mining Code would need to be agreed and that the relevant States would share royalties with the Commonwealth.⁹ Offshore installations not connected

6 Offshore Constitutional Settlement 1979, p 8. At that time the Australian territorial sea was three miles wide, not the current 12 miles, which is mentioned more fully in Chapter 2.

7 Ibid, pp 7-8.

8 Ibid, p 7 provided: "**Offshore petroleum arrangements outside the 3 mile territorial sea.** These will be regulated by Commonwealth legislation alone, consisting of an amended Commonwealth Petroleum (Submerged Lands) Act. Day-to-day administration will continue to be in the hands of the Designated Authority appointed for the 'adjacent area' of each State, that is, the State Minister-and State officials. The existing mining code will be retained and existing permits and licences will not be affected".

9 Ibid, pp 8-9.

with the petroleum or minerals industries came under the general agreement on offshore jurisdiction.

This then was the regime established in relation to offshore petroleum in 1967 and continued in the OCS 1979, so it is appropriate to turn to the legislation that gave effect to it. It should be mentioned that the OCS 1979 had a considerable number of other provisions but only those relating to petroleum and minerals are mentioned in this chapter. The wider provisions are, however, mentioned in Chapter 2.

3.3 Petroleum (Submerged Lands) Act 1967

The original main legislation by the Commonwealth to give effect to the Offshore Petroleum Agreement 1967 was the *Petroleum (Submerged Lands) Act 1967* (PSLA 1967).¹⁰ Its preamble admirably stated its purpose by repeating most of the preamble to the 1967 agreement, and it then went on to summarise the jurisdictional aspects of the Act. In short, it set out that the Commonwealth Act was limited to the resources beyond the outer limits of the (then) territorial sea of three miles, that the legislation of the States and the Northern Territory should apply to the landward side of the outer limit of the territorial sea, that they would share in the administration¹¹ and that they would all endeavour to maintain common principles, rules and practices in the regulation and control of those petroleum resources.¹² Petroleum was defined as naturally occurring hydrocarbons, whether in gaseous, liquid or solid state,¹³ so gas was and is part of the petroleum regime.

To summarise the position in relation to the jurisdiction over which the PSLA 1967 was to have effect, the Act applied in the “adjacent area” (set out in Sch 2 to the Act) as the area adjacent to the respective States. The first three miles was termed the “coastal area”, which distinguished it from the “adjacent area” which began at the three mile limit. In the “adjacent area” the laws, written and unwritten, of the Commonwealth and the States were applicable and the Supreme Courts of the States were invested with, and the courts of the Territories had conferred on them,

10 For details about the Offshore Petroleum Agreement 1967, see R Cullen, *Federalism in Action: The Australian and Canadian Offshore Disputes* (Federation Press, Sydney, 1990), p 66. The Victorian government levied fees for the use of a pipeline to convey the oil and gas from Bass Strait under the *Pipelines Act 1967* and the *Pipelines (Fees) Act 1967*, but when they raised the amount of the levy substantially by amendment in 1981 it was challenged and the High Court held that it amounted to an excise (for which the State had no power) and was invalid: *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599.

11 Joint Authorities were established for each adjacent area comprised of the minister for the Commonwealth and the minister for the respective State: Pt 1A, in particular s 8A.

12 PSLA 1967, preamble in the fourth paragraph.

13 Section 5.

federal jurisdiction. The administration under this cooperative scheme was that there was a Joint Authority for each State comprised of the relevant mining ministers, and a Designated Authority, which was largely run by each State and the Northern Territory to administer to the details of petroleum activity in the area offshore that was adjacent to that State or the Northern Territory. It can be seen, therefore, that the PSLA 1967, as amended, accurately reflected what had been agreed in the OPA 1967 and the OCS 1979.

The States and the Northern Territory for their part passed legislation¹⁴ and the parties all established administrative and regulatory structures to deal with the companies engaged in the important and complex business of exploring for and exploiting offshore petroleum as well as constructing and running offshore rigs and pipelines.

3.4 Offshore Petroleum and Greenhouse Storage Act 2006

3.4.1 Introduction

The PSLA 1967 served well enough for many years and a thriving offshore petroleum industry was established which has served and is serving the Australian national interest very well. The Act was amended from time to time over the years, including in 1994 when the amendments replaced the references to the 1958 international conventions to those of UNCLOS,¹⁵ and then the PSLA 1967 was debated, renamed and finally repealed and replaced, effective from 1 July 2008, by the *Offshore Petroleum Act 2006* (the OPA 2006).¹⁶ There are numerous changes of nature and style in the OPA 2006 from the PSLA 1967 but only minor policy changes relevant to its geographical jurisdiction. The OPA 2006 was introduced to provide a more “user-friendly” Act, to reduce compliance costs for industry and to simplify administration for the governments.¹⁷ The

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- 14 Each of the States and the Northern Territory passed an Act called the *Petroleum (Submerged Lands) Act 1982* and these were all amended before the Commonwealth proclaimed the OPA 2006 to conform with its provisions.
 - 15 The *Maritime Legislation Amendment Act 1994* replaced the references to the *Convention on the Territorial Sea and Contiguous Zone 1958* and the *Convention on the Continental Shelf 1958* with references to comparable provisions in *United Nations Convention on the Law of the Sea 1982* (UNCLOS); see Chapter 2 for mention of these conventions.
 - 16 Accompanying legislation was passed with the OPA 2006. The current effective accompanying Acts are the *Offshore Petroleum Amendment (Greater Sunrise) Act 2007*, *Offshore Petroleum and Greenhouse Gas Storage (Annual Fees) Act 2006*, *Offshore Petroleum and Greenhouse Gas Storage (Registration Fees) Act 2006*, *Offshore Petroleum and Greenhouse Gas (Safety Levies) Act 2003*, *Offshore Petroleum (Repeals and Consequential Amendments) Act 2006* and *Offshore Petroleum (Royalty) Act 2006*.
 - 17 See Explanatory Memorandum, Offshore Petroleum Bill 2005, p 2, “General Outline”; circulated by the Minister for Industry, Tourism and Resources, as part of the Parliamentary Papers in 2005.

structure of the management regime for offshore petroleum was unchanged from that in the PSLA 1967, although there were numerous changes about the management of the exploration, production, processing and conveyance aspects. As with the PSLA, the OPA 2006 covers petroleum in liquid, gaseous or solid state,¹⁸ so it covers offshore gas and gas pipelines as well as liquid petroleum.

The OPA 2006 comprised 450 sections and seven Schedules, amounting to over 600 pages of legislation. Certain expressly relevant provisions will be mentioned shortly, but the general purview of the Act is that it regulates the steps involved in exploration for and exploitation of offshore petroleum. The Schedules cover such things as the description of certain relevant areas, the occupation health and safety laws that are to apply offshore, workplace arrangements laws and transitional provisions. The Act, in general terms, regulates the grant and administration for exploration permits, retention leases, production licences, infrastructure licences and pipeline licences. The coverage and detail of the Act makes for a set of complicated and detailed laws, to which there are numerous detailed regulations.

However as mentioned in the Introduction, no sooner had the OPA 2006 been agreed with industry and brought into force on 1 July 2008 than the whole regime was thrown into uncertainty by the *Offshore Petroleum Amendment (Greenhouse Gas Storage) Act 2008*. An attempt will be made shortly to summarise the scope of this amended Act but before turning to it the chapter will mention the jurisdiction itself, in relation to area and activity, over which this Commonwealth Act is expressed to apply. The shortened form for the Acts will be OPA 2006 where the unamended OPA is intended and will be OPGGSA 2006 where the amended Act is intended.

3.4.2 Offshore Petroleum Areas and Coastal Waters

To comprehend the jurisdiction fully one has to have in mind the current offshore phrases, so they will be mentioned again. The term “adjacent area” was replaced by the term, “offshore area” in the OPGGSA 2006¹⁹ and a table sets out the areas covered by the offshore areas for each State and Territory, with “offshore area” covering the waters beyond the coastal waters²⁰ of the adjacent State or the Northern Territory, ie three

18 Section 6, but now s 7.

19 See ss 4, 6, 7 and 8 for definitions. A significant volume of publications, including much legislation, referred to the “adjacent area”. This term now corresponds to the “offshore area” although it may take some years for all of the changes to be made. This aspect is specifically referred to in the OPGGSA 2006, Sch 1. The Commonwealth has made the legislative changes in the *Offshore Petroleum (Consequential Amendments) Act 2007* but at the time of writing the States and the Northern Territory had not amended all of their Acts and regulations.

20 Sections 5-7.

miles from the baselines, to the outer limits of the Australian continental shelf²¹ ie to the 200 miles EEZ and beyond that for those areas where Australia has a recognised outer continental shelf. A slightly different legislative arrangement had to be made for the offshore territories and major islands as they were neither States nor a Territory with its own Parliament, so the Commonwealth offshore jurisdiction from these territories runs off the land out to sea and not from the three mile limit. The jurisdiction of the OPGGSA 2006 includes, of course, the space above, the water column, the seabed and the subsoil below these areas²² and it covers all individuals and all companies carrying on petroleum activities in them. Interestingly, the provisions regulating the pipelines are the only provisions that expressly make them subject to Australia's obligations under international law.²³

This paragraph above gives only a general outline, so to deal more accurately with the offshore jurisdiction aspects under the OPGGSA 2006 some further details are required.

3.4.2.1 Coastal Waters of the States

The "coastal waters" adjacent to a State also include any waters on the landward side of the baselines not (otherwise) within the State.²⁴ There are not many of these sea areas but where they occur the OPGGSA 2006 provides that they come within coastal waters (and not internal waters). Apart from the need to delineate the extent to which the boundaries extended offshore, it was also necessary to delineate the boundaries for each of the adjoining States and the Northern Territory areas where they were adjacent to one another, because it was important to know exactly what areas came under which State or Northern Territory legislation.²⁵

21 The "continental shelf" is defined in the *Seas and Submerged Lands Act* 1973. Reference has already been made to the Australian outer continental shelf that Australia claimed in 2004 and which the Commission on the Limits of the Continental Shelf approved in 2008, see Chapter 2 above.

22 Section 9.

23 Section 36. The OPGGSA 2006 makes express provision for datums from which offshore limits are taken, and these include reference to the datums established in international agreements in maritime boundary agreements with Indonesia, Papua New Guinea, New Zealand and other countries: s 49. Further in relation to the references to international law, "natural resources" are defined in s 7 to have the meaning given under Art 77(4) of UNCLOS, ie mineral and other non-living resources of the seabed and subsoil as well as the living organisms and other resources.

24 Section 7, Definitions. The definition of "coastal waters" in the OPA as originally enacted had a slight error in that it had boundary from low tide elevations as appropriate for a 12-mile territorial sea, instead of a three mile one. This was corrected by later amendment.

25 As mentioned above, to save repetition of "Northern Territory" the word "State" will continue to encompass the "Northern Territory" except where otherwise mentioned.

3.4.2.2 Offshore Areas of the States

The section above dealt with the “coastal waters”, which waters only covered out to three miles, and the descriptive phrase used beyond three miles offshore is “offshore waters of a State”. The OPGGSA 2006 sets these waters out, with a geographic description, as follows:

- (a) the offshore area for New South Wales, Victoria, South Australia and Tasmania are waters of the sea that are beyond the coastal waters of the State and within the outer limits of the continental shelf;²⁶
- (b) for Queensland it was as for (a) but also including the Territory of the Coral Sea, noting that it does not include the Great Barrier Reef;²⁷
- (c) for Western Australia and the Northern Territory, it was the same as for (a) except for those waters within the Joint Petroleum Development Area (JPDA) because this area has a special arrangement under the Agreements with Timor-Leste for the operation of the laws within it;²⁸
- (d) for South Australia there was some delineation needed to clarify the boundaries across its gulfs and around Kangaroo Island, as mentioned above, and s 5 and the accompanying map makes it clear what waters are coastal waters of the State (South Australia) and not offshore areas (Cth);
- (e) particular provision was made to encompass the different offshore areas of the Territory of the Ashmore and Cartier Islands (which are in the Indian Ocean to the north-west of Australia), for Norfolk Island (in the Pacific Ocean to the east), the Territory of Heard Island and McDonald Islands (in the Southern Ocean to the south-west) and the Territories of Christmas Island and

²⁶ Sections 7, 8. The details of the “scheduled area” are set out in OPGGSA 2006 Sch 1. Included are details of the “excised areas” which are, in effect, the areas where the Australian maritime boundary abuts the boundary agreed with New Zealand. This applies to New South Wales and Tasmanian offshore areas.

²⁷ Section 8. See s 8(2) for the definition of the Coral Sea, which are the waters beyond the Great Barrier Reef but not south of latitude 25 degrees south and not on the landward side of the coastline of any island at mean low water (MLW). This term, mean low water, is the mean of the monthly tides at low water and is commonly used for the datum for land survey purposes as the “low water line”. Charts on the other hand, as they are used for ships’ navigation, usually use the minimum astronomical tide as the datum for charted depths of water. For discussion of the territory of the Coral Sea see Chapter 10 and for the Great Barrier Reef see Chapter 12.

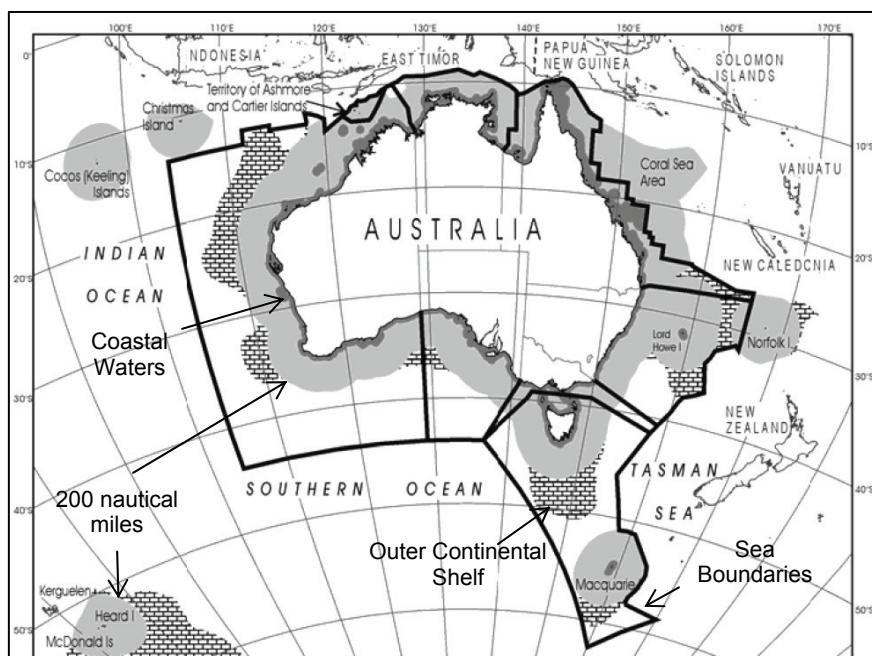
²⁸ Section 8, and for geographical details of the Greater Sunrise areas in the JPDA see Sch 7 to the Act. The JPDA is excised from the offshore areas for Western Australia and the Northern Territory under s 8 of the Act. For the legislation concerning the JPDA see the *Petroleum (Timor Sea Treaty) Act 2003* which is discussed in Section 3.7 under.

AUSTRALIAN OFFSHORE LAWS

Cocos (Keeling) Island (in the Indian Ocean to the west and slightly north);²⁹

- (f) naturally, no EEZ or outer continental shelf comes under the OPGGSA 2006 that is beyond the agreed maritime boundary with any of Australia's neighbouring countries;³⁰

These areas are set out in a Schedule to the Act, the “scheduled areas”, as columns of latitudes and longitudes delineating the adjacent areas for each of the States and the Northern Territory and each of the offshore territorial islands mentioned in the Act. Seen as columns of latitudes and longitudes the Schedule is incomprehensible, but the authorities have produced helpful maps that depict the areas, one of which is shown below.



Map 3.1 Offshore Areas and Scheduled Areas

Source: *Offshore Petroleum and Greenhouse Gas Storage Act 2006*, s 6 (as amended)

29 The Territory of the Ashmore and Cartier Islands has an unusual provision in which the land areas are to be treated as if they were beneath the sea and part of the seabed and subsoil of that offshore area: s 8(3). The offshore territories are discussed in Chapter 10.

30 Section 8(4).

This simplified map, above, which is set out in OPGGSA 2006, illustrates the offshore areas off the Australian coast. The shaded areas of the outer continental shelf under UNCLOS that Australia claimed and that the Commission on the Limits of the Continental Shelf recognised in 2008 are quite extensive.³¹ Whether they contain valuable petroleum or other mineral deposits remains to be seen.

3.4.2.3 *Applied Laws of the States*

The geographical areas to which the OPGGSA 2006 applies having been described above, it is now appropriate to turn to the actual laws that apply in these geographical areas. As mentioned above, those that apply in the coastal waters (the first three miles from the baselines) are those of the adjacent State or the Northern Territory and those laws apply in their own right as enacted by the relevant State or Northern Territory Parliament.³²

Further out, in the offshore adjacent areas, however, there is a mixture of Commonwealth and State laws concerning petroleum. The State laws are given effect as “applied laws of the Commonwealth”, with some exceptions, see under, by a provision in the Commonwealth Act. The applied laws are expressed in the Act to be the general body of laws, written and unwritten, of the relevant State or Territory, and they are termed the “applied provisions” because the State laws are applied by reason of the Commonwealth legislation.³³ The activities and persons coming under them are those relating to petroleum and they include relevant vessels, aircraft, structures, installations, equipment or other property that touch or concern exploring, exploiting or conveying petroleum and also offshore pipelines.³⁴ Exceptions to the State laws applying in the offshore area are where a State or Territory law is inconsistent with a Commonwealth law, the State or Territory occupational health and safety laws³⁵ and substantive criminal laws (which laws come under the *Crimes at Sea Act 2000*, as to which see Chapter 4).³⁶

There are a number of other qualifications and exceptions on what laws do apply in the offshore areas and to whom and how.³⁷ They are too detailed to be addressed here. It may be observed, however, that the

31 The CLCS website, <www.un.org/Depts/los/clcs_new/clcs_home.htm>.

32 The Acts that give effect to offshore jurisdiction by the various States and the Northern Territory are mentioned in Chapter 2. They are all slightly different from each other so readers may wish to refer to each separate Act.

33 Section 80.

34 Section 80.

35 Section 89 and Sch 3 to the Act contain detailed provisions about occupational health and safety that apply offshore in the petroleum areas.

36 Section 84.

37 See generally ss 81-88 and note that s 94 applies certain provisions of the Act irrespective of the exceptions.

resulting matrix of laws is so complex that some uncertainty must arise as to how and when they apply. There are numerous offshore activities relating to petroleum exploration and exploitation, which include the equipment concerning oil and gas platforms and ships, the ships and helicopters servicing them, the pipelines, exploration activities, seabed installations and all of the associated infrastructure, as well as the personnel who operate them all.

In short, beyond the three mile limit the adjacent State or Northern Territory laws are applied in relation to petroleum activities but with many exceptions. Where these exceptions apply then the Commonwealth laws apply. For the offshore areas from the external territories the Commonwealth laws apply. Further, certain special laws are applied by the OPGGSA 2006 to the Greater Sunrise area of the JPDA, to accommodate the agreements between Australia and Timor-Leste about the petroleum developments in the Timor Sea.

3.4.3 Courts' Jurisdictions

In relation to the jurisdiction of courts, the State courts are invested with jurisdiction and the Territory courts have jurisdiction conferred on them in their respective monetary and offshore geographical limits in matters arising under those respective State or Northern Territory laws, as applied offshore through s 80 of the OPGGSA 2006.³⁸ Of course the Commonwealth courts have their standing general jurisdiction over Commonwealth legislation, which includes the OPGGSA 2006.³⁹

3.4.4 Safety Zones and Areas to be Avoided

There are other aspects of the OPGGSA 2006 that deserve at least some mention. Each offshore well, installation or item of equipment has around it a safety zone and area to be avoided of 500 metres and the Designated Authority regulates what vessels may enter this area. This 500 metre safety zone is provided for in UNCLOS⁴⁰ to try to eliminate, or at least reduce, accidents between shipping and offshore facilities, to which the OPGGSA 2006 gives domestic effect.⁴¹ Part 6.6 in OPGGSA

38 Sections 91, 92 and also ss 769, 770. The OPGGSA 2006 s 93 validates acts done in or by a court or a regulator that, because of some other circumstance or legislation are, in fact, not valid, provided it could have otherwise have been within power under the applied law of the OPGGSA 2006.

39 *Federal Court of Australia Act 1976* (Cth) s 19; *Judiciary Act 1903* (Cth) s 39B.

40 See UNCLOS Art 60 which gives jurisdiction to the coastal state to construct and regulate offshore island, installations and structures. The coastal states may establish safety zones around them, to "ensure the safety both of navigation and of artificial islands, installations and structure"; which zones are not to exceed 500 metres: Art 60(4), (5).

41 Part 6.6, especially ss 616, 617.

2006 also provides for areas to be avoided and sets out the only Australian area under this category, at least so far, which is off the east coast of Victoria somewhat north of Wilsons Promontory.⁴² It is, of course, an offence to enter these zones unless authorised or for some good reason.⁴³

3.4.5 Terrorism Issues

In relation to terrorism, in both the safety zone and the area to be avoided there is power for the Commonwealth minister to declare and gazette that an emergency exists due to the risk of terrorism.

The main legislation dealing specifically with security against offshore facilities is the *Maritime Transport and Offshore Facilities Security Act 2003*, which provides for administrative aspects relating to security and also sets out the offences for unlawful actions against offshore facilities and ships. This is mentioned in more detail in Chapter 4. The other laws relating to serious crime, including terrorism, are contained in the *Defence Act 1903*, which are mentioned in Chapter 5. Of course the criminal laws of the States and the Northern Territory are applied offshore, as are some Commonwealth laws, and these are also mentioned in Chapter 4. Whether the proposed Maritime Powers Bill, mentioned in the Memorandum at the front of this book, touches on these aspects remains to be seen.

3.4.6 Occupational Health and Safety

The fact that the State occupational health and safety (OHS) laws are not applied in the offshore areas for all purposes has already been mentioned and this is yet another aspect of the complexities of the petroleum offshore jurisdiction. In this area the Commonwealth OHS laws are applied to the petroleum industry and its facilities under the OPGGSA 2006.⁴⁴ In relation to the coastal waters (ie within three miles), the Commonwealth OHS laws do not apply there so the adjacent State or Northern Territory laws are applied to petroleum facilities in those waters as well as other areas of endeavour. It should be noted that in the offshore areas these Commonwealth OHS laws under the OPGGSA 2006 only apply to petroleum facilities and activities and people associated with them, otherwise the relevant State laws apply. Specifically, the OHS laws for petroleum facilities do not apply to ships as sea-going personnel have an entirely different legal regime.⁴⁵ In all, these OHS provisions in the OPGGSA 2006 make up a very complicated scheme.

⁴² Sections 612-615 and Sch 2. Section 613 has a useful map of the scheduled area.

⁴³ Sections 618, 619 and following; Sch 2.

⁴⁴ Part 6.8 and Sch 3.

⁴⁵ Section 640. For ships the OHS aspects come under the *Navigation Act 1912* and the *Occupational Health and Safety (Maritime Industry) Act 1993*.

Further in relation to the offshore OHS regime, one notes that OPGGSA 2006 provides for a National Offshore Petroleum Safety Authority which had previously been established under the PSLA from the beginning of 2005. The main function of the Authority is to promote and to regulate the occupational health and safety of persons engaged in offshore petroleum operations.⁴⁶ Its powers and responsibilities apply in "Commonwealth waters", a new term, which are the offshore areas, and they can also apply in the "designated coastal waters", which are the coastal waters, where the State or the Northern Territory legislation confers power on it.⁴⁷ The Authority is a body corporate, is advised on safety by the board and may refer matters to the National Oil and Gas Safety Advisory Committee (NOGSAC).⁴⁸ It should be noted that amendment of the OPGGSA 2006 is always under review and regular discussion papers and bulletins are sent out by the department for consultation and many of these result in amendments to the Act. It is important, therefore, for readers to check with the current version of the Act before relying on its provisions.

3.4.7 Greenhouse Gas Storage Amendments 2008

The text above has referred to the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* in its amended version. A few words, however, on these amendments concerning offshore storage of greenhouse gases may be helpful.

In December 2007 the Commonwealth elections resulted in the Howard government losing office and the Rudd government coming into office, one result of which was a more vigorous drive to deal with climate change. Although legislation had been under consideration for some years, one aspect of this change of government was to bring forward the proposed legislation to establish a framework for greenhouse gases to be stored under the seabed. Rather than establish a new Act it was resolved that the *Offshore Petroleum Act 2006* would be amended and to give effect to this the *Offshore Petroleum Amendment (Greenhouse Gas Storage) Act 2008* was passed by the Parliament and came into force on 28 November 2008.

This amendment established a system of offshore storage gas titles, similar to the offshore petroleum titles, in order to "authorize the transportation by pipeline and injection and storage of greenhouse gas substances in deep geological formations under the seabed".⁴⁹ This storage is to be in what the Explanatory Memorandum describes as "Commonwealth waters",⁵⁰ meaning beyond the three mile limit, and the various

⁴⁶ Section 646.

⁴⁷ Section 646, and see also ss 643, 644.

⁴⁸ Section 651 and following.

⁴⁹ Explanatory Memorandum to the Bill, para 1.

⁵⁰ Ibid, Attachment A, para 1.

systems of rights and obligations associated with the various titles correspond, so far as was practicable, with those under the former OPA. Thus the new permits and licences parallel those relating to petroleum and are known as greenhouse gas permits, holding leases, injection leases, injection licences and so on.⁵¹

Numerous amendments were enacted, including that the title of the *Offshore Petroleum Act 2006* changed to *Offshore Petroleum and Greenhouse Gas Storage Act 2006*. It is unfortunate that this major change to legislation in an as-yet undeveloped industry was not established in its own Act, but it is understandable as the titles, leases, areas and activities overlap to some extent with the petroleum industry. That it should have been introduced so soon after the new *Offshore Petroleum Act 2006* came in to force in 2008 was not helpful. Further compounding these unfortunate decisions are that the 2008 amending Act included a requirement to renumber all of the sections of the amended Act, which was not helped by the fact that for some six months after the amended Act came into force no consolidated, renumbered Act was prepared by the government departments and published. These series of decisions by government officers are unfortunate but are just another example of the rapid changes in the Commonwealth legislation with which this book is concerned and the need for readers to check on the frequent and often extensive legislative amendments.

3.4.8 Administration

Of course the administration of the offshore petroleum industry and the laws that apply to it is of critical importance. This is dealt with in the OPGGSA 2006, as it was in the preceding Act, by creating Joint Authorities and the Designated Authorities, as is mentioned under. Under them come the various departments in the Commonwealth, the States and the Northern Territory.

3.4.8.1 Joint Authority

The Joint Authority is the top of the administrative hierarchy and is comprised of the responsible State minister and the responsible Commonwealth minister; there being one such authority for each State and for the Northern Territory. For the Timor Sea JPDA for the Greater Sunrise area, as to which see under, the Joint Authority is the Commonwealth minister alone and this is also the case for the five named external territories (see Section 3.4.2.2 above for their names and details of their areas).⁵² If the two ministers disagree, then the Commonwealth minister's decision

51 See exposure draft Bill dated 1 September 2008.

52 Section 56.

prevails, as is the case if the Commonwealth minister gives written notice about a decision and the State minister does not respond within 30 days.⁵³ Other provisions in the OPGGSA 2006 are that courts are to take judicial notice of the Joint Authority instruments, the ministers may delegate their powers to others and the Joint Authorities are actually to work through the Designated Authorities.⁵⁴

3.4.8.2 Designated Authority

The Designated Authority is the working body that gives effect to decisions and applies the policies and laws. It is comprised, for each respective State and the Northern Territory, only of the responsible State or Northern Territory minister alone, and for the Greater Sunrise area in the Timor Sea and for the nominated external territories it is the Commonwealth minister alone.⁵⁵ These ministers may delegate their powers and judicial notice is to be taken of the Designated Authority instruments. In fact, as mentioned, the daily administration is run by the respective departments in the States, the Northern Territory and, for the more limited purposes mentioned above, by that of the Commonwealth.

After this review of the offshore petroleum legislation it is now appropriate to turn from it to the offshore regime concerned with minerals other than petroleum.

3.5 Offshore Minerals Act 1994

As already mentioned, the OPGGSA 2006 only applies to petroleum, so those minerals that do not come within the definition of petroleum (hydrocarbons in any form) are regulated and administered under the *Offshore Minerals Act 1994* (Cth).⁵⁶ In relation to minerals, under the 1979 OCS it was agreed:

Arrangements for the mining of offshore minerals other than petroleum will be the same as for offshore petroleum.

Commonwealth and State legislation embodying a common mining code will be needed to implement the arrangements. Arrangements will be made for sharing royalties.⁵⁷ [The OCS 1979 is set out in Annex 1 to this book.]

53 Section 59.

54 Sections 70-74.

55 Section 70.

56 The associated Commonwealth Acts are: *Offshore Minerals (Exploration Licence Fees) Act 1981*, *Offshore Minerals (Mining Licence Fees) Act 1981*, *Offshore Minerals (Registration Fees) Act 1981*, *Offshore Minerals (Royalty) Act 1981*, *Offshore Minerals (Works Licence Fees) Act 1981* and *Offshore Minerals (Retention Licence Fees) Act 1994*.

57 OCS 1979, p 8 last para. The details of mining offshore relevant to the OCS 1979 are recited in s 3 of the *Offshore Minerals Act 1994* and in the maps contained in the Act itself.

The OCS 1979 terms in relation to minerals⁵⁸ was given effect by the Commonwealth Parliament passing the *Minerals (Submerged Lands) Act 1981* which was later replaced by the *Offshore Minerals Act 1994*, which is still in force.

The jurisdictional areas covered by the *Offshore Minerals Act 1994* are similar to those for the OPGGSA 2006. Basically for the waters out to three miles from the State or Northern Territory, the laws of that State or the Northern Territory apply of their own force⁵⁹ and these are the "coastal waters" of the State.⁶⁰ From three miles to the outer limit of the continental shelf a mixture of the State or Northern Territory and the Commonwealth legislation applies and it is managed jointly by them but with the day-to-day management falling to the States or the Northern Territory.⁶¹ The State and Northern Territory laws are applied by force of Commonwealth law. These are the "offshore areas" of the State.⁶² For the external Australian territories the area covered under the *Offshore Minerals Act 1994* is from the mean low water mark of the land to the limit of the outer continental shelf, with the Commonwealth (alone) administering this area.⁶³ Under the *Offshore Minerals Act 1994* the Northern Territory is to be treated as though it were a State.⁶⁴

In relation to the regulatory structure governing the exploration for and exploitation of offshore minerals, the framework of the *Offshore Minerals Act 1994*, being similar to the OPGGSA 2006, is that of establishing a licensing system for mining and exploration over designated blocks. Administration is by a Joint Authority acting through the various Designated Authorities for each State and the Northern Territory.⁶⁵ For the external territories the administration is done by the Commonwealth minister, whose responsibilities encompass both those of the Joint and the Designated Authorities for those territory offshore areas. Regulation of the activities in the blocks is carefully set out in the *Offshore Minerals Act 1994* and associated regulations.⁶⁶

58 A "mineral" is defined in the *Offshore Minerals Act 1994* as a naturally occurring substance or mixture, which may be in form of sand, gravel, clay, limestone, rock, evaporites, shale, oil-shale or coal: ss 4, 22. The *Offshore Minerals Act 1994* does not apply to petroleum: s 35.

59 Only New South Wales, Queensland, South Australia and Western Australia have legislated in regard to mineral exploration offshore: *Offshore Minerals Act 1999* (NSW); *Offshore Minerals Act 1998* (Qld); *Offshore Minerals Act 2000* (SA); *Offshore Minerals Act 2003* (WA).

60 Section 16.

61 Section 13. Schedule 2 is a map of the offshore areas for all of Australia and the external territories.

62 Section 13.

63 Section 14.

64 Section 5.

65 Sections 29-33.

66 Chapter 2 and following.

The application of the *Offshore Minerals Act 1994* is to all individuals and all corporations, whether they are Australian or not.⁶⁷ In relation to these offshore mineral laws the relevant State courts are invested with federal jurisdiction and jurisdiction is conferred on all courts that have jurisdiction in the Northern Territory or an external territory.⁶⁸

This then completes the section dealing with the *Offshore Minerals Act 1994* and, having dealt with petroleum and then other types of minerals, it now remains to mention the jurisdiction over those other offshore installations not already covered.

3.6 Sea Installations Act 1987

There are many offshore installations that are not used in the petroleum or mining industry, examples of which are offshore tourism and boating installations.⁶⁹ The need to control and regulate the offshore installations is addressed by the *Sea Installations Act 1987* (Cth),⁷⁰ the object of which Act is stated to be to apply appropriate laws to sea installations in the adjacent areas and to ensure the installations are operated in a manner that is consistent with the safety of people, ships and aircraft and the protection of the environment.⁷¹

A “sea installation” means any man-made structure, whether floating or in physical contact with the seabed, that can be used for “an environment related activity” (but excludes dumping, commercial fishing, pearl-ing vessels, wrecks, pipelines, oil and gas rigs whether mobile or fixed in place, navigational aids and certain other listed vessels or installations that may otherwise have been included).⁷² An “environment related activity” is defined very widely and strangely, as including tourism, recreation, carrying on business, exploring, exploiting or using the living resources of the sea or the seabed, marine archaeology or any other prescribed purpose.⁷³ Thus it can be seen that the Act sets out to regulate most activities and installations offshore other than those that have their own special regulated statutory scheme. One of the major types of instal-

⁶⁷ Section 37.

⁶⁸ Section 436. These vestings of jurisdiction relate to State laws that are applied laws by force of Commonwealth law, but also s 439 is needed, which invests Commonwealth jurisdiction in the State courts relating to the Commonwealth laws themselves.

⁶⁹ There are numerous wharves, buoys, beacons, platforms, etc in the inland waters of the States, but these come within the relevant State legislation.

⁷⁰ Associated Acts are *Environment Protection and Biodiversity Conservation Act 1999*; *Sea Installations Levy Act 1987*.

⁷¹ Section 3.

⁷² Section 4. These areas of activity are excluded as they all have their own quite separate legislative arrangements.

⁷³ Section 4.

lations coming under this Act is that related to offshore tourism in its various forms, especially in the Great Barrier Reef.

The area over which the *Sea Installations Act 1987* claims jurisdiction is the “adjacent area”, and this includes the space above and below that area.⁷⁴ Now although the “adjacent area” is a term used and defined under the PSLA 1967, when the OPGGSA 2006 came into force it was replaced by the “offshore area”, so it is a pity to further complicate understanding of the offshore laws by reverting to a term that was abandoned, for the most part, with the repeal of the PSLA 1967. With an exception that will be mentioned shortly, the effect of this provision under the *Sea Installations Act* is similar to the offshore areas in that the adjacent area is defined as the area outside the “territorial sea” out to the limits of the EEZ or outer continental shelf as appropriate. The exception is the reference to the “territorial sea” which, for all of Australia except some limited islands in the Torres Strait, is 12 nautical miles. However, s 5(2) provides that if at any time the territorial sea is greater than three nautical miles s 1 continues to have effect as if it did not. This sort of provision is taken from the OCS 1979, as to which see Chapter 2, and has long been inappropriate as Australia declared its 12 mile territorial sea in 1990 and the *Sea Installations Act 1987* should have been amended to this effect.

Further, the *Sea Installations Act 1987* goes on to provide that the laws, written and unwritten of the adjacent State, apply to the sea installations installed in the adjacent area (the “applied laws”).⁷⁵ The legal effect seems to be that the States and the Northern Territory have jurisdiction for their laws in their own right for the first three miles and then they have jurisdiction as applied laws from the three mile limit to the outer EEZ or outer continental shelf as appropriate.⁷⁶ In short, in the adjacent area the laws of the States apply to sea installations adjacent to those respective States.

The *Sea Installations Act 1987* also makes provision for its application offshore from the external territories. In these areas, there being no State or Northern Territory Parliament to enact laws, the Commonwealth laws apply from the low water mark.⁷⁷ As with the other similar Acts, the jurisdictional areas are those from the three mile limit beyond to the outer continental shelf, but it excludes the areas over which by international agreement Australia does not exercise sovereign rights.⁷⁸ Despite this mixture of jurisdictions, there is no common code agreed in relation to sea installations, in contrast to the petroleum and the mining industry activities.

⁷⁴ Section 5.

⁷⁵ Section 46.

⁷⁶ The State criminal laws apply by reason of the *Crimes at Sea Act 2000*, see Chapter 4.

⁷⁷ Section 47.

⁷⁸ Section 5. The maritime boundary areas where there is an agreement with another country eg Indonesia, Papua New Guinea, the Solomon Islands, New Zealand, France and Timor-Leste and the JPDA (as to which see next section).

The discussion above referred to the geographical areas of which the State, Northern Territory and Commonwealth laws are applied, but it is worth noting some aspects about which activities and which Acts are applied in these areas. Section 45 provides that, notwithstanding the State laws being otherwise applied, the Commonwealth Acts that apply in the adjacent areas are those listed in the Schedule to the Act. This Schedule lists 37 Acts but, unlike the OPGGSA 2006 and *Offshore Minerals Act 1994*, does not include the occupations health and safety laws. Further complicating the matter is that s 45 also uses the unfortunate drafting technique that a regulation may revoke the application of any Act listed in the Schedule that applies in the adjacent area to a sea installation or may apply one that is not otherwise applicable. As the regulations to any Act are often long and complex, a person, to thoroughly understand the law, must comb not only the complexities of the relevant Act but also the regulations. No doubt this drafting technique is a comfortable one for the Commonwealth officers but it is an unfortunate one for the clarity, understanding and proper administration of the law.

The *Sea Installations Act 1987* sets up a system of permits for the due regulation and administration of offshore sea installations. Unless exempted, the owner or occupier of a sea installation is guilty of an offence if a sea installation is installed, used or worked on in an offshore area otherwise than in accordance with a permit.⁷⁹ The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) has some application as well as, in certain circumstances, environmental issues need to be taken into account and, further, there are time limits on the minister to deal with issues that arise for decision.⁸⁰ Where the minister considers that a sea installation is or may constitute a threat to the safety of persons, or that it is having or is likely to have an "adverse effect on the environment", the minister may direct the owner of the permit to take requisite action and in default the minister may carry out the requisite action and claim the expenses back from the permit holder.⁸¹ The minister or an "interested person" is empowered to seek an injunction from the court against any contravention or proposal likely to give rise to one.⁸² Wide powers are given in relation to enforcement and there is provision for collection of a levy, the amount of which is based on the market value of the installation.⁸³ Provision is also made for review of decisions by the Administrative Appeals Tribunal. The courts of the adjacent States and

⁷⁹ Sections 14-16.

⁸⁰ Section 20(5A).

⁸¹ Section 54.

⁸² Section 59.

⁸³ Power for a levy is to be found in the *Sea Installations Levy Act 1987* (Cth) which provides that where a sea installation is installed in accordance with a permit and it "is being, or has been, used for an environment related activity" a levy is imposed on the permit holder. The rate of it is fixed by the regulations: see *Sea Installations Levy Act 1987* (Cth) Pt VIII.

the Northern Territory are vested with federal jurisdiction and the Commonwealth courts have theirs conferred in the usual way.⁸⁴

Returning to the complexities of the law under this Act, as mentioned above the Commonwealth laws that apply are contained in some 37 Acts but the exceptions to these and to the State laws should be mentioned. As already mentioned, a disturbing one is that a mere regulation can abrogate all or part of any of those Acts from applying.⁸⁵ For the States (and the Northern Territory), although their respective laws apply in the adjacent areas as “if they were part of that State and of the Commonwealth”⁸⁶ there are many exceptions, including the substantive criminal law. Further there are other Acts that apply not already mentioned. To control customs, excise, immigration etc relating to offshore installations, the *Customs Act 1901* (Cth) repeats some of the provisions of the *Sea Installations Act 1987* and deems sea and resources installations to be part of Australia and makes them subject to customs control. It also lays a framework to control people, ships and aircraft travelling to and from them and deems goods brought to them to be imported. Along similar lines, the *Excise Act 1901* (Cth) gives suitable powers to the excise officers, including in the Great Barrier Reef over the tourist pontoons anchored on the reef. For the same purpose, direct journeys are not permitted to or from sea installations to foreign places (external places) unless otherwise regulated.⁸⁷

From this it may be seen that the offshore jurisdiction applying laws to people and activities to offshore sea installations is a complex mixture of Commonwealth and State laws.

It is appropriate now to turn to the last area for attention in this chapter, which is the Joint Petroleum Development Area (JPDA), which lies in the Timor Sea. This next section will, therefore, address what the JPDA and the Timor Sea agreements with Timor-Leste contain, how they came into being, and the application of Australia’s offshore jurisdiction in relation to the Timor Sea.

3.7 Timor-Leste and the Joint Petroleum Development Area

3.7.1 Background

The Timor Sea, which lies between northern Australia and Timor Island, is rich in oil and gas and in order to exploit them a special agreement between Australia was made, first with Indonesia and then, after its

⁸⁴ Section 49.

⁸⁵ Section 45(2).

⁸⁶ Sections 46, 47.

⁸⁷ Section 51. See Chapter 6 for “immigration” and Chapter 8 for “customs and excise” laws.

independence, with Timor-Leste (East Timor). Over a period of almost 30 years Australia and Indonesia negotiated the joint maritime boundary between the two countries, beginning in the early 1970s. The negotiations began in the east near Papua New Guinea and extended west until the common boundary ended in the Indian Ocean. However, a section of the boundary to the south of the eastern half of the Timor Island was not agreed and this boundary came to be called the "Timor Gap".

A short explanation for this gap existing lies in former colonial times. In the 16th century Timor-Leste became a Portuguese colony and Portugal continued to govern the area until 1975. After internal disturbances, the Portuguese authorities gradually withdrew from the main land of Timor-Leste and it completely withdrew in December 1975. Indonesia then forcibly occupied the territory and it remained under its control until its forces were withdrawn and, under United Nations auspices, a combined United Nations armed force led by Australia took over. Subsequently the East Timorese voted for self-determination and they achieved full independence on 20 May 2002.⁸⁸

The gap in Australia's northern maritime boundary opposite East Timor arose because Portugal refused to negotiate the maritime boundary with Australia. Indonesia had been in de facto control of the country from 1975 and in 1979 delimitation negotiations began between Australia and Indonesia relating to the gap but no agreement was reached. The countries then sought to establish a provisional arrangement for the joint exploration and exploitation of the valuable oil and gas resources in the subsoil of the continental shelf. The treaty implementing these arrangements was concluded in 1989. The treaty established a "Zone of Co-operation" in this area between the then Indonesian Province of East Timor and Australia. Australia enacted legislation in 1990 implementing the treaty which came into force in 1991.⁸⁹

In the meantime an armed war of independence was being waged by the East Timorese and also an international political and legal campaign. Part of the international legal campaign resulted in this Australian-Indonesian agreement being brought before the International Court of Justice. Portugal filed an application with the ICJ instituting proceedings against Australia concerning "certain activities of Australia with respect to East Timor".⁹⁰ Australia objected to the jurisdiction of the court arguing Portugal's application would require the court to determine the rights and obligations of Indonesia and as Indonesia had not submitted to the ICJ jurisdiction it was not a party and its being so was necessary. It followed from this, so the argument went, that the court could not deter-

⁸⁸ The author has covered these events in more detail in M White, "Northern Offshore Oil and Gas Areas" in M White, *Australasian Marine Pollution Laws* (Federation Press, Sydney, 2nd ed, 2007), Ch 9, Section 9.4.

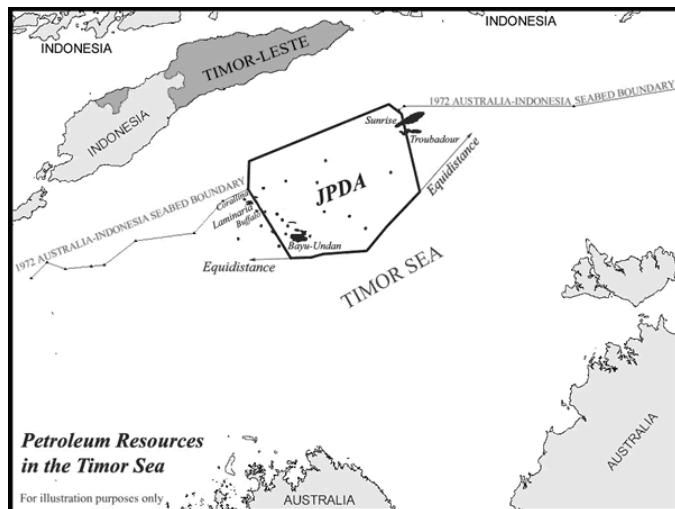
⁸⁹ See *Ibid.*

⁹⁰ *Portugal v Australia* (1995) ICJ Rep 90 at 92.

mine the application. This argument won the day and the Portuguese application failed.⁹¹

3.7.2 Timor Sea Treaty 2002

Whilst Timor-Leste was achieving, and after it had achieved, independence, Australia negotiated with it over the same area in the Timor Sea and exploitation rights as had been agreed with Indonesia. This led to agreement and, in May 2002, Australia and Timor-Leste signed the Timor Sea Treaty. This treaty was enacted into Australian law in 2003⁹² and into Timor-Leste law the following year. The treaty outlined the arrangements for a Joint Petroleum Development Area (JPDA), as shown in the map, below. Under the treaty, the JPDA is jointly managed and controlled by Timor-Leste and Australia.⁹³ The taxing rights (royalties) on production in the JPDA are expected to produce substantial revenue for the two governments and of these approximately 90 per cent are agreed to accrue to Timor-Leste and 10 per cent to Australia.⁹⁴ The regime created by the treaty was agreed to last for 30 years, or until the settlement of a permanent maritime boundary, whichever should occur sooner.⁹⁵ Readers will find a useful map showing details about the JPDA in Chapter 7, Map 7.3.



Map 3.2 Timor Sea showing JPDA

Source: Timor-Leste Government map, released in 2006.

⁹¹ Ibid at 100.

⁹² *Petroleum (Timor Sea Treaty) Act 2003* (Cth). The treaty is to be found as *Timor Sea Treaty* [2003] ATS 13.

⁹³ *Timor Sea Treaty*, Art 3. The DFAT website is <www.dfat.gov.au> follow prompts to "Timor Sea Treaty".

⁹⁴ Article 4.

⁹⁵ Article 22.

This agreement only settled the issue in the JPDA. Outside the JPDA the issue was where the maritime boundary should lie. Timor-Leste maintained that it should move south to the median line between the two countries with Australia arguing for the boundary it had agreed with Indonesia (to which Timor-Leste had never agreed). As can be seen from the map, the areas to the west had productive fields from which Australia was taking substantial royalties. The area to the east also had a major point of controversy in that the petroleum reserves straddled the boundary of the JPDA. Under the treaty these reserves had to be the subject of a unitisation agreement.⁹⁶ One such unitisation agreement, dealing with the Greater Sunrise field, was included as an annex to the treaty,⁹⁷ and was the subject of the subsequent International Unitisation Agreement for Greater Sunrise.⁹⁸ Under the Greater Sunrise unitisation agreement Timor-Leste's entitlement was only 18 per cent of the reserves in the subsoil of the sea.⁹⁹ The dispute was subsequently settled in 2005-2006, as to which see shortly.

The arrangement for management of the JPDA itself was that the Designated Authority would manage the day-to-day arrangements, overseen by a Joint Commission, which would settle on policy and direct the Designated Authority, and both of these bodies would be overseen by a Ministerial Council.¹⁰⁰ Provision was made in the Timor Sea Treaty, of course, for legal schemes as well as for management. The Australian jurisdiction, in many cases a dual jurisdiction with Timor-Leste, was agreed to be over the following: a fiscal scheme for each petroleum entity in the JPDA, a Petroleum Mining Code, any pipeline that may be constructed to Australia from the JPDA, protection of the marine environment from pollution,¹⁰¹ occupational health and safety for the personnel working there, taxation laws, criminal jurisdiction,¹⁰² customs, quarantine and migration,

96 *Timor Sea Treaty*, Art 9. "Unitisation" is desirable where a field lies underground partly in one party's exploitation area and partly in another's. If they both exploit in a race against each other they both lose. Agreement avoids this situation.

97 Article 9(b), Annex E.

98 The International Unitisation Agreement for Greater Sunrise was implemented into Australian law as the *Greater Sunrise Unitisation Agreement Implementation Act 2004* (Cth).

99 Timor-Leste's entitlement is 90 per cent of 20.1 per cent = 18.09 per cent.

100 *Timor Sea Treaty*, Art 6.

101 Inside the JPDA the Designated Authority was charged with issuing regulations to protect the marine environment: *Timor Sea Treaty*, Art 10(c).

102 In relation to the criminal jurisdiction, this is dealt with in the *Crimes at Sea Act 2000*, where the substantive criminal laws of the Northern Territory are applied to Australian nationals accused of offences in the JPDA: *Crimes at Sea Act 2000* s 6A. Sections 6B and 6C deal with transit of persons accused of offences against the laws of East Timor and s 6C empowers making regulations giving effect to any agreement with East Timor about enforcement of criminal laws in the JPDA. Whether the proposed Maritime Powers Bill, mentioned in the Memorandum at the front of this book, touches on these aspects remains to be seen.

hydrographic and seismic surveys, petroleum industry vessel safety and operations, surveillance, security, search and rescue and air traffic services.¹⁰³

3.7.3 Petroleum (Timor Sea Treaty) Act 2003¹⁰⁴

The terms of the agreement were given effect in Australian law by the *Petroleum (Timor Sea Treaty) Act 2003*. It established the Ministerial Council, the Joint Commission and the Designated Authority.¹⁰⁵ It made it an offence to carry out prospecting or production of petroleum in the area without the authority of the Designated Authority and also gave effect to the Australian tax laws and the Petroleum Mining Code.

From the point of view of Australian jurisdiction the Act invested the courts of each State and the Northern Territory with jurisdiction in civil matters, within their respective offshore jurisdictions.¹⁰⁶ These courts in applying the civil laws are to apply the Northern Territory laws, whether written or unwritten (but this jurisdiction did not apply to the “substantive” criminal laws).¹⁰⁷

In relation to these criminal laws, the treaty provided that the laws of each country were to be applied to its nationals, with the exception that a person merely resident in one country but a national of the other was to come under the laws of the latter. Nationals of a third state were to be subject to the laws of both countries.¹⁰⁸ This was given effect in Australian law by the *Petroleum (Timor Sea) Treaty (Consequential Amendments) Act 2003* which had the effect of Australia applying the *Crimes at Sea Act 2000* and the Northern Territory laws (see Chapter 4). The *Consequential Amendments Act 2003* amended in all some 13 Acts, which included those relating to crime, customs, migration, tax and quarantine.

It may be seen from this that the Australian offshore jurisdiction in the JPDA is a complicated matrix of laws that apply the Australian civil and criminal laws to Australian nationals and to all other persons except Timor-Leste nationals.

103 Articles 5, 7-21. Disputes are to be settled by consultation or negotiation or, failing that, by an agreed arbitral tribunal; *Timor Sea Treaty*, Art 23.

104 For a complete description of the negotiations relating to the various treaties with Indonesia and then Timor-Leste in the Timor Sea, see P Cleary, *Shakedown: Australia's Grab for Timor Oil* (Allen & Unwin, Sydney, 2007).

105 Section 4.

106 Section 9. The Federal Courts already have jurisdiction under the *Federal Courts Act 1975* s 20.

107 Section 10.

108 *Timor Sea Treaty*, Art 14.

3.7.4 Treaty on Certain Maritime Arrangements in the Timor Sea 2006¹⁰⁹

As mentioned, the Greater Sunrise controversy was linked to the broader debate over the appropriate placement of the permanent maritime boundary between Australia and Timor-Leste. Ordinarily, a dispute over maritime boundaries could be compulsorily resolved by the International Court of Justice or the International Tribunal for the Law of the Sea. This option became unavailable, however, because Australia suddenly withdrew its recognition of this compulsory jurisdiction in March 2002. Accordingly, the permanent maritime boundary needed to be settled by negotiations. Talks between Australia and Timor-Leste over a permanent boundary were conducted in various stages for several years but no agreement was reached until 2006.

As mentioned above, the Australian government argued for keeping the maritime boundary where it had been agreed with Indonesia and the Timor-Leste government¹¹⁰ argued for the maritime boundary to be based on equidistance between the two countries.¹¹¹ On the Timor-Leste argument the entire *Timor Sea Treaty* area and the Greater Sunrise, Buffalo, Corallina and Laminiara fields were all on the Timor-Leste side of the line and that it was entitled to exploit these resources and obtain these revenues. Timor-Leste criticised the Australian decision to withdraw from the compulsory dispute resolution mechanisms of the International Court of Justice and International Tribunal for the Law of the Sea and was not alone in this criticism.¹¹²

The uncertainty over the Greater Sunrise field and generally about the maritime boundary jeopardised the willingness of the relevant oil companies to invest the huge sums of money required to exploit the Greater Sunrise field. Woodside Petroleum, the project operator for the multi-billion dollar Greater Sunrise gas project, suspended work on the project. The joint venture had also included the Royal Dutch/Shell Group, ConocoPhillips and Osaka Gas Co, and it was stopped until the two governments gave them certainty.¹¹³

Then, after extensive negotiations, on 12 January 2006 Australia and Timor-Leste agreed on the main terms for the *Treaty on Certain Maritime Arrangements in the Timor Sea 2006*¹¹⁴ (CMATS).¹¹⁵ In conjunction with the

¹⁰⁹ *Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea*, Sydney, 12 January 2006; [2007] ATS 12.

¹¹⁰ Timor-Leste Timor Sea Office *Fact Sheet: Summary*. 2003-2004. (See <www.timorseaoffice.gov.tp/summary.htm>.)

¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ [2007] ATS 12.

¹¹⁵ Department of Foreign Affairs, "Media Release: Australia and East Timor Sign Treaty on Maritime Arrangements in the Timor Sea" (12 January 2006).

2003 International Unitisation Agreement, the CMATS established a framework for the exploration of the Greater Sunrise gas and oil field and extended and built on the 2002 *Timor Sea Treaty*.¹¹⁶

The fundamental terms of the CMATS Treaty are:

1. the treaty will remain in force until 50 years after its entry into force (Art 12) and the *Timor Sea Treaty* 2002 is amended to be in force for the duration of the CMATS Treaty 2006 (Art 3);
2. the treaty was without prejudice to Timor-Leste or Australia's rights to the future delimitation of their respective boundaries, or any future claim relating to the whole or part of the Timor Sea and it was not to be a basis for asserting or furthering the legal position of either party with respect to boundary claims, jurisdiction or rights (Art 2). Also, there was a moratorium on claims to sovereign rights, jurisdiction or maritime boundaries for the period of the treaty (Art 4);
3. the revenues arising from the upstream petroleum production in the Greater Sunrise field were to be shared equally (Art 5);
4. the rights to the resources in the water column ie fisheries, were to be divided by a line set out in Annex II, to the south of which Australia had sole rights and to the north of which they belonged to Timor-Leste (Art 8);
5. any disputes about the interpretation or application of the treaty were to be settled by consultation or negotiation (Art 11);
6. the CMATS Treaty, *Timor Sea Treaty*, Sunrise International Unitisation Agreement and any future agreement between the countries was to determine the obligations and rights between the countries governing the exploration and exploitation of petroleum resources (Art 7); and
7. the Maritime Commission was established, comprised of one minister from each country, to consult from time to time and not less than annually with regard to maritime matters of interest to the parties (Art 9).

The CMATS Treaty 2006 came into force on 23 February 2007. It was, in the main, an international agreement and most of it did not require legislation. Those parts that did related to the Greater Sunrise field and this was given effect by the *Offshore Petroleum Amendment (Greater Sunrise) Act 2007*.¹¹⁷

¹¹⁶ In March 2006, the Australian and East Timorese governments agreed on the Petroleum Mining Code and Model Production Sharing Contract so these agreements, along with other cooperative steps, are sound steps along the road to providing companies, investors and business with some certainty of the conditions under which they could operate.

¹¹⁷ Certain fiscal amendments were made in the accompanying *Customs Tariff Amendment (Greater Sunrise) Act 2007*.

This concludes the saga over the Timor Sea, at least to date. It remains now to draw some conclusions about it.

3.7.5 Timor Sea Conclusions

It can be seen from this section that this series of treaties seems to have settled most of the major points between Australia and Timor-Leste for the exploration and exploitation of the natural resources in the Timor Sea. The dispute over the maritime boundary has been settled with a moratorium on claims for a 50 year period from 2007. A suitable agreement for sharing the petroleum resources has been put in place and the fisheries (water column) control has also settled. The more technical questions of revenue-sharing of petroleum production, unitisation, etc are now mainly settled. There is still, however, much detail that is not settled and it remains for the two countries not to fall out over the administration for the 50 years of its operation. The stage has now been set for the oil companies to feel confident enough to invest their huge expenditures in exploring for and exploiting the oil and gas fields and if and when they come to full production this will provide substantial tax revenues to both countries.

3.8 General Conclusions

Turning now to draw some conclusion about the laws set out in this chapter about the legal jurisdiction over the offshore petroleum and mining industries, other sea installations and the Timor Sea petroleum agreements, one notes that the situation is highly complex. Starting with offshore petroleum, the basic jurisdiction arising from the Offshore Petroleum Agreement 1967, as amended and affirmed by the Offshore Constitutional Settlement 1979, is that there is a joint arrangement amongst the Commonwealth, the States and the Northern Territory. This arrangement has been given effect in the legislation passed by all of them by their own parliaments, the current Commonwealth Act being the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*.

Under this combined legislative structure the legislation of the States and the Northern Territory applies of its own right in the coastal waters (out to three miles) in the waters that are adjacent to each State and the Northern Territory. Beyond the three miles boundary, the States and the Northern Territory legislation has some limited application by right of the Commonwealth Act provisions, but there are many exceptions to this and in these cases the Commonwealth legislation applies. These latter include where there is inconsistency between the State and the Commonwealth laws, the occupational health and safety laws, the tax laws and the substantive criminal laws, which latter laws are applied by

the *Crimes at Sea Act 2000* (Cth) (see Chapter 4). The main laws that apply beyond the three-mile limit are those of the Commonwealth Parliament. As noted above, whether the proposed Maritime Powers Bill, mentioned in the Memorandum at the front of this book, touches on these aspects remains to be seen.

In relation to the Australian external territories, as they do not have their own parliaments, the Commonwealth Parliament is their source of jurisdiction. Nor do they have their own separate full administrations like the States, so the Commonwealth administers the offshore petroleum industry in these areas. The result is that offshore from the external territories, there are no coastal waters as such but the offshore petroleum legislation commences at the baseline. In all cases, for the States, the Northern Territory and the external territories, the jurisdiction over some aspects extends to the outer limit of the continental shelf claimed by Australia, but of course it does not extend past a maritime boundary with another country.

The offshore jurisdiction relating to the petroleum industry applies to persons, equipment, rigs, pipelines, but not ships and the main Act is the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*. In all zones there may be exceptions, examples of which are the 500 metre safety zones around petroleum installations and the area to be avoided offshore from Victoria. In these latter zones and in any area where the Commonwealth minister declares an emergency due to terrorism risk, special laws may apply for the duration.¹¹⁸ This, by any standards, is a far from simple jurisdiction regulating the offshore petroleum industry.

In relation to offshore minerals other than petroleum, the legislation is controlled by the *Offshore Minerals Act 1994* (Cth) and the equivalent State and Northern Territory Acts. The basis for this regime is the Offshore Constitutional Settlement 1979 and the zones and jurisdictions are similar to that for petroleum. The States and the Northern Territory apply their legislation in their own right out to the three mile limit, and beyond that the OMA 1994 applies. The outer limits are similar to the outer continental shelf, the EEZ or external boundary, as for those for the OPGGSA 2006. The external territories have their own areas in which the Commonwealth laws apply and which is administered by the Commonwealth.

For offshore installations, other than those that come under the other Acts, different legislation applies. For these the *Sea Installations Act 1987* (Cth) applies for man-made structures, floating or anchored, but it excludes many vessels, structures and activities as they have their own set of laws. The laws applying in these offshore installations are comprised of some 37 Commonwealth Acts and otherwise the adjacent State or Northern Territory laws apply. There are numerous exceptions to every

¹¹⁸ These special laws are addressed in Chapter 5, “Offshore Defence Laws”.

aspect of this jurisdiction. Also the *Sea Installations Act* reads in terms of "adjacent areas" which is confusing as that term had been replaced in the *Offshore Petroleum and Greenhouse Gas Storage Act*. Not only that, the *Sea Installations Act* is still written in terms of a change if the Australian territorial sea were to be extended beyond three nautical miles, which occurred many years ago. This confuses things generally and overall it can fairly be said that this Act needs revision.

The final part of this chapter addresses the laws in the Timor Sea and the JPDA and there the complexities are much reduced from those of earlier years, which is a good move forward. The other benefit is that the petroleum companies may find that, subject to much detail needing to be worked out, the scheme for cooperative development in the area has been set. Special agreement was needed with Timor-Leste and the first of these was in the *Timor Sea Treaty 2002* which only related to the JPDA. Although agreement has been reached on what areas and over what persons Australia may pass laws, in many cases Timor-Leste is also entitled to pass its own laws for the same area and persons. The nationals of each country are subject to their own national criminal laws but there is no certainty about the rest.

The eastern area outside the JPDA, the Greater Sunrise area, is the subject of the *Treaty on Certain Maritime Arrangements in the Timor Sea 2006*¹¹⁹ (CMATS treaty). This 2006 treaty overlaps with the earlier ones, in particular the *Timor Sea Treaty*. Much has still to be worked out and only time will tell about these complexities but it certainly makes for a complex offshore jurisdiction in the Timor Sea in and about the oil and gas fields shared with Timor-Leste.

Overall in relation to Australia's offshore petroleum and other laws one can observe that they are complex. It is suggested that they are unnecessarily so and the root cause of this unnecessary complexity lies in the fact that the Offshore Constitutional Settlement 1979 established a basic line offshore of three miles between the Commonwealth and State laws. This issue is addressed in more detail in the concluding chapter. The interplay of Commonwealth and State laws, with exception piled on exception, does not give rise to the simple application of the rule of law.

¹¹⁹ [2007] ATS 12.

Chapter 4

Offshore Criminal Laws

- 4.1 Introduction
- 4.2 British Settlement in 1788
- 4.3 Two Significant Cases: R v Bull and Oteri v R
 - 4.3.1 R v Bull
 - 4.3.2 Oteri v R
- 4.4 Crimes Act 1914
- 4.5 Offshore Constitutional Settlement 1979 and the Uniform Scheme for Crimes at Sea 1979
 - 4.5.1 Offshore Constitutional Settlement 1979
 - 4.5.2 Crimes at Sea Act 1979
- 4.6 Crimes (Ships and Platforms) Act 1992
- 4.7 Cooperative Scheme for Crimes at Sea Act 2000
 - 4.7.1 Crimes at Sea Act 2000
 - 4.7.2 Inner Adjacent Area
 - 4.7.3 Outer Adjacent Area
 - 4.7.4 Joint Petroleum Development Area
 - 4.7.5 Jervis Bay Laws Otherwise Applied
 - 4.7.6 Exceptions to the Adjacent Areas
- 4.8 Terrorism and Offshore Laws
- 4.9 Police Offshore Powers
- 4.10 Some Leading Cases
 - 4.10.1 The Pong Su Case
- 4.11 Conclusions

4.1 Introduction

This chapter addresses the offshore jurisdiction of the criminal laws of the Australian Commonwealth and those of the States and Territories.¹ It proceeds chronologically from the earliest English criminal law offshore jurisdiction to the English law introduced into Australia through the various colonies, then to the federation of the colonies into the Commonwealth of Australia in 1901 and, finally, to the present offshore criminal law jurisdiction. It is not possible to deal with the criminal law itself, which is a vast topic, but only with the jurisdiction as it is exercised offshore that applies the criminal law.

¹ I am indebted to Ms Kylie Weston-Scheuber, then of the Commonwealth Director of Public Prosecutions Office, for assistance with aspects of this chapter, and to others as well, as mentioned in the acknowledgements in the Author's Preface.

The start for this is in the early English criminal laws and these came under the jurisdiction of the Admiral and the Admiral's Court. It is not practicable to enter into a detailed treatise on its origins and development² but merely to mention sufficient of them, and the difficult issues that they threw up, to show the background to the present Australian law.

One may commence by noting that the early maritime laws from Rhodes, the Roman laws and then the Laws of Oleron and the Black Book of Admiralty were mainly concerned with what we would now call criminal law.³ The punishments for offences were cruel and brutal by present day standards with torture and mutilation common and a mere quick and ordinary hanging being regarded as somewhat lenient.

As mentioned, the English jurisdiction came under the Admiral, which Cremeen states was a title which came into use in about 1300 and which jurisdiction was later followed and developed by the High Court of Admiralty.⁴ As the years passed the Admiral's Court also developed a civil jurisdiction and this led to the collision between the common law courts and those of the civil laws, with which the Admiralty law was associated. This, in turn, led to the triumph of the common law courts and so to the reduced jurisdiction of the Admiralty courts. In the 19th century, however, this Admiralty jurisdiction was enlarged by statute, and so this enlargement also applied to the law that had come to Australia with British settlement in 1788. It should be mentioned that it was English law that was brought to and applied in Australia, not the laws of Scotland, Ireland or Wales, so it is the development of English criminal jurisdiction offshore that is relevant to Australia.

The offshore criminal jurisdiction initially regulated conduct only in relation to British ships and it was established that the English laws applied to those onboard a British ship wherever that ship may be ie in British waters or overseas. When it came to foreign ships, however, it was more complex. The laws of the foreign flagged vessel applied onboard but if the crime was committed by, or against, a British citizen then in some cases the English law could apply. If the accused, of any

- 2 The standard texts on the early maritime and criminal law are useful but the Australian situation is admirably set out in Australian Law Reform Commission, "Reference on Admiralty Jurisdiction. Research Paper No 4. Criminal Admiralty Jurisdiction" (ALRC, Sydney, February 1988).
- 3 For an informative Australian scholar on the development of the Admiralty jurisdiction, including the criminal law, see CW O'Hare, "Admiralty Jurisdiction" (1980) 6 *Mon LR* 91 (Part 1) and 195 (Part 2). The criminal jurisdiction is discussed at 105-106, 109-116.
- 4 D Cremeen, *Admiralty Jurisdiction: Law and Practice in Australia and New Zealand* (Federation Press, Sydney, 2nd edn, 2003, p 1). Dr Cremeen is well placed as an expert on this topic as he was one of the principal researchers for the Australia Law Reform Commission Report, *Criminal Admiralty Jurisdiction and Prize*. Report No 48 (ALRC, 1990).

nationality, British or otherwise, came into the British jurisdiction then that person could be tried under English law. So one aspect of the jurisdiction turned on the nationality of the accused and, to a lesser extent, it also turned on that of the victim. Another aspect turned on the nationality of the ship on which the crime was committed or against which it may have been committed. A third aspect was in what waters, or ports etc, the crime occurred. In all cases the accused had to be within the British jurisdiction before the court could exercise its powers over him or her.

As the ordinary common law applied to crimes committed on land and the Admiral's courts applied to crimes committed at sea, questions arose as to exactly which waters in and near the land come under which jurisdiction. The ordinary English criminal laws were applied in the early days by the local authorities, but as the criminal law became more sophisticated questions arose as to the limits of the jurisdiction where the sea merged with the rivers, the bays and the ports. The basic Admiralty jurisdiction came to be exercised on the seas themselves and in the rivers, bays and harbours where the ebb and flow of the tide occurred. This test of the "ebb and flow of the tide" had exceptions and difficult areas. For a time the concept of the jurisdiction of the Admiral being restricted to below the major bridges emerged. Then there was the question of which jurisdiction covered the area between the high and low water marks.

Another question that arose was for what distance offshore could the coastal state exercise its criminal jurisdiction. In the end it became established that any vessel in the territorial sea, initially three nautical miles wide under English law but now generally accepted as up to 12 miles in width, should be in the jurisdiction. However, this did not mean that all of the laws of the coastal state applied; merely that they could lawfully apply. In the case of the criminal law, if the flag state or the ship's master requested assistance from the coastal state it came to be accepted that it could be lawfully given and the accused could be tried in the coastal state and under its laws. Also for adjudication was what types of crimes should come under the Admiral's jurisdiction. Some crimes occurred over a period of time so that they partly occurred at sea and partly on the land.

Of course piracy was an international criminal problem and in international and national law the pirate was regarded as the common enemy of all nations and subject to the jurisdiction of all equally. As a result a pirate was tried by the state that caught him or her and no request for *renvoi* to his or her own country for trial was accepted. Piracy has for a long time been considered a principle of *jus cogens* in international law, requiring all states to prosecute pirates wherever they may be found.

This is sufficient by way of introduction to the various issues thrown up by the topic because, as mentioned above, the purpose of this chapter

is to concentrate on the Australian offshore criminal laws and not to dwell too long on its origins.⁵

4.2 British Settlement in 1788

The settlement of the British penal colony in New South Wales in 1788 brought with it English law, so the imperial written and unwritten laws applied initially to the colony of New South Wales and then later to all of the Australian colonies as they were established. Imperial legislation applied in two phases. Imperial legislation generally applicable beyond the waters of the United Kingdom applied to the colonies as did imperial legislation specifically applicable to the named colonies.

This area of the law was fully explored and set out in an excellent report by the Australian Law Reform Commission in 1990,⁶ upon which considerable reliance is placed for this section. The demarcation between the Admiral's Court's jurisdiction and that of other courts followed into the colonies. The applicable Acts under which the Admiral had jurisdiction included the *Offences at Sea Act 1799* (UK). There were other Acts that applied in the colonies, including the *Piracy Act 1698* (UK)⁷ and the *Offences at Sea Act 1806* (UK).⁸ Piratical offences at sea were tried by special tribunals, sitting with Commissioners, and the *Offences at Sea Act 1806* (UK) extended the scope of the tribunals' jurisdiction to a wider range of offences committed at sea within the jurisdiction of the Admiral. The jurisdiction of the tribunals was replaced as the legislation outlined below was enacted. Although replaced, the Acts were not formally repealed and remained in force in Australia and other dominions for some time so the situation was not entirely clear in many cases.

British legislation conferred jurisdiction upon Australian courts in regard to offences aboard British ships committed at sea between the low water mark of the British colony and the coast of any foreign country where the tide flowed. This jurisdiction was over offences against the law of England.⁹ Other Acts, those that did not confer general jurisdiction

5 Selden Society, MJ Pritchard and DEC Yale (eds), *Hale and Fleetwood on Admiralty Jurisdiction*, Selden Society Vol 18, 1992. The "Introduction", and the "Treatises" by Hale and by Fleetwood in the book give a sound scholarly history of English maritime jurisdiction.

6 Australian Law Reform Commission Report, *Criminal Admiralty Jurisdiction and Prize*. Report No 48 (ALRC, 1990), especially Chs 2 and 3.

7 All "piracies, felonies and robberies" committed within the jurisdiction of the Admiral were to be tried by appointed Commissioners in the colonies.

8 See also the *Murders Abroad Act 1817* (UK) which extended the Commissioner's jurisdiction under the *Offences at Sea Act 1806* (UK) to murders and manslaughters committed on land in certain overseas areas by persons from a British ship. For an excellent general book on English law in British colonies, see Hon Dr BH McPherson, *The Reception of English Law Abroad* (Supreme Court of Queensland Library, 2007).

9 *Offences at Sea Act 1799* (UK).

on the Admiralty courts, specified the areas, vessels and persons over which, or whom, jurisdiction was granted. As the ALRC report on "Criminal Admiralty Jurisdiction and Prize" sets out,¹⁰ such Acts were the *Australian Courts Act 1828* (UK),¹¹ *Admiralty Offences (Colonial) Act 1849* (UK),¹² *Courts (Colonial) Jurisdiction Act 1874* (UK),¹³ *Territorial Waters Jurisdiction Act 1878* (UK)¹⁴ and the *Merchant Shipping Act 1894* (UK).¹⁵

The powers of the various Australian courts were the same as the English courts exercising Admiralty jurisdiction.¹⁶ These criminal laws were applied by the Supreme Courts of the colonies¹⁷ and, but only in limited jurisdictions, by the colonial Vice-Admiralty courts¹⁸ until they were abolished.

When the colonies federated into the Commonwealth of Australia in 1901, there was no major change relating to the offshore criminal jurisdiction. The colonies, now having become the States, continued to exercise the jurisdiction that they had always exercised offshore which was from the low water mark out to the limit of the territorial sea. So, after federation it was presumed the States had continued to exercise that same jurisdiction. (See Chapter 2 for discussion of the dispute between

¹⁰ Australian Law Reform Commission Report, *Criminal Admiralty Jurisdiction and Prize*. Report No 48 (ALRC, 1990), pp 8-9.

¹¹ Section 4 confers jurisdiction over all "treasons, piracies, felonies, robberies, murders, conspiracies and other offences" on the Supreme Courts of New South Wales and Tasmania where the Admiral has authority.

¹² The Act confers jurisdiction on the criminal courts of other States and the Northern Territory as conferred by the *Australian Courts Act 1828* (UK).

¹³ Applies Australian punishments to English offences over which jurisdiction is conferred by the *Australian Courts Act 1828* (UK) and *Admiralty Offences (Colonial) Act 1874* (UK).

¹⁴ Extends the jurisdiction of the "Admiral" (and therefore the Australian courts) to indictable offences aboard foreign ships in the territorial sea. The Act was enacted to remedy the decision in *R v Keyn* (1876) 2 Ex D 63 which determined that the courts lacked jurisdiction over foreign vessels in territorial waters.

¹⁵ Section 686 confers jurisdiction on Australian criminal courts over offences by British subjects on British ships on the high seas and British subjects on foreign ships (excluding crew) within the territorial jurisdiction of the relevant court. Section 687 confers jurisdiction on Australian courts exercising jurisdiction under the *Australian Courts Act 1828* (UK) and the *Admiralty Offences (Colonial) Act 1848* (UK) over offences committed outside the Dominions by any master, seaman or apprentice employed on a British ship.

¹⁶ *Admiralty Offences (Colonial) Act 1849* (Imp) s 1; see also *Courts (Colonial) Jurisdiction Act 1874* (Imp).

¹⁷ See the discussion of the offshore criminal jurisdiction in *R v Bull* (1974) 131 CLR 203 at 224 per Barwick CJ and at 257 per Gibbs J.

¹⁸ For the background and jurisdiction of the Vice-Admiralty courts see Archives Authority of New South Wales, *Vice Admiralty Court of New South Wales 1787-1911* (Archives Authority Record Group NVAC, Guide No 22, 1980). For discussion of the development of these courts and their subsequent abolition see H Zelling and M White, "Constitutional Background and Jurisdiction of Courts" in M White (ed), *Australian Maritime Law* (Federation Press, Sydney, 2nd edn, 2000), Ch 1, Section 1.4.

the Commonwealth and the States over who had the offshore jurisdiction and the subsequent Offshore Constitutional Settlement 1979.) As the Commonwealth Parliament started passing laws relating to the whole of Australia, such as those relating to customs, defence, etc, the Commonwealth conferred jurisdiction on the State courts under the *Judiciary Act 1903* (Cth) so there was no particular problem about their exercising offshore jurisdiction.

There were changes and amendments made to the British law, the Commonwealth laws and the various State laws, but the British aspects of Australia continued with Australian ships being “British” ships on the British registry¹⁹ and English criminal laws applying offshore where those of the States did not. Then in the 1970s there occurred two cases which showed the complexity of this jurisdiction and the need for reform.

4.3 Two significant cases – R v Bull and Oteri v R

4.3.1 R v Bull

In 1974 Mr Bull and others were convicted in the Supreme Court of the Northern Territory of assembling to import a prohibited import (cannabis) into Australia, possessing it, importing it and using a ship unlawfully for these purposes, under the *Customs Act 1901* (Cth). The offences occurred within three miles of the Northern Territory coast, ie in the territorial sea. The defendants argued that the court had no jurisdiction, alternatively none under the *Customs Act*, and the issues went on appeal to the High Court in *R v Bull* in 1974.²⁰

The majority held that the Northern Territory Supreme Court had jurisdiction under its ordinary criminal law and not under its Admiralty jurisdiction. However, the defendants had some success as the court also held that no importation occurred until the prohibited goods actually landed or came into port and that a charge of knowingly using a vessel for importing did not lie whilst the vessel was still some miles out to sea. Although the court held that an Australian court had jurisdiction under Australian law, that the court had to canvass the British criminal law and its possible application to offences offshore from Australia even in the Australian territorial sea, showed that it was time for reform.

4.3.2 Oteri v R

Then in 1976 the Privy Council had to consider a case which clearly demonstrated that the Australian offshore criminal jurisdiction had an

¹⁹ Australian ships were registered as “British” ships until the *Shipping Registration Act 1981* (Cth) came into effect.

²⁰ *R v Bull* (1974) 131 CLR 203.

absurdly British basis for a country that had been independent for 75 years. In *Oteri v R*²¹ two people were accused of a theft of crayfish pots some 22 miles off the Western Australian coast on board a fishing vessel owned by Australian residents who lived in Fremantle, a port in Western Australia. The vessel was not registered. The indictment in the Western Australian District Court alleged that the offence was within the Admiralty jurisdiction of England and the offences were governed by the English *Theft Act 1968*. The accused demurred on the grounds that neither the Australian criminal law of Western Australia nor that of the United Kingdom was in force at that place, which was on the high seas.

In the Full Court of the Supreme Court of Western Australia it was held that jurisdiction did lie. An appeal to the Privy Council was dismissed with Lord Diplock giving the opinion of their Lordships. Their opinion was that the jurisdiction was founded on the four propositions advanced by the Western Australian Solicitor-General,²² which were:

- (1) the vessel was a British ship. Even though it was not registered it still had that nationality because these Australian citizens were "British" under the *British Nationality Act 1948* and the *Merchant Shipping Act 1894* (Imp) still gave the vessel a British nationality even though it was not registered;
- (2) the criminal law of England extended to all British ships on the high seas. This was the ordinary Admiralty law which had been codified in the *Offences at Sea Act 1799* and, even though the rest of this Act was repealed by the *Criminal Law Act 1967* (Imp) the relevant section still applied. The 1799 Act was ambulatory so it picked up the newly created statutory offence under the *Theft Act 1968* (Imp), so the *Theft Act* did apply to the accused;
- (3) it followed that the offences were committed on a British ship by British subjects and they did come within the criminal jurisdiction of the Admiralty; and
- (4) this jurisdiction was regulated by the *Admiralty Offences (Colonial) Act 1849* (Imp), supplemented as to penalty by the *Courts (Colonial) Jurisdiction Act 1874* (Imp), and the effect was that in Western Australia the District Court exercised the criminal jurisdiction of the Admiralty for offences on the high seas.

It may be seen from *Oteri's* case that the application of British laws to Australian citizens committing offences offshore from Australian States had reached absurd complications and that reform and repatriation back to Australian laws of the Australian offshore criminal jurisdiction was long overdue.

21 [1976] 1 WLR 1272; 51 ALJR 122.

22 RD Wilson QC, later Sir Ronald Wilson a justice of the High Court.

However, before we progress to the laws that followed on from *Oteri's* case it is necessary to go back to the earlier criminal law that was enacted by the Commonwealth Parliament not many years after federation in 1901.

4.4 Crimes Act 1914

On federation it was necessary that the Commonwealth make laws to deal with criminal activities in those areas that the Commonwealth acquired after federation and in relation to those laws that were peculiarly Commonwealth by nature. Of course the criminal laws of the various States still applied and the enforcement of most of the Commonwealth laws was left to the State police and the State courts. For this latter purpose the State courts were vested with the jurisdiction permitted under the Constitution.²³ These were the only Australian courts until the Commonwealth established its own courts in 1975.²⁴

The need for some Commonwealth criminal laws resulted in passage of the *Crimes Act 1914* (Cth), which Act has since been much amended and expanded. Ancillary to the Act is the Commonwealth *Criminal Code*, Ch 2 of which creates general principles of criminal responsibility, which applies to all offences against the *Crimes Act 1914*.²⁵ In its current form the offshore jurisdiction of the *Crimes Act 1914* is extensive as it is expressed to apply throughout the whole of the Commonwealth and the territories²⁶ and beyond.²⁷ The powers given to law enforcement officers under the Act are also extensive as they encompass Australian Federal Police, State and Territory police, members of the Australian Commission for Law Enforcement Integrity Commission, the Australian Crime Commission, Australian Customs Service and members of certain police forces or law enforcement agencies of a foreign country.²⁸ The Act applies in "Commonwealth places" which are defined to have the same meaning as in the *Commonwealth Places (Application of Laws) Act 1970* (Cth).²⁹ The *Crimes Act* empowers the Commonwealth government to make arrangements with the governments of the States, the Northern Territory and the Australian Capital Territory or the administrator of Norfolk Island for the latter's officers to exercise Commonwealth powers and functions and

23 Constitution s 76: "the Parliament may make laws- ... (iii) investing any court of a State with federal jurisdiction".

24 The Federal Court of Australia and the Family Court of Australia.

25 Section 3BA.

26 For this purpose the "Territories" does not include the Northern Territory but instead the Northern Territory is included in the meaning of "State": s 3(1).

27 Section 3A.

28 Section 3.

29 Section 3AA.

for facilities and procedures to be made available,³⁰ which has been done from time to time. There is, of course, an extensive array of related Acts dealing with the criminal law and they may be identified on the Commonwealth law website under the legislation commencing with the word "crime" or "criminal".³¹

The *Crimes Act 1914* itself is very extensive and extends over some 500 pages when one includes the tables and notes. Its provisions are wide ranging and, as mentioned above, they apply offshore as well as onshore. Because so many of the provisions are important to understanding the extent of Australian laws offshore the main headings of the Parts and some Divisions are set out, even though the list is lengthy. They are as follows:

- Part I Preliminary matters;
- Part IAA Search, information gathering, arrest and related powers; which includes extensive and very intrusive powers in relation to "terrorist acts";
- Part IA General provisions, including conferring non-judicial powers on officers, meaning of "penalty units",³² indictments;
- Part IAB Controlled operations for obtaining evidence about Commonwealth offences, which includes that law enforcement officers are not liable for offences committed during "controlled operations";
- Part IAC Assumed identities being authorised, acquired and used;
- Part IAD Protection of children in proceedings for sexual offences;
- Part IAE Video link evidence in terrorism proceedings;
- Part IB Sentencing, imprisonment and release of federal offenders;
- Part IC Investigation of Commonwealth offences;
- Part ID Forensic procedures; which includes admissibility of evidence;³³
- Part II Offences against the government, which includes treachery, sabotage and inciting mutiny;
- Part IIA Protection of the Constitution and of public and other services, which includes unlawful associations and offences associated with them;

³⁰ Section 3B.

³¹ See <www.comlaw.gov.au>. The Acts relate to such matters as controlled police operations, enforcement of fines, forensic procedures, aviation, biological weapons, foreign incursions and recruitment, hostages and internationally protected persons.

³² Section 4AA.

³³ Part ID, Div 7.

- Part III Offences relating to the administration of justice, which includes giving false testimony or fabrication of evidence;
- Part IIIA Child sex tourism;
- Part IV Piracy, which includes creating the offence of piracy or operating a pirate-controlled ship or aircraft;
- Part VI Offences by and against public officers;³⁴
- Part VII Official secrets and unlawful soundings;
- Part VIIA Offences relating to postal services;
- Part VIIC Pardons, quashed convictions and spent convictions;
- Part VIII Miscellaneous provisions, including trespass and discharging firearms on Commonwealth land.

As mentioned above, the *Criminal Code* is associated with the *Crimes Act 1914* and it is concerned with many of the provisions that flesh out the methods by which the regulation and enforcement of the offences in the *Crimes Act* are presented and heard in courts. The *Criminal Code* is, in fact, the schedule to the *Criminal Code Act 1995* (Cth), which Act extends to all external territories and offshore installations.³⁵ The Code is extensive, as may be expected, and covers some 600 pages of print. There is not space to deal in any details with its provisions but it may be noted that most of the offences created under it can apply to acts and circumstances offshore. The principal areas covered by the various chapters to the *Criminal Code*, are:

Chapter 1 Codification, meaning that the only Commonwealth offences are those created by the Code or some other Commonwealth Act;

Chapter 2 General principles of criminal responsibility. This chapter includes the elements that need to be proved to convict, defences available and it also deals with "strict liability"³⁶ and "absolute liability";³⁷ (There is no Chapter 3.)

Chapter 4 The integrity and security of the international community and foreign officials;

Chapter 5 The security of the Commonwealth, which includes the controversial amended laws relating to "terrorism" and "preventative detention orders"; (There is no Chapter 6.)

34 Part V has been repealed and is omitted.

35 *Criminal Code Act 1995* (Cth) ss 3A, 3B.

36 Strict liability, which is to be found in many of the Commonwealth Acts, is where no "fault elements" need to be proved such as intention, knowledge, recklessness or negligence, although the defence of mistake of fact is available: s 6.1.

37 Absolute liability is the same as for "strict liability" but the defence of mistake of fact is not available: s 6.2.

Chapter 7 The proper administration of government; which chapter includes offences relating to fraudulent conduct, bribery and impersonation of Commonwealth officials;

Chapter 8 Offences against humanity and related offences; which chapter includes offences relating to war crimes, genocide and other crimes for violations of the *Geneva Conventions*;

Chapter 9 Dangers to the community; which chapter includes offences relating to import and trafficking of drugs and weapons and contamination of goods;

Chapter 10 National infrastructure; which chapter includes offences relating to money laundering and interference with postal, telecommunications, computer and financial services.

The Code ends with an extensive dictionary, which takes the place of the definition section found in many other Acts.

This section has indicated the scope of the Commonwealth criminal laws but because Australia is a federation there are, of course, the criminal laws of the six States and two Territories with parliaments, all of whom have made extensive provision for criminal laws. The next section, therefore, will deal with how the interaction of the geographical span of these laws is applied with, of course, a focus on the offshore aspects of it.

4.5 Offshore Constitutional Settlement 1979 and the Uniform Scheme for Crimes at Sea 1979

4.5.1 Offshore Constitutional Settlement 1979

A summary of the laws, as confirmed by *Oteri's* case, is that in the 1970s imperial legislation governed the prosecution in Australian courts of criminal offences committed on board ships on the high seas.³⁸ Criminal law applicable on board all Australian-owned ships, which were then deemed British ships, on the high seas was British law and Australian citizens were then deemed to be British subjects.³⁹ This offshore jurisdictional problem had been compounded the year before when, in 1975, the *Seas and Submerged Lands Act Case*⁴⁰ was decided by the High Court in which it held that the Commonwealth had offshore jurisdiction from the low water mark or relevant historic boundaries, and not the States.

38 *Admiralty Offences (Colonial) Act 1849* (Imp) s 1.

39 *British Nationality Act 1948* (UK) s 1. This section was repealed by the *British Nationality Act 1981* (UK).

40 *New South Wales v Commonwealth* (1975) 135 CLR 337, discussed above in Chapter 2.

This led to the Offshore Constitutional Settlement 1979 (OCS 1979) (see Chapter 2 for a full exploration of the OCS) and also to a uniform scheme for crimes at sea, which was reflected in the *Crimes at Sea Act* 1979 (Cth) and complementary legislation by the States. Dealing first with the OCS 1979, and returning later to the 1979 Act, one notes that the actual document recording the OCS dealt with crimes as follows:

Under the scheme (ie the OCS) State legislation will deal with offences in the territorial sea (then three nautical miles) and offences committed on voyages between two ports in one State, or that began and ended at the same port in a State. The Commonwealth legislation deals with other cases, but in doing so it applies the criminal laws of a State and Territory with which the ship is connected by registration or otherwise.⁴¹ ...

The scheme will not affect the application of existing specific federal criminal offences, which will continue to be dealt with, as now, under the special Commonwealth legislation in question, for example the *Customs Act*. ...

The Commonwealth legislation involved – the *Crimes at Sea Act* 1979 – came into force on 1 November 1979, the date of the establishment of the Australian 200 nautical mile fishing zone.⁴² ...⁴³

It can be seen from this quote that the OCS 1979 provided that the criminal laws of the adjacent State would apply to offences on vessels out to three nautical miles and those on intrastate voyages. For other cases the Commonwealth law would apply the State law (the applied law) and the law would be that of the State in which the vessel was registered or was otherwise connected.⁴⁴ The Commonwealth criminal law would also apply to offences against specific Commonwealth laws. This was given legislative effect, as to which see the next and subsequent sections of this chapter.

⁴¹ The convoluted sharing of jurisdiction over fisheries between the Commonwealth, dealing with international and interstate vessels, and the States, dealing with State and intrastate vessels, merely reflects the power sharing established under the Australian Constitution. This restriction on Commonwealth powers is reflected in much of the Commonwealth legislation, a good example being the *Navigation Act* 1912 (Cth) s 2.

⁴² The Australian Fishing Zone of 200 nautical miles offshore was established before Australia gave effect to UNCLOS, but now the Australian Fishing Zone is coterminous with the 200 mile EEZ: *Fisheries Management Act* 1991 (Cth) s 4.

⁴³ Attorney-General's Department, "Offshore Constitutional Settlement. A Milestone in Co-operative Federalism" (Australian Government Publishing Service, Canberra, 1980) see the Commonwealth Attorney-General's website at <www.ag.gov.au> and follow prompts. A copy is an annex to this book.

⁴⁴ This is not a *Pearce v Florencia* (1976) 135 CLR 507 situation in which there is sufficient nexus, as that does not require the Commonwealth law to have any application at all: see Chapter 2 for discussion of this case and its legal effect.

4.5.2 Crimes at Sea Act 1979

As mentioned in the text of the OCS 1979, the Commonwealth enacted the *Crimes at Sea Act 1979* and the States and Northern Territory enacted related legislation.⁴⁵ The basic arrangement was that the criminal law of the relevant State or the Territory would be applied offshore from that State or Territory, defined in the Act as the “adjacent area”.⁴⁶

The main provisions of the Act provided that the criminal law, written and unwritten, substantive and procedural, of a particular State or the Northern Territory applied to unlawful acts that were committed: aboard Australian ships on a non-intrastate voyage or while in a foreign country;⁴⁷ aboard foreign ships on a voyage to Australia where the offender subsequently enters Australia;⁴⁸ by Australian citizens or residents aboard foreign ships beyond the Australian territorial sea;⁴⁹ by any citizens aboard foreign ships fishing within the Australian fishing zone where the offender subsequently enters Australia⁵⁰ or connected with the exploration or exploitation of Australia’s continental shelf.⁵¹ The courts of the States and the Territories were invested with jurisdiction over these criminal laws extended to seaward.⁵²

This uniform system of criminal laws extending offshore from each State and Territory applying that State or Territory’s criminal laws was a major advance in the orderly application of the Australian criminal laws offshore. However, there were some shortcomings and so a further scheme was agreed upon, known as the cooperative scheme, which came into effect in 2000.

Before turning to that, however, in chronological order the next legislative enactment about criminal jurisdiction offshore came about due to acts of terrorism against ships and offshore oil and gas platforms. It is convenient, therefore, to deal with this aspect first.

⁴⁵ *Crimes (Offences at Sea) Act 1980* (NSW); *Crimes (Offences at Sea) Act 1980* (SA); *Crimes (Offences at Sea) Act 1979* (Tas), *Crimes (Offences at Sea) Act 1978* (Vic), *Criminal Law (Offences at Sea) Act 1978* (NT). Queensland simply amended its *Criminal Code*, s 14A, to extend the Queensland criminal jurisdiction to 200 nautical miles. For a case on this, see *R v Olney* [1996] 1 Qd R 187. The Western Australian *Criminal Code* similarly applies to offences committed at sea by reference to a connection with the State. The Code extends the application of Western Australian criminal law additionally to that as provided in the *Crimes (Offences at Sea) Act 1979* (WA). Jurisdiction under both schemes is expressly conferred on the State and Territory criminal courts. For discussion of these issues see M Davies and A Dickey, *Shipping Law* (Law Book Co, Sydney, 3rd edn, 2004), pp 62-63.

⁴⁶ The “adjacent area” was defined in the same terms as in the then *Petroleum (Submerged Lands) Act 1967* (Cth) now in the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*, discussed in Chapter 3.

⁴⁷ Section 6.

⁴⁸ Section 7.

⁴⁹ Section 8.

⁵⁰ Section 7.

⁵¹ Sections 9, 10.

⁵² Section 13.

4.6 Crimes (Ships and Fixed Platforms) Act 1992

Criminal jurisdiction for crimes at sea had been thought adequate to cover all bases because the ordinary criminal law dealt with crimes committed in ships and piracy laws dealt with crimes committed from outside the ship. Crimes committed on offshore oil and gas rigs normally came under the criminal jurisdiction of the coastal state so they, too, were subject to an adequate regulatory system.

In 1985, however, some Palestinian militants hijacked the Italian cruise liner *Achille Lauro* and, in the course of other crimes, murdered one of the passengers. Their motive was political gain, not for any private ends, as they demanded the release of 50 Palestinian prisoners held by Israel. In the end they were brought to trial in Italy, but it raised the concern of the international shipping community that perhaps the criminal regulatory regime needed improvement for crimes committed for political ends. The definition of "piracy" required the crime be for private ends and, also, that it be committed against another ship, so the piracy conventions did not cover the criminal acts in the *Achille Lauro* case, which were for political ends.⁵³ The more recent issues relating to terrorism are mentioned below but they are mainly dealt with in other chapters.

The result of the *Achille Lauro* hijacking was that the International Maritime Organization organised an international convention, the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, which was agreed at an International Maritime Organization international conference held in 1988 (the SUA convention). This convention only related to ships, with fixed platforms being expressly excluded as they were not ships under the relevant definition. It has been widely supported.⁵⁴ Apart from providing for member states to make laws dealing with terrorism in and to ships, their passengers and crews, it also required all state parties to support and cooperate with each other. Similar provision was made for terrorist acts against offshore platforms in a 1988 protocol to the SUA convention, the *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf* (the SUA protocol).

Australia became a party to this SUA convention and protocol and gave legislative force to it in the *Crimes (Ships and Fixed Platforms) Act 1992* (Cth) which is still in force. The offences under the Act include seizing, destroying, etc ships, platforms, navigational facilities etc or doing or offering violence to persons on them. The Act provides for co-operation amongst those states that are parties to the SUA convention

⁵³ UNCLOS Art 101.

⁵⁴ The International Maritime Organization website, under "Status of Conventions", sets out the detail about the number of countries that have ratified the International Maritime Organization conventions: see <www.imo.org>.

and its protocol, including cooperation so that the master of a ship is empowered to deliver any alleged offender to the authorities of another state.

In relation to jurisdiction, the Act provides that it extends to acts, matters and things outside Australia and to all persons whatever may be their nationality.⁵⁵ In relation to the offences concerning a ship, the ship must be one on an international voyage or in another country's territorial sea and have an Australian element⁵⁶ (which is defined as being an Australian ship or the offender is an Australian national⁵⁷).

In relation to an offence on or against a platform, the platform must be beyond the Australian territorial sea and have an Australian element which is defined as requiring the platform to be on the Australian continental shelf or the offender to be an Australian. Alternatively, the offence must have a protocol state element, which is that the platform be in the territorial sea or on the continental shelf, or be a national of that state, which state is a party to the protocol.⁵⁸

The jurisdiction of the 1979 Act includes platforms, ships and people out to the limit of the continental shelf. This same jurisdiction is also covered by the ordinary crimes provisions, so it is now convenient to turn to the improved version of this legislation, which is the *Crimes at Sea Act 2000* (Cth).

4.7 Cooperative Scheme for Crimes at Sea Act 2000

4.7.1 Crimes at Sea Act 2000

In 2000 the Commonwealth repealed the *Crimes at Sea Act 1979* and enacted in its place the *Crimes at Sea Act 2000*. The 2000 Act legislated for the cooperative scheme between the States and Commonwealth relating to the application of criminal law of the States extraterritorially in areas adjacent to the coast of Australia.⁵⁹ The Commonwealth Attorney-General and the relevant ministers of the States and the Northern Territory entered into an agreement for this cooperative scheme. As with the 1979 Act, the scheme basically was that the substantive criminal laws of each of the States and the Northern Territory should apply offshore from their coasts, but there were numerous exceptions and qualifications.

The map, following, shows a geographical illustration of the areas over which the various State and Northern Territory criminal laws apply.

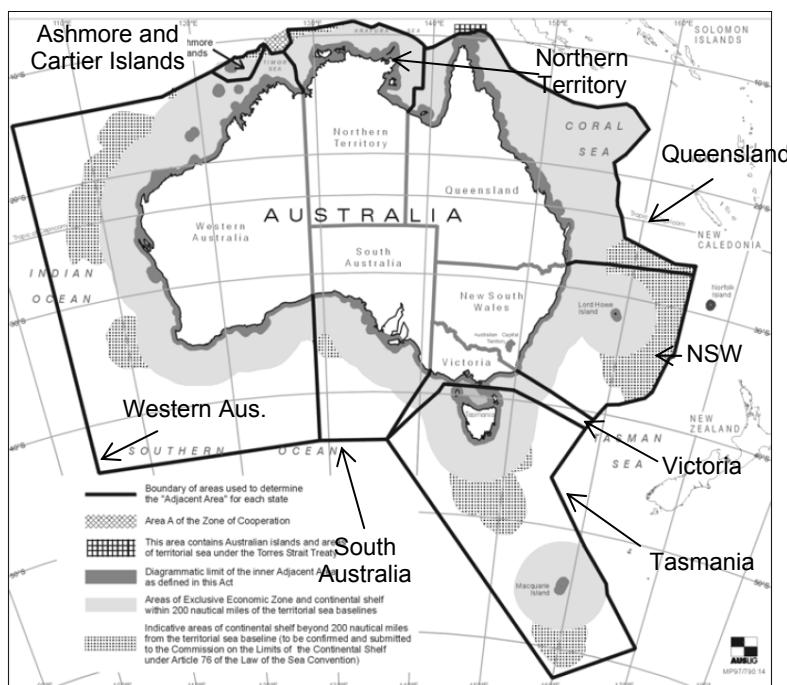
55 Section 5.

56 Section 18.

57 Section 18(3).

58 Section 29(3), (4).

59 Preamble, *Crimes at Sea Act 2000*.



Map 4.1: Offshore Criminal Jurisdictional Areas of the States and the Northern Territory

Source: *Crimes at Sea Act 2000* (Cth) App 1 (as amended)

The *Crimes at Sea Act 2000* contains the legislation itself, followed by Sch 1, which sets out the agreed scheme in the form of legislation, and then Sch 2, which sets out the related Commonwealth Acts that are to be amended. There are four zones for the application of the criminal law, each applying slightly different aspects to the different areas or situations. It is convenient to deal with them separately.

4.7.2 Inner Adjacent Area

To take account of the OCS 1979 provisions whereby certain laws of the States and Northern Territory apply offshore for a limited distance of their own right, and thereafter the Commonwealth laws apply, the offshore zones for criminal laws need to be established. The "inner adjacent area" extends 12 miles to seaward of the base line.⁶⁰ It is noteworthy that the extension is for 12 miles to seaward from the baseline,

⁶⁰ Schedule 1, cl 1.

whereas the other legislation only extends *three* miles to seaward, both of which distances are in accordance with the OCS 1979. The substantive criminal law of the State and the Northern Territory applies in this area by force of law of the State itself and does not need the force of the Commonwealth legislation to so apply.⁶¹

4.7.3 Outer Adjacent Area

The substantive criminal law of the States and the Northern Territory applies to the “outer adjacent area” by force of the law of the Commonwealth and the “outer adjacent area” is from the 12 mile line out to the outer limits of the “adjacent area”.⁶² The “adjacent area” was in turn defined in Sch 1, and its terms were the same as Sch 2 to the *Petroleum (Submerged Lands) Act 1967* (Cth).⁶³ Readers will recall that this latter Act, the PSLA 1967 as discussed in Chapter 3, has been replaced by the *Offshore Petroleum Act 2006* (Cth) and this OPA 2006 adopts different terminology for the offshore zones. As a result, the *Crimes at Sea Act 2000* was amended by the *Offshore Petroleum Amendment (Greenhouse Gas Storage) Act 2008* (Cth) to accord with these changes. A consolidated version of the amended *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) is the Act which readers should consult.⁶⁴ The criminal laws of the States and Northern Territory apply, therefore, continuously from the land out to the limit of the EEZ or the outer continental shelf, whichever is the greater distance.⁶⁵

4.7.4 Joint Petroleum Development Area

As discussed in Chapter 3, the various treaties with Timor-Leste about the Joint Petroleum Development Area (JPDA) provide for some Australian criminal jurisdiction to apply there. This is done in the *Crimes at Sea Act* and, very sensibly because of its close geographical proximity, the substantive criminal laws of the Northern Territory are applied in the JPDA. These laws apply where the criminal act is done in relation to the exploration or exploitation of petroleum resources. It does not include acts on a ship or aircraft or acts done by a national of Timor-Leste.⁶⁶ Provision is also made in the Act for transit through the JPDA of accused

61 Schedule 1, cl 2(1).

62 Schedule 1, cl 2(2).

63 See Sch 1, cl 1 and also cl 14.

64 See Department of Resources, Energy and Tourism, “Australian Petroleum News (Special Edition)” (November 2008), as cited in S Barrymore and A Mathison, “Update: Offshore Petroleum Amendment (Greenhouse Gas Storage) Act 2008 (Cth)” (November 2008), available at <www.freehills.com.au/4471.aspx>.

65 *Crimes at Sea Act 2000* (Cth) preamble.

66 Section 6A.

persons being taken in custody to Timor-Leste and for further agreement between Australian and Timor-Leste for enforcement of criminal laws.⁶⁷

4.7.5 Jervis Bay Laws Otherwise Applied

These “adjacent areas” only apply to the sea areas offshore from the States and the Northern Territory, with the result that the areas offshore from the external territories and Norfolk Island had to use different terminology and to apply some other substantive criminal law structure. It selected the law of the criminal law of the Jervis Bay Territory. The *Crimes at Sea Act 2000*, therefore, applies the Jervis Bay Territory criminal law at sea to areas that are not adjacent areas to the States and the Northern Territory. The criminal law of the Australian Capital Territory applies in Jervis Bay by virtue of the *Jervis Bay Territories Acceptance Act 1915* (Cth).⁶⁸ So they apply to a criminal act on an Australian ship, to an Australian citizen not a member of the crew on a foreign ship or to any person on a foreign ship whose first port of call after the criminal act is Australia.⁶⁹ The exceptions to this are that the Jervis Bay laws do not apply to the territorial sea of Norfolk Island, nor to certain of the offshore territories, as to which areas see Chapter 10, “Offshore Territories Laws”.⁷⁰

4.7.6 Exceptions to the Adjacent Areas

Mention has been made of the numerous exceptions and qualifications in relation to the jurisdiction and the offences to which this scheme applies. One of these is that the actual geographical areas that are adjacent to the States and the Northern Territory are not simple in some cases. Queensland’s adjacent area excludes the Great Barrier Reef area, see Chapters 2 and 12, but includes the Coral Sea area which is to its seaward side⁷¹ and the territorial sea of certain Queensland islands.⁷² The Northern Territory adjacent area does not however include the area in the JPDA because it has its own scheme but the area does include the areas

⁶⁷ Sections 6B, 6C.

⁶⁸ Sections 4A, 4AA.

⁶⁹ Section 6. There are numerous qualifications and exceptions set out in the section, including the requirement for the Attorney-General to give consent to any proceedings on an indictable offence.

⁷⁰ *Crimes at Sea Act 2000* s 6(10). The offshore territories to which the Jervis Bay laws do not apply are Christmas Island, Cocos (Keeling) Islands, Australian Antarctic Territory, Heard Island and Macdonald Islands, Ashmore and Cartier Islands and the Coral Sea Islands: see s 6(10)(b).

⁷¹ Within the meaning as defined in the *Offshore Petroleum Greenhouse Gas Storage Act 2006*; *Crimes at Sea Act 2000* Sch 1, cl 14(2)(b).

⁷² Determined by proclamation under *Seas and Submerged Lands Act 1973* (Cth) s 7; *Crimes at Sea Act 2000* Sch 1, cl 14(2)(c).

adjacent to the Territory of Ashmore and Cartier Islands but excluding their territorial seas (12 miles).⁷³

The *Great Barrier Reef Marine Park Act 1975* (Cth) applies to numerous offences committed in the Barrier Reef, including using and entering a zone for a purpose other than a purpose provided for in a zoning plan;⁷⁴ discharging waste into the park without permission;⁷⁵ and navigating without a pilot in a compulsory pilotage area.⁷⁶ The provisions of the *Crimes Act 1914* (Cth) relating to aiders, abettors, conspiracy and incitement apply to Great Barrier Reef Marine Park offences.⁷⁷ The laws in the Great Barrier Reef are dealt with in further detail in Chapter 12.

It may be seen from the above that the jurisdiction relating to offshore criminal law is far from simple. It has the unusual provision that the laws of the States and the Northern Territory apply offshore of their own right for 12 nautical miles as opposed to three nautical miles for most other State and Northern Territory laws. However, this offshore jurisdiction becomes even more complicated due to the more recent raft of legislation relating to terrorism. This will now be mentioned.

4.8 Terrorism and Offshore Laws

The *Maritime Transport and Offshore Facilities Security Act 2003* (Cth) is the central piece of legislation in response to the threat of terrorism in ports, ships and offshore platforms. The Act, formerly called the *Maritime Transport Security Act 2003*, applies to Australian trading and passenger ships, foreign ships travelling to a port in Australia, Australian ports, port facilities and port operators, and service providers that service these ships, ports and offshore facilities. The Act does not apply to Defence vessels, Commonwealth or foreign vessels on non-commercial voyages, or fishing and recreational vessels.

The scheme created by the Act requires the management of ports, ships and offshore facilities to establish a bureaucracy and training scheme so that nominated people have specified tasks to establish greater security from criminal acts. The scheme involves different maritime security levels and establishes different measures to be implemented when the various security levels are in force.⁷⁸ It also provides for maritime security plans⁷⁹ and offshore security plans,⁸⁰ establishes maritime

73 Schedule 1, cl 14(4).

74 Section 38A.

75 Section 38J.

76 Section 59B.

77 See *Great Barrier Reef Marine Park Act 1975*; also see the discussion in Chapter 12.

78 Part 2.

79 Part 3.

80 Part 5A.

security zones,⁸¹ and imposes obligations on foreign and Australian ships and offshore service vessels.⁸² Unlawful interference is an offence, plans have to be submitted to the Commonwealth bureaucracy for approval and incidents have to be reported. A detailed regulatory system, with identification cards (International Ship Security Certificates), is created for the various managements to establish and regulate marine and marine related personnel. Most of its provisions are required under the International Ship and Port Security Code, which is directed to achieving efficient practical measures to make shipping and port facilities safer from terrorist activity, and which Code is mandatory under the *Convention for the Safety of Life at Sea 1974*.

The geographical jurisdiction is that the Act extends to all external Australian territories⁸³ and to the geographical areas established under the *Criminal Code* in ss 15.2 and 15.4. These sections require that the offence must occur wholly or partly in Australia or on board an Australian ship or aircraft, or if the offence is committed outside Australia some result must occur from it inside Australia, or finally, that the offence be committed by an Australian citizen, resident or company.⁸⁴

The issue of terrorism is further mentioned in the Defence Laws in Chapter 5. It is possible that the proposed Maritime Powers Bill, mentioned at the front of this book, will touch on this aspect but whether it does so or not remains to be seen.

4.9 Police Offshore Powers

Each of the State and Northern Territory governments has, of course, police forces and, of course, they need to work offshore from time to time. Also the Commonwealth government has a police force, the Australian Federal Police, which has many requirements to enforce laws offshore. In fact, as the Australian Federal Police website puts it, its challenges include "counter terrorism, human trafficking and sexual servitude, cyber-crime, peace operations, protection and other transnational crimes",⁸⁵ which list amply illustrates aspects of the laws that require offshore policing.

The Australian Federal Police is established and regulated by the *Australian Federal Police Act 1979* (Cth). Its functions are extremely wide. From the geographic point of view the Australian Federal Police is required to provide police services in the Australian Capital Territory, Jervis Bay and external territories and, as may be agreed with the States

81 Part 6.

82 Parts 4, 5, 5A, 5C.

83 Section 5.

84 *Criminal Code* ss 15.2, 15.4. There are some qualifications and exceptions in the *Criminal Code* and only the major principles are set out above in the text. The *Criminal Code* is the Schedule to the *Criminal Code Act 1995* (Cth).

85 Australian Federal Police website <www.afp.gov.au>, "About Us".

and the Northern Territory, support police services in the States and the Northern Territory as well. They also have duties overseas in embassies, consulates, and other Australian diplomatic premises, as well as providing support services for certain overseas enforcement agencies. From the activities point of view, their functions include witness protection services, cooperation with other police forces and also the intelligence and security agencies and monitoring security in foreign countries.⁸⁶ The powers conferred on them are spread through various Acts but they also include the common law powers.⁸⁷

There is not space to develop in any detail the wide powers of the Australian Federal Police offshore but they are extensive.

The various State police forces also have wide powers. As may be seen from this chapter, the criminal laws of the States and the Northern Territory apply to the limits of the EEZ or continental shelf, whichever is the greater.⁸⁸ So they have an extensive geographical area offshore. It follows that they, like the Australian Federal Police, need to have vessels for handling their work in ports and harbours and they are increasingly acquiring larger vessels for work offshore. The New South Wales police force acquired a 32 metre vessel, *Nemesis*, in July 2008, which resulted from the New South Wales police having no appropriate craft for the effective pursuit of the Korean drug-running vessel, the *Pong Su*, in 2003, as to which see shortly, prior to the naval vessel HMAS *Stuart* taking over these duties.⁸⁹ The Queensland police have ordered larger vessels too, including two 22 metre ones. Police officers are also transported on vessels run by other agencies to perform their duties offshore, such as the customs, fisheries and defence vessels.

In short, the powers and obligations of the various Australian police forces are extensive, as they are required to be from time to time. When enforcing the laws in such areas as smuggling, fisheries, customs and criminal acts they need these powers. As has just been mentioned, one such example was the 2003 drug smuggling case by the North Korean ship the *Pong Su*, which will now be mentioned.

4.10 Some Leading Cases

4.10.1 The Pong Su Case

The *Pong Su* was a 106 metre general cargo ship flagged in North Korea. On 15 April 2003 a sailor from a rubber dinghy was found dead from drowning on the south-east coast of Australia, near Lorne, and his

⁸⁶ Australian Federal Police Act 1979 s 8.

⁸⁷ Section 9.

⁸⁸ Crimes at Sea Act 2000 (Cth) preamble, s 14.

⁸⁹ See Australian Maritime Digest, 1 August 2008, No 171, p 4.

companion was caught and arrested; it being established that they had illegally come ashore in a rubber dinghy with about 125 kilograms of heroin. The *Pong Su* was anchored offshore but it then sailed north up the east coast of Australia. The Australian Navy, customs officers and Australian Federal Police gave chase and it was boarded by the Australian Navy personnel on 20 April and brought into Sydney harbour. A search of the ship revealed no commercial cargo but another 150 kilograms of heroin and another rubber dinghy, indicating that this North Korean ship was in Australian waters for drug smuggling purposes.

Some of the crew pleaded guilty to various charges, mainly relating to smuggling heroin, and the jury found some guilty, who were sentenced, and found some not guilty, who were released. The trial was held in the Supreme Court in Melbourne, before Kellam J and a jury, with them travelling to Sydney for a view of the vessel. The trial judge made numerous rulings in the course of the various aspects of the trials, many of which are available online.⁹⁰

The whole episode caused an enormous amount of public interest and aspects of it were widely reported. The conduct of the prosecution of these cases against the master, chief mate and chief engineer came in for criticism from some master mariners on the grounds that it was impossible that the master and officers did not know what was going on when the dinghy was launched and that, had proper expert mariner witnesses been called, the jury would likely have been satisfied as to their guilt. The *Pong Su* was forfeited to the Australian government because of its use by those who were convicted. In a showy display that was designed to discourage other possible criminals from engaging in such activity, the government had the Australian Air Force sink it by missiles offshore amidst maximum media coverage.⁹¹ In fact the sinking was not the loss of a good ship as the vessel was found not to be marketable, partly because of its poor condition anyway and partly because of the significant damage done by the Australian security and customs officers in searching the ship.⁹²

4.11 Conclusions

It may be seen from what has been set out in this chapter that the legal structure for regulation of criminal conduct offshore from Australia has had a dynamic and complex growth. Even the early English law estab-

90 The rulings begin with *Pong Su (No 1)* [2004] VSC 482 and end with *Pong Su (No 13)* [2005] VSC 38. They can be found on the Supreme Court of Victoria (Trial Division) reports on <www.austlii.edu.au> and follow prompts.

91 *The Australian* 7 March 2006, *The Courier Mail* 24 March 2006, *The Australian* 7 April 2006.

92 Evidence of Mr Trevor Cosh, marine surveyor, set out in *Pong Su (No 1)* [2004] VSC 482 at 3-4 per Kellam J.

lished with the penal settlement in 1788 brought with it complex criminal law provisions and much uncertainty about how and when the criminal law applied. With the establishment of the various Australian colonies these laws were administered, with all of their complexities, by the respective colonial Parliaments, but always subject to control, and heavily influenced by, British legislation.

When federation of the Australian colonies occurred in 1901 the questions raised as to which Parliaments could legislate and which laws should apply in the offshore jurisdiction were ignored for about 60 years. It was the increasing offshore oil and gas industry that led to the first cogent scheme, which was the Offshore Petroleum Agreement 1967, which was a genuinely cooperative agreement. However, the 1970s saw two important new issues arise. The first was that Australia increasingly was forced to actively administer its offshore laws in international law due to the increasing number and importance of the international conventions to which it was a party. These forced the Commonwealth to confront the States about their offshore effect. The second issue was that the political parties in the Commonwealth Parliament developed a major centralist attitude which led to lessening cooperation and increasing hostility with the State governments.

The two test cases of *R v Bull* in 1974 and *R v Oteri* in 1976 exposed the ridiculous situation that much of the offshore Australian criminal law derived from outdated British legislation. This exposure of the shortcomings of the offshore criminal law was combined with other issues between the Commonwealth and the States, not least the *Seas and Submerged Lands Act Case* in 1975. These issues led to the second major agreement, which was the Offshore Constitutional Settlement 1979. This is still in force but in the intervening years its terms have become less and less satisfactory.

On the offshore jurisdiction of the criminal law, the research set out in this chapter shows that offences committed offshore come under a number of regimes. The principal one is the *Crimes at Sea Act 2000* (Cth) which provides for the States and the Northern Territory and Jervis Bay criminal laws to apply offshore. The States and the Northern Territory criminal laws apply of their own force from the land to 12 miles offshore.⁹³ (This 12 mile zone is at odds with the rest of the laws of the States and the Northern Territory, which only apply of their own force offshore for three miles, which is an anomaly in itself). The States and the Northern Territory laws then apply from 12 miles to the limits of the continental shelf by force of the Commonwealth law.⁹⁴

However, if the offence is committed outside the adjacent area but on board an Australian ship then the law of Jervis Bay applies,⁹⁵ even

⁹³ *Crimes at Sea Act 2000* preamble, Sch 1, cl 1, 2(1).

⁹⁴ Preamble, Sch 1, cl 1, 2(2), 14.

⁹⁵ Section 6(1).

though many offences are provided for on ships under the State and Northern Territory laws. Jervis Bay criminal law also applies to offences committed by Australian citizens on foreign ships outside the adjacent area,⁹⁶ and to criminal acts committed on foreign ships when Australia is the first country at which the ship calls after the criminal act.⁹⁷ If the offence is by an Australian citizen or resident but it occurs in a foreign ship, then the usual practice is that by arrangement between the two governments either the Australian criminal law will be applied or the criminal laws of the flag state.

Ascertaining which criminal law applies in the coastal waters of each offshore territory is a complicated task. The Criminal Code expressly extends to all offshore territories.⁹⁸ As Lord Howe Island is technically part of New South Wales, the criminal law of that State applies in the Island's coastal waters. Similarly, Macquarie Island is not a territory but is part of Tasmania and for this reason Tasmanian criminal law applies. The situation in the coastal waters of Christmas Island and Cocos (Keeling) Islands is more complicated because a matrix of Western Australia and Commonwealth law applies in those territories.⁹⁹ Because of the close connection these territories have with Western Australia, it is likely that a combination of Western Australian and Commonwealth criminal laws apply to the outer limits of the EEZ. Similarly, given the close connection the Ashmore and Cartier Island Territories have with the Northern Territory,¹⁰⁰ Northern Territory criminal law applies offshore from the Cartier or Ashmore Islands other than in the territorial sea. Excluded from the usual geographical area of the continental shelf is the area of the JPDA, where the agreement with East Timor is that Australia may apply its criminal laws, and in this case it is the law of the Northern Territory.¹⁰¹

It is not entirely clear which criminal laws apply in the seas within and adjacent to the Coral Sea Islands Territory. The laws of the Commonwealth and the Australian Capital Territory apply in the Coral Sea Islands Territory and the territorial seas of each island.¹⁰² However, the offshore area of Queensland includes the Coral Sea area.¹⁰³ The Coral Sea Islands Territory also lies inside Queensland's outer adjacent area.¹⁰⁴ For

⁹⁶ Section 6(2).

⁹⁷ Section 6(3). As mentioned above, the criminal laws of the Australian Capital Territory are applied in the Jervis Bay Territory by *Jervis Bay Acceptance Act 1915* (Cth) ss 4A, 4AA.

⁹⁸ Section 3A.

⁹⁹ *Cocos (Keeling) Islands Act 1955* (Cth) ss 8A(1), (2), (3), 8E; *Christmas Island Act 1958* (Cth) ss 8A(1), (2), (3), 8E.

¹⁰⁰ *Ashmore and Cartier Islands Acceptance Act 1933* (Cth) ss 6(1), (2), 8(1).

¹⁰¹ *Crimes at Sea Act 2000* (Cth) s 6A.

¹⁰² *Application of Laws Ordinance 1973* (CSI) s 3(1), (2). See further the discussion in Chapter 10.

¹⁰³ *Offshore Petroleum Act 2006* s 7(1).

¹⁰⁴ See *Crimes at Sea Act 2000* (Cth) App 1.

these reasons it is possible a combination of Commonwealth and Queensland criminal laws apply in the waters surrounding this territory.

The Territory of Norfolk Island is a unique case because it is one of only three territories with a measure of self-governance.¹⁰⁵ The Legislative Assembly of Norfolk Island can pass laws for the “peace, order and good government of the Territory”.¹⁰⁶ The areas over which the Norfolk Island Legislative Assembly may pass laws include laws for the “maintenance of law and order and the administration of justice” and “correctional services”.¹⁰⁷ This suggests the territory has the ability to pass criminal laws. However, the *Crimes at Sea Act 2000* does not state Norfolk Island has an adjacent area in which Norfolk Island criminal laws apply. For this reason it is presumed the criminal laws of Jervis Bay/Australian Capital Territory apply in the waters surrounding Norfolk Island.

In the waters surrounding the Southern Oceans Territories, Commonwealth criminal law applies. The criminal law of the Jervis Bay Territory/Australian Capital Territory applies to the Heard and McDonald Island Territory¹⁰⁸ and the Australian Antarctic Territory.¹⁰⁹ These same laws apply outside these territories to the limit of the EEZ.

For further discussion on the laws pertaining to the offshore territories, see Chapter 10.

When it comes to offshore platforms on the Australian continental shelf, of which there are many, and certain crimes on some ships then the regulation is under the *Crimes (Ships and Fixed Platforms) Act 1992*. In such cases the offences relate to attempting to seize the ship, etc which are crimes relating to what is often described as terrorism, especially where there is a political motive for the offence. Distinguishing crimes by the motive brings its own complexities as for most offences the motives may be relevant to penalty but they seldom relate to the guilt or innocence of the offence itself. However, offences related to terrorism brought much emotion after the murders of nearly 3000 people by planes in the United States on 11 September 2001 and the international community considered more needed to be done. So the Australian government gave effect to its obligations under *Convention for the Safety of Life at Sea 1974* and the International Ship and Port Security Code and had the Commonwealth Parliament pass the *Maritime Transport and Offshore Facilities Security Act 2003*.

This Act requires a considerable bureaucracy to be established by the managers in the ports, the ships, offshore platforms and the governments. It establishes many offences not previously known, mainly

¹⁰⁵ The others are the Northern Territory and the Australian Capital Territory.

¹⁰⁶ *Norfolk Island Act 1979* (Cth) s 19(1).

¹⁰⁷ *Norfolk Island Act 1979* (Cth) Sch 1.

¹⁰⁸ *Heard Island and the McDonald Islands Act 1953* (Cth).

¹⁰⁹ *Australian Antarctic Territory Act 1954* (Cth) s 6(2).

AUSTRALIAN OFFSHORE LAWS

through failing to meet the bureaucratic requirements. As mentioned above, it is possible that the proposed Maritime Powers Bill, mentioned at the front of this book, will make some amendments to these provisions, but it remains to be seen.

It may be observed then that the Australian offshore criminal jurisdiction is not without its complexities. Some simplification of it would be in the national interest and this is another reason for revisiting the terms of the Offshore Constitutional Settlement 1979, as is further discussed in the final chapter.

Chapter 5

Offshore Defence Laws

- 5.1 Introduction
- 5.2 Defence Force Constitutional Framework
 - 5.2.1 Defence and the Constitution
 - 5.2.2 Call Out and the Constitution
 - 5.2.3 Executive Power and the Constitution
- 5.3 Structure and Administration of the Defence Force
- 5.4 Extent of Offshore Area
- 5.5 Ordinary Border Protection Powers
 - 5.5.1 Introduction
 - 5.5.2 Defence Force and Fisheries Powers
 - 5.5.3 Defence Force and Customs Powers
 - 5.5.4 Defence Force and Quarantine Powers
 - 5.5.5 Defence Force and Immigration Powers
 - 5.5.6 Defence Force and Offshore Installations Powers
- 5.6 Counter-Terrorism Operations
 - 5.6.1 Activation in the Australian Offshore Area
 - 5.6.2 Expedited Activation
 - 5.6.3 Powers in the Australian Offshore Area
 - 5.6.4 Special Powers
 - 5.6.5 Powers in General Security Areas
 - 5.6.6 Powers in Designated Areas
 - 5.6.7 Other Powers
 - 5.6.8 Defence Force and Aircraft Threats
- 5.7 Restrictions on the Use of Force
- 5.8 Defence of Superior Orders
- 5.9 Cooperation with Police
- 5.10 Military Commissions
- 5.11 Piracy
- 5.12 Salvage Claims
- 5.13 Conclusions

5.1 Introduction

One of the reasons for the federation of the Australian colonies in 1901 was to coordinate the defence of the country against any foreign power with hostile intent. One of the early Acts passed by the newly elected 1901 Parliament, therefore, was the *Defence Act 1903*. This Act, much amended, is still in force. The object of defence forces is the defence of the

country or in the words in the introductory title to the *Defence Act*, to provide for the “naval and military defence and protection of the Commonwealth and of the several States”.¹

Although the use of the armed forces against its own people is heavily circumscribed, because of the bitter experience over many centuries in the British constitutional law and governance, the Australian laws make provision for this to be done in certain circumstances. As will be developed shortly, they provide for the Defence Force to be “called out” to act in aid of the government in enforcing laws against its own civil population. However, quite apart from the civil call out situation the Defence Force has traditionally supported government in the enforcement of the laws in relation to such activities as fisheries, customs, smuggling and other criminal activities. The result is, as this and other chapters show, that the members of the Defence Force are charged with acting in many civil situations that are not directly connected with war or warlike operations.

This chapter concentrates on the jurisdiction of the Defence Force² in the offshore areas and although many of the powers also apply to onshore activities the offshore laws are the focus. The chapter does not address the laws of war or warlike operations. Finally it is appropriate to mention in this introduction that the Commonwealth Parliament has passed some 25 pieces of legislation the titles to which begin with the word “Defence”. These Acts all have their place relating to the administration of the Defence Forces and the benefits and responsibilities of its members³ but only the *Defence Act 1903* is directly relevant here.

5.2 Defence Force Constitutional Framework

5.2.1 Defence and the Constitution

As one of the primary reasons for federation of the colonies was the better defence of the country against a foreign enemy, the Constitution

¹ The best book on the defence powers in relation to offshore law enforcement is C Moore, *ADF on the Beat: A legal analysis of offshore enforcement by the Australian Defence Force* (Ocean Publications, 2004). Mr Moore covers the topic in considerable detail and readers are referred to it for further reading in this area.

² The terms the Defence Force, Defence Force members and Australian Defence Force are used in various contexts, but they all refer to the same entity and members of the armed forces.

³ The Acts may be found on the Commonwealth website at <www.comlaw.gov.au/legislation>. Most of the *Defence Act 1903* that is not addressed here is concerned with war and warlike operations and regulation of the Defence Force. The numerous other Acts deal with these and other aspects in some considerable detail. The *Defence Force Discipline Act 1982* and the *Defence Force Discipline Appeals Act 1955* are the two main Acts that deal with the legal structure and administration of discipline in the Defence Force and their provisions, of course, apply onshore and offshore.

addressed the issue. By s 51(vi) of the Constitution the Commonwealth Parliament is empowered, subject to the other provisions in it, to make certain defence laws.

51: The Parliament shall ... have power to make laws for the peace, order and good government of the Commonwealth with respect to ...
 (vi) the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth.

This provision covered the Commonwealth interests but, in order to ensure the States were also covered, s 119 of the Constitution addressed the two aspects of the threat of invasion of the States and the call out of the Commonwealth armed forces in a domestic violence situation in or against a State. It provides:

119. The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence.

It is noted that the first part of s 119 addresses the invasion aspects so this section, when combined with s 51(vi), provides the constitutional basis for Defence Force participation in the actual defence of the country from invasion and other like threats of a foreign power.

5.2.2 Call Out and the Constitution

The second part of s 119 of the Constitution refers to the use of the Defence Force in domestic violence situations (on the application of the government of a State). This refers to the traditional term of "call out" of the Defence Force that is the subject of so much attention in the development of the British, and hence the Australian, constitutional law. It is distinguished from the use of the Defence Force to actually defend the country against a foreign power or similar armed threat or actual incursion. In this chapter the term "call out" will be used only in this more traditional sense of the situation arising from aid to civil power in a domestic violence situation.⁴

Domestic violence is hard to define and it has not been judicially considered in this context, probably because there have been few situations and, anyway, it is a question of fact rather than law. The phrase would seem to include domestic security threats, such as riot and large scale violence. The "domestic" aspect is important and is differentiated in s 119 from the external threat of an "invasion". Provided the State government requested the Commonwealth to assist, there is clear power for the Commonwealth government to order the Defence Force to act

⁴ See also C Moore, *ADF on the Beat: A legal analysis of offshore enforcement by the Australian Defence Force* (Ocean Publications, 2004), p 9.

against domestic violence. By contrast to a State situation, where a domestic violence threat relates to a Commonwealth interest the *Defence Act 1903* does not require that a State government initiate a request and nor does the State have to agree to the use of the Defence Force within its borders. How one would separate the violence presented to a State interest from a threat to a Commonwealth interest may well be difficult and would depend on the details of the circumstances at the time.

However, Dixon J discussed this interaction of the defence power and domestic violence situations in *R v Sharkey*.⁵

But what is important is the fact that, except on the application of the Executive Government of the State, it is not within the province of the Commonwealth to protect the State against domestic violence. The comments made by Quick & Garran in *Constitution of the Australian Commonwealth* bring out clearly the distinction between matters affecting internal order and matters, which though in one aspect affecting internal order, concern the functions or operations of the Federal Government: – “The maintenance of order in a State is primarily the concern of the State, for which the police powers of the State are ordinarily adequate. But even if the State is unable to cope with domestic violence, the Federal Government has no right to intervene, for the protection of the State or its citizens, unless called upon by the State Executive. If, however, domestic violence within a State is of such a character as to interfere with the operations of the Federal Government, or with the rights and privileges of federal citizenship, the Federal Government may clearly, without a summons from the State, interfere to restore order. Thus if a riot in a State interfered with the carriage of the federal mails, or with inter-state commerce, or with the right of an elector to record his vote at federal elections, the Federal Government could use all the force at its disposal, not to protect the State, but to protect itself. Were it otherwise, the Federal Government would be dependent on the Governments of the States for the effective exercise of its powers”.⁶

A number of articles have traced the history of the use of the power to call out the Defence Force.⁷ It was not until 2000 that detailed legislative provisions were inserted into the *Defence Act 1903*⁸ regulating the use of

5 (1949) 79 CLR 121 at 151; [1949] HCA 46.

6 See J Quick and RR Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, Sydney, 1901), p 964.

7 For a detailed article relating to call out of the Defence Force, see NC Laing “Call out the Guard: Why Australian Should No longer Fear the Deployment of Australian Troops on Home Soil” (2005) 28(2) *UNSWLJ* 34. The Commonwealth Attorney-General’s departmental submission on the topic “Coastal Shipping Policy and Regulation Inquiry”; Comments from the Attorney-General’s Department on the Terms of Reference, Submission 54 to the Inquiry has some governmental insights into the role of the Royal Australian Navy: see <www.aph.gov.au/house/committee/itrdlg/shipping>.

8 *Defence Legislation Amendment (Aid to the Civilian Authorities) Act 2000*; not to be confused with the 2006 Act of the same name.

the Defence Force for domestic incidents in Australia and thereby removing uncertainty regarding the tasks for which the Defence Force could be used, and the powers that Defence Force members could exercise. The catalyst was the possibility of a large scale terrorist attack during the Olympic Games held in Sydney in September 2000. The provisions authorised the use of the Defence Force, including members of the Reserves,⁹ to protect Commonwealth interests and the States and self-governing Territories against “domestic violence”. The powers granted to the Defence Force included powers relating to the recapture of premises, freeing hostages, detaining or evacuating persons, and powers of search and seizure of dangerous things.

The call out provisions were one part, combined with aspects of terrorism as to which see shortly, of a review in 2003-2004.¹⁰ The report identified limitations in the current provisions and resulted in the amending Act, *Defence Legislation Amendment Act (Aid to the Civilian Authorities) Act 2006*. The then Minister for Defence, Dr Nelson, stated in his second reading speech:

I would like to emphasise that, while the current threat environment is likely to remain dynamic, the use of Australia’s defence forces in domestic security operations remains one of last resort. Equally, the primacy of the state and territory authorities and the retention of the military chain of command are central to this bill ... Further, the amendments address the lack of statutory legal authority to use reasonable and necessary force in ADF operations involving aviation and maritime security and the protection of designated critical infrastructure.¹¹

It will be seen that the minister’s reference included mention of maritime security. Further, the amended Act provided for the authorising minister to initiate empowerment if violence was likely “in Australia” which includes, at least, the coastal sea.¹² There appears, therefore, little doubt that the powers conferred in the amended *Defence Act 1903* were meant to apply offshore to some extent at least.

⁹ Because calling out the Reserve forces has some particularly sensitive political and legal aspects relating to it, the *Defence Act 1903* devotes particular provisions to it, see Pt III, Div 4.

¹⁰ An independent review of the provisions pursuant to the *Defence Act 1903* s 51XA with the report presented to the Minister for Defence on 12 January 2004: A Blunn (AO), General J Baker (Rtd) (AC DSM) and J Johnson (AO APM QPM), *Statutory Review of Part IIIAAA of the Defence Act 1903 (Aid to the Civilian Authorities)* (2004).

¹¹ Minister for Defence, Second Reading Speech, *Hansard*, House of Representatives, 13 February 2006, p 83.

¹² *Defence Legislation Amendment (Aid to Civilian Authorities) Act 2000* s 51A, as amended by Sch 1 to this Act. Acts are to apply to the Australian “coastal sea”: *Acts Interpretation Act 1901* s 15B.

5.2.3 Executive Power and the Constitution

Before these 2006 amendments, the call out provisions in the *Defence Act* 1903 did not extend to Australia's offshore maritime environment. Use of the Defence Force for such operations was authorised under the executive power. The executive power of the Commonwealth government also plays a part in this situation although more in the background. Section 61 provides:

61. The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.¹³

One disadvantage of using the executive power was that Defence Force personnel did not have the same express legislative powers and protections when operating in the offshore area as they did when conducting land-based counter terrorism operations.

5.3 Structure and Administration of the Defence Force

The Defence Force is part of the executive arm of government.¹⁴ The Constitution provides that the command of the naval and military forces is vested in the Governor-General as the Queen's representative¹⁵ but in fact and at law it is the Minister for Defence who controls and administers the Defence Force.¹⁶ The Defence Force is commanded by the Chief of the Defence Force and Service Chiefs command its various arms, navy, army, and air force,¹⁷ all of whom are appointed by the Governor-General. The Chief of the Defence Force and the Service Chiefs exercise their command powers subject to any directions given by the Minister.¹⁸ The *Defence Act* 1903 applies to and regulates the navy, army and air

¹³ The Executive power was central to the litigation over the *Tampa* refugee situation in 2000 in *Victorian Council for Civil Liberties Inc v Minister for Immigration and Multicultural Affairs* [2001] FCA 1297 and on appeal *Ruddock v Vadarlis* (2001) 110 FCR 491; [2001] FCAFC 1329. The author has discussed these cases fairly extensively in M White, "Tampa Incident: Shipping, International and Maritime Legal Issues" (2004) 78 *ALJ* 101 and M White, "Tampa Incident: Some Subsequent Legal Developments" (2004) 78 *ALJ* 249. Also see D Rothwell, "The Law of the Sea and the MV Tampa Incident: Reconciling Maritime Principles with Coastal State Sovereignty" (2002) 13(2) *PL* (The Tampa Issue).

¹⁴ Constitution s 61.

¹⁵ Constitution s 68. This is considered to be no more than "titular command" requiring the Governor-General to act on the advice of the responsible minister: see Hon Justice Margaret White, "The Executive and the Military" (2005) 28 *UNSWLJ* 442.

¹⁶ *Defence Act* 1903 s 8.

¹⁷ Section 9(2).

¹⁸ Section 8.

forces structure as well as all of its members.¹⁹ The Act extends to the external territories, and members may be required to serve in or beyond the Australian territorial limits.²⁰

5.4 Extent of the Offshore Area

Part IIIAAA of the *Defence Act 1903* deals with “Utilisation of the Defence Force to protect Commonwealth interests and States and self-governing Territories”, in which Div 3A sets out the specific powers that the Defence Force may exercise in Australia’s offshore area. Some discussion of these provisions is set out shortly, but first to clarify to what offshore areas the Act refers. The term “Australian offshore area” is defined in the Act as “Australian waters, the EEZ, the sea over the continental shelf or any prescribed area and includes the airspace over these areas”.²¹ In its turn the term “Australian waters” is defined as the territorial sea and the waters further inshore but these do not include the internal waters of a State or self-governing Territory.²²

Generally therefore, the Australian offshore area includes the waters from the baseline to the outer boundary of the EEZ or continental shelf, whichever is the furthest. Ports, as internal waters of a State or self-governing Territory, are excluded, along with other internal waters (such as rivers). This definition of the Australian offshore area is based on the Offshore Constitutional Settlement 1979 and the decision of the High Court in the *Seas and Submerged Lands Act Case*²³ that the Commonwealth, and not the States, had jurisdiction from the low water mark or historic State boundaries (see Chapter 2, “Offshore Constitutional and Federal Laws”). Accordingly, the response to any threats or incidents involving likely violent conduct in the Australian offshore area is primarily a Commonwealth responsibility and not that of the States or Territories. This is, of course, subject to any particular agreement between the Commonwealth and the States and to the fact that the State and Northern Territory criminal jurisdiction extends out to the limits of the EEZ; see Chapter 4, “Offshore Criminal Laws”. That the State and Northern Territory police forces have limited maritime assets, as have the Australian Federal Police, is also a factor.

19 Section 5.

20 Sections 5, 50C. It has always been a major political issue in Australia as to whether members of the army should be required to serve overseas in war unless they volunteer for it, but currently all members of the army are volunteers so the issue is not presently relevant.

21 *Defence Act 1903* s 51.

22 Section 51.

23 *New South Wales v Commonwealth* (1975) 135 CLR 337, which case is set in context and discussed in Chapter 2.

5.5 Ordinary Border Protection Powers

5.5.1 Introduction

The Defence Force, especially the navy, has a long history of involvement in law enforcement operations in the Australian offshore, particularly regarding fisheries, customs, immigration, quarantine and the protection of the offshore petroleum industry. The Australian government has chosen to organise certain aspects of these activities under the rubric of "border protection" and to this end has organised an entity called "Border Protection Command" which is a combination of customs and defence personnel. This is addressed further in Chapter 8, "Offshore Customs, Quarantine and Excise Laws", in Section 8.12.

A major weakness in Australian offshore laws is that there is no coordination or uniformity among the different Acts about the enforcement powers granted to Defence Force members, and therefore each Act must be read individually. Generally, however, Defence Force members, or in some cases classes of Defence Force members, such as commissioned officers or commanding officers, are empowered to intercept and board ships suspected of committing an offence, search the ships and persons onboard, seize items connected with the suspected offence, and bring the ship and persons into Australia; a port in most cases.

The relevant legislation will often detail the level of force authorised for use by Defence Force members in exercising their powers against persons and property, which is normally what is "reasonable and necessary" in the circumstances. Any use of force by Defence Force members must also be considered in light of Australian criminal law, such as the right of self-defence. International law also applies when dealing with foreign flagged vessels and there is a body of customary international law on the issue of how much force may be used to stop or intercept a vessel for boarding for law enforcement purposes, as to which see under. It is important to note that during law enforcement tasks Defence Force members have no general immunity from civil or criminal liability merely because they are members of the Defence Force (officers of the Crown) and any such defence or immunity must be found in the common law or expressly in a particular statute.²⁴

[24] See *Shaw Savill and Albion Co Ltd v Commonwealth* (1940) 66 CLR 344, especially at 353-355 per Starke J. This case held that the navy could not be held responsible in negligence for a collision between one of its ships and a merchant ship in wartime, 1940, but the position about the civil liability for negligence of the members of the Defence Force in ordinary peacetime activities is different, see *Groves v Commonwealth* (1982) 150 CLR 113. For an excellent summary of the offshore law enforcement powers of the Defence Force see C Moore, *ADF on the Beat: A legal analysis of offshore enforcement by the Australian Defence Force* (Ocean Publications, 2004), pp 1-4.

5.5.2 Defence Force and Fisheries Powers

The Royal Australian Navy is very active in relation to fisheries law enforcement. Apart from its ships based in other parts of Australia, it has patrol boats based in Darwin to patrol in the northern waters and other patrol boats based in Cairns to patrol in the Great Barrier Reef. Australian naval frigates have also been employed, but particularly in the southern waters, where the distances and the harsh sea conditions require larger vessels than patrol boats to be deployed. Units from the army and the air force are also called in aid from time to time.

The powers of enforcement granted to Defence Force members for the fisheries enforcement task are contained in the *Fisheries Management Act 1991* (Cth). Section 4 of that Act defines “officers” to include members of the Defence Force (as well as customs and police officers).²⁵ For further detail on this topic readers are referred to Chapter 7, “Offshore Fisheries Laws”, and in particular Section 7.4.7.

The Torres Strait has a legal regime that is unique to itself, as these waters and islands are the subject of a 1975 treaty between Australia and Papua New Guinea and special laws have been enacted by Australia to give effect to it. Amongst those laws is the *Torres Strait Fisheries Act 1984* (Cth) in which an “officer” is given extremely wide powers to board, seize, detain, search and otherwise deal with persons and vessels.²⁶ The definition of an “officer” includes a member of the Defence Force.²⁷ The Torres Strait is further mentioned in Chapter 12, “Offshore Geographical Areas”.

5.5.3 Defence Force and Customs Powers

In a similar manner to fisheries the Defence Forces are sometimes called in aid to enforce the laws relating to customs. This often arises if the customs officers are met with serious confrontation from suspected offenders in the exercise of their duties offshore; sometimes with threats and sometimes with actual violence. In such situations the well armed and trained Defence Force members are best suited to deal with the situation, at least until the situation abates sufficiently for the customs or police officers to take over.

The *Customs Act 1901* (Cth) is the Act that performs this function and its relevant provisions are set out in Chapter 8, “Offshore Customs Laws”. In that chapter, Section 8.8 deals with the various powers that are

²⁵ Section 4: “officer means: (a) a person appointed under s 83 to be an officer for the purposes of this Act; or (b) a member or special member of the Australian Federal Police or a member of the police force of a State or Territory; or (c) a member of the Defence Force; or (d) an officer of Customs (as defined in the *Customs Act 1901*)”.

²⁶ *Torres Strait Fisheries Act 1984* s 42.

²⁷ Section 3.

given to customs officers and, in that section, reference is made to the fact that Defence Force members are also given certain powers. The schedule to Chapter 8 sets these out in detail and readers are referred to it.

5.5.4 Defence Force and Quarantine Powers

The *Quarantine Act 1908* (Cth) gives wide powers to officers to protect the country from disease including detention of persons, animals, plants, vessels and aircraft. The Defence Force is not directly given powers to take steps under this Act, but such powers are derived from the *Customs Act 1901*. The definition of “officer” does not directly include persons except quarantine officers or those appointed under that Act²⁸ but if a Defence Force member were so appointed they could be empowered under the *Quarantine Act 1908*. Further, in Pt 12 of the *Customs Act 1901* very wide powers are given to officers, some of which powers overlap with quarantine duties, and an “authorized person” in that Part includes, from place to place, a “member of the Defence Force”.²⁹ This limited role of the Defence Force in quarantine matters is a little surprising as regulation of quarantine is a long way from the main role of a defence force, unless it were to be accompanied by extreme criminal violence.

5.5.5 Defence Force and Immigration Powers

Unlawful immigration has been a major issue for Australia from time to time and the need to control it has required that appropriate officers be given appropriate powers. Some of these unlawful immigrants come by sea, mainly across northern waters from Indonesia and Papua New Guinea. The offshore laws relating to this issue and the immigration officers charged with this responsibility are addressed in Chapter 6, “Offshore Immigration Laws”. Under the *Migration Act 1958* (Cth), in which these laws are set out, some of the powers are also conferred on Defence Force members, for detail of which readers are referred to Section 6.4.2 in Chapter 6.³⁰

5.5.6 Defence Force and Offshore Installation Powers

The petroleum and sea installations situated offshore from the Australian coast need, of course, to be regulated and protected. The civil aspects of this have been mentioned in Chapter 3, “Offshore Petroleum, Mining and

28 Section 5: “Officer means a quarantine officer or other officer appointed under this Act”.

29 *Customs Act 1901* s 183UA under definition of “authorised person”.

30 In particular *Migration Act 1958* ss 189, 198A and Pt II, Div 12A are relevant as they include wide powers in relation to detaining persons and vessels and dealing with them before and after detention.

Installation Laws" and the laws relating to crime have been mentioned in Chapter 4, "Offshore Criminal Laws". There is one aspect of crime, however, that has attracted particular concern throughout much of the world in recent decades, known as "terrorism". While the police forces have skill and resources in relation to dealing with such criminal behaviour, it may include dealing with extreme violence and the Defence Force is, of course, the more appropriate force to handle it. This, therefore, will be the subject of the next section.

5.6 Counter-terrorism Operations

In the early part of the 21st century a considerable amount of international criminal violence occurred and some of it came to be known as "terrorism". This violence would normally be handled by the law enforcement agencies, but the armed forces were also called in to play. Because of the significant numbers of people involved and the high levels of violence, many thought that a new situation had emerged which surpassed ordinary criminality.³¹ In Australia this led to some new legislation. It is convenient, therefore, to lead into the next part of this chapter with a recitation about this legislation before addressing the more general aspects of the use of the Defence Forces in offshore law enforcement.

In 2006 the *Defence Act 1903* was amended by the *Defence Legislation Amendment (Aid to the Civilian Authorities) Act 2006* to provide the Defence Force with express powers to respond to security threats in Australia's offshore maritime area. The Act also strengthened the existing powers of Defence Force members to respond to onshore threats.³²

Security threats to Australia, such as terrorism, are generally considered to be a domestic issue for the police. This policy was nicely stated by Justice Hope (in part quoting Edmond Bourke) in his 1979 review of the possibilities of State, Territory and Commonwealth cooperating in dealing with terrorism, including the use that could be made of the Defence Force:

Use of the military other than for external defence, is a critical and controversial issue in the political life of a country and the civil liberties of its citizens. "An armed disciplined body is in its essence dangerous to Liberty: undisciplined, it is ruinous to Society". Given that there must be a permanent Defence Force, it is critical that it be employed only for proper purposes and that it be subject to proper control.³³

³¹ An excellent discussion of this is to be found in S Bronitt and D Stephens "Flying under the Radar – The use of lethal force against hijacked aircraft: Recent Australian Developments" (2007) 7 *OUCLJ* 265.

³² The *Defence Legislation Amendment (Aid to the Civilian Authorities) Act 2006* was enacted in preparation for the 2007 Asia-Pacific Economic Cooperation (APEC) meetings hosted by Australia.

³³ RM Hope, *Protective Security Review*, Parliamentary Paper No 397/1979, p 142.

Similar sentiments were expressed in 2006 when the Defence Legislation Amendment (Aid to the Civilian Authorities) Bill 2005 was reviewed by the Senate Legal and Constitutional Legislation Committee:

The Committee received a number of submissions which contend that the proposals would erode long standing protections against the potential for capricious use of the military in civilian matters, and represent a blurring of the important distinction between the role of the police and that of the military.³⁴

It was noted by the Senate Committee, however, that the terms of the Bill reflected the changed security environment faced by Australia and the reality that the police may lack the resources adequately to respond to it:

The old neat distinctions between external threats of invasion by another sovereign state, responded to by the military, and the internal threat of civil unrest against the elected government, for which the police are responsible, simply no longer applies. As events overseas have unpleasantly demonstrated, there is a real possibility that threats or attacks may occur that are beyond the technical expertise or manpower of the relevant police force. In such circumstances, it is inconceivable that the ADF would collectively "sit on its hands" and not provide assistance.³⁵

As stated in the Explanatory Memorandum to the 2006 Bill:

As the ADF is likely to be the principal agency equipped to conduct maritime counter-terrorism (and related) operations there is a requirement to ensure a consistent legislative approach for both land-based and offshore activities. It should be noted that, with respect to counter-terrorism operations, members of the ADF perform many of the roles in the offshore area that the State or Territory Police would perform in Australia.³⁶

Against this background it is appropriate to outline the legal basis for the Australian powers to use the Defence Force to respond to security threats in Australia's offshore maritime environment, particularly where it relates to actual or threatened extreme violence (terrorism).

5.6.1 Activation in the Australian Offshore Area

The 2006 amendments inserted into Pt IIIAAA of the *Defence Act 1903* detail the circumstances in which the Defence Force may be called on³⁷ to

³⁴ Senate Legal and Constitutional Legislation Committee, Defence Legislation Amendment (Aid to the Civilian Authorities) Bill 2005 (February 2006), p 12.

³⁵ Ibid, p 13.

³⁶ Explanatory Memorandum, Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2006, p 4.

³⁷ Pt IIIAAA uses the term "called out" when referring to the Defence Forces but, as mentioned above, the meaning of this phrase in this chapter is restricted to the more traditional use of calling out the forces to aid civil power on land.

respond in the Australian offshore area and the procedures that must be followed if this is to occur. These are lengthy and complicated provisions and only the general outlines will be mentioned so in considering the detailed effect of Pt IIIAAA readers may need to refer to the actual Act itself.

In summary, the authorising ministers³⁸ must be satisfied of three things: first, that there is a threat in the Australian offshore area to Commonwealth interests (noting that the Commonwealth interest under threat need not itself be located in the Australian offshore area); secondly, that the Defence Force should be activated and the Chief of the Defence Force should be directed to use the Defence Force to protect the country; and, thirdly, the express powers granted to the Defence Force in any of Divs 2A, 3A, or 4, should apply.³⁹ If these conditions are satisfied, the Governor-General, meaning in effect the nominated minister(s) in the Commonwealth government, may call out the Defence Force and direct the Chief of the Defence Force to use the Defence Force against the relevant threat.⁴⁰ The term “Commonwealth interest” is not defined in the legislation and its meaning would depend on the particular circumstances but, if it were challenged, one would expect that a court would interpret it widely.

Cognisant that a threat could include, for example, a likely dangerous vessel or aircraft not only attempting to enter, but already in, Australia s 51AA, which relates primarily to the offshore area, includes provisions for the Governor-General to activate the Defence Force also to operate in the internal waters of a State.⁴¹ As mentioned above, the Commonwealth may act unilaterally and without a request from a State if it is to protect Commonwealth interests. In this case of acting in the internal waters of a State, s 51AA requires that the authorising ministers be satisfied of three things: that domestic violence is occurring or is likely to occur in the internal waters of a State or self-governing Territory; that the State or Territory is unable or is unlikely to be able to protect the Commonwealth interests against the domestic violence; and that the Chief of the Defence Force should be directed to use the Defence Force in those waters to protect the Commonwealth interests.⁴² As discussed above, the term “domestic violence” may include a terrorist incident or threat of a terrorist incident.

38 Section 51(1). “Authorising Ministers” are defined as meaning the Prime Minister, the Minister for Defence and the Attorney-General.

39 Section 51AA(1)

40 Section 51AA(2). There are two further constitutional provisions worth noting. One is that the Reserves may not be called out in connection with an industrial dispute (s 51AA(3)); and unless the urgency of the situation does not allow it the minister must consult with the relevant State or self-governing Territory: s 51AA(6), (7).

41 Section 51AA(5); see also s 51A but which section does not apply offshore.

42 Section 51AA(4).

5.6.2 Expedited Activation

Where a threat has developed with little or no notice and it requires an urgent response, s 51CA authorises any of the Prime Minister or a combination of designated other authorising ministers to make an order activating the Defence Force (rather than the Governor-General).⁴³ To make the order the Prime Minister or the authorising ministers must be satisfied that because “a sudden and extraordinary emergency exists, it is not practicable for an order to be made” under the normal processes. The order may be made verbally if a written record of the verbal order is made and witnessed.⁴⁴ The Explanatory Memorandum explains the circumstances in which an expedited call out order may be made:

133. It is likely that threats capable of overwhelming civil authorities will emerge with limited warning. The situation within the air and maritime environment may change quickly, from the relatively benign, to a terrorist threat. What could appear to be a fisheries or customs enforcement issue, may quickly turn into a terrorist incident. A high jacked aircraft would pose a similar short-notice threat.

135. The amendments ... will enable “call-out” or utilisation of the ADF to be activated in a timely and transparent fashion in circumstances where any unnecessary delay could potentially impact adversely on the ADF’s ability to respond. For example, a response might be required at very short notice (such as an aircraft or ship heading for a vessel, installation or facility with the intention of damaging it and/or killing those onboard).⁴⁵

It may be seen that the *Defence Act 1903* makes provision for sudden emergencies so that an urgent phone call from the Prime Minister or a combination of other ministers to a suitable person in the Defence Force would mobilise the armed forces to deal with it. There are limitations, of course, and they include that suitable written orders should be made as soon as possible and that the activation under these emergency provisions must not be for more than five days.⁴⁶

Finally it should be mentioned that the Act makes provision for a particular site or venue (infrastructure or part of an infrastructure) to be designated as “critical infrastructure” and there are separate provisions in the Act relating to onshore and offshore situations.⁴⁷ In these cases

43 The two authorising ministers are the Attorney-General and the Minister for Defence. However, the section also allows for one authorising minister together with any of the Deputy Prime Minister, the Minister for Foreign Affairs or the Treasurer to make the order: s 51CA(1), (2), (2A).

44 Section 51CA(4), (8).

45 Revised Explanatory Memorandum, Defence Legislation Amendment (Aid to the Civilian Authorities) Bill 2006, p 21.

46 Section 51CA(7).

47 The provisions are spread out in Pt IIIAAA, but the offshore provisions are in s 51CB and following.

special provisions apply some of which depend on whether, or not, the State or self-governing Territory has requested this assistance. These provisions, as applied offshore, could allow an offshore petroleum platform or gas pipeline, for instance, to be designated as critical infrastructure which would allow extraordinary measures to be taken for its protection.

5.6.3 Powers in the Australian Offshore Area

Division 3A⁴⁸ of Pt IIIAAA in the *Defence Act 1903* details the powers that may be exercised by the Defence Force in the Australian offshore area, and also in the internal waters of a State or self-governing Territory, once they have been activated. The order to activate the Defence Force must specify that Div 3A powers apply and the Act divides the powers that may be exercised into three groups. The “special powers” are the most severe, and may only be exercised upon ministerial authorisation subject to a sudden and extraordinary emergency. Lesser powers, such as search and control powers, may be exercised by Defence Force members without specific ministerial authorisation, but only in declared “general security” or “offshore designated” areas. The authorising ministers must have declared these areas to exist before the powers may be exercised.⁴⁹ Any authorisation or declaration made by authorising ministers must be made with regard to Australia’s international obligations.⁵⁰ For example, this would include consideration of the right of foreign flagged vessels to freedom of navigation in accordance with Australia’s obligations under the *United Nations Convention on the Law of the Sea 1982* (UNCLOS).

5.6.4 Special Powers

Section 51SE provides broad “special powers” to a member of the Defence Force in the Australian offshore area and, in limited circumstances, in the internal waters of a State or self-governing Territory.⁵¹ The member may take a number of actions, including capturing a vessel or aircraft,⁵² boarding or recapturing a facility, vessel or aircraft⁵³, preventing or putting an end to acts of violence,⁵⁴ freeing a hostage,⁵⁵ controlling the movements of

48 Pt IIIAAA, Div 3 contains the powers for Defence Force operations onshore or in internal waters.

49 See below Section 5.6.5 “Powers in General Security Areas” and Section 5.6.6 “Powers in Designated Areas”.

50 Section 51SC.

51 Section 51SB.

52 Section 51SE(1)(a)(iii).

53 Section 51SE(1)(iv), (v). “Facility” and “vessel” are both broadly defined in s 51SD. “Facility” encompasses oil and gas installations. “Vessel” would also include a floating oil and gas installation which has been detached and is “capable of carrying persons or goods on or through water”.

54 Section 51SE(1)(vi)

55 Section 51SE(1)(b)(i).

persons, vessels or aircraft,⁵⁶ searching a person, facility, vessel or aircraft for dangerous things and seizing such things,⁵⁷ and detaining a person who the member believes on reasonable grounds to have committed an offence against a State, Territory, or Commonwealth law.⁵⁸ A Defence Force member may also use reasonable and necessary force against a vessel or aircraft, up to and including destroying the vessel or aircraft.⁵⁹ There is a catch-all power, which authorises a Defence Force member to do anything incidental to the above powers.⁶⁰ All of the special powers are subject to ministerial authorisation,⁶¹ except where there is insufficient time to obtain the authorisation required due to a sudden and extraordinary emergency.⁶²

Because these powers are so wide and could, if necessary lead to destruction of ships, platforms or aircraft and the death of innocent persons onboard them, there are special requirements. They include that the person doing the acts must be doing so under “superior orders”, must be under a legal obligation to obey such orders, the order must not be manifestly unlawful and the measures reasonable and necessary to give effect to the orders and, finally, the member has no reason to believe that there has been a material change in circumstances since the order was given.⁶³ All of these are sensible restrictions but not so restrictive as to inhibit the Defence Force members taking necessary action if faced with a violent, armed and murderous situation. The scenario to which these powers are directed include hostages on hijacked aircraft, which is mentioned separately below.

Clearly the special powers have been drafted as broadly as possible in order to provide Defence Force members with the capacity to respond appropriately and swiftly to a range of possible terrorist scenarios, such as an attack against an offshore oil and gas installation or the hijacking or other control of a vessel with an intent to bring it into a major Australian port while laden with dangerous items, such as explosives or biological weapons. There is less risk to civilian life or critical infrastructure if the Defence Force is authorised to take such measures against the threat while it is offshore rather than in a harbour or even close to the coast so the power to destroy it could include doing so while it was still in its approach phase.

⁵⁶ Section 51SE(1)(b)(iii), (vi).

⁵⁷ Section 51SE(1)(b)(v).

⁵⁸ Section 51SE(1)(b)(ii).

⁵⁹ Section 51SE(1)(a)(i), read with s 51SE(2).

⁶⁰ Section 51SE(1)(c).

⁶¹ Section 51SE(4).

⁶² Section 51SE(5).

⁶³ Section 51SE(2), (3).

5.6.5 Powers in General Security Areas

As mentioned above, a threat in the offshore area from an incoming high speed vessel or aircraft towards possible targets offshore or onshore had to be envisaged. The Act has provisions that deal with less specific threats in any offshore area that has been identified as at risk and to this end the Act uses the phrase "general security area".⁶⁴ These provisions are appropriate in relation to the threat itself in such an area. Further, the intelligence relating to the threat may be limited to identifying a class of vessel, for example a tanker, rather than the specific name of the vessel. The *Defence Act 1903*, therefore, also provides that the authorising ministers may declare that an area is an offshore general security area, which may be specified by reference to an area surrounding one or more vessels, aircraft or class of vessels or aircraft, the boundaries of which may even move as the vessel or aircraft moves.⁶⁵ In emergency where there is not time to involve the minister the Chief of the Defence Force may still give authorisation to search.⁶⁶

In a general security area, Defence Force members may be authorised to search vessels, aircraft, facilities or persons for dangerous things and seize them or other things related to the threat.⁶⁷ The power to search a vessel or aircraft for dangerous things includes an enabling power to erect barriers to stop the vessel or aircraft⁶⁸ and to stop and detain the vessel or aircraft⁶⁹ but, unlike under the "special powers", no express power is given in this section to destroy the vessel, aircraft or facility that provides the threat.

5.6.6 Powers in Designated Areas

As opposed to general areas, there may be specific special areas, onshore and offshore, where a threat is expected to emerge. To deal with this situation, the authorising ministers may specify all or part of an offshore general security area to be a designated area.⁷⁰ The area may include areas within the internal waters of a State or Territory.⁷¹ If an area ceases

⁶⁴ Section 51SF.

⁶⁵ Section 51SF(2). This declaration must be forwarded to the Presiding Officer of each House of Parliament for tabling within 24 hours of the declaration being made, except where such a declaration would prejudice the exercise of the special powers (eg forewarn the persons associated with the threat): s 51SF(3)(f), (4).

⁶⁶ Section 51SG.

⁶⁷ A "dangerous thing" means a gun, knife, bomb, chemical weapon or any other thing that is reasonably likely to be used to cause serious damage to property or death or serious injury to persons: s 51(1).

⁶⁸ Section 51SJ(1)(a).

⁶⁹ Section 51SJ(1)(b)(i).

⁷⁰ Section 51SL.

⁷¹ Section 51SL(2)(b).

to be a general security area, then it also ceases to be an offshore designated area.⁷²

There are a number of powers that may be exercised in a designated offshore area which generally cover regulating the movement of the vessel or aircraft. There are broad powers to direct vessels and aircraft to move out of and away from a designated offshore area.⁷³ The member may erect barriers to achieve this purpose,⁷⁴ and, importantly, the Defence Force member may compel any person to comply with any directions made.⁷⁵

The member also has similar powers over persons to those over vessels and aircraft, including directing them to move out of or away from designated areas,⁷⁶ and the member has the power to refuse entry to a person seeking entry to a designated area unless they consent to being searched and allow seizure of any items deemed to be dangerous.⁷⁷

5.6.7 Other Powers

There are two ancillary powers provided for in the Act which may be used in connection with any of the powers discussed above. These are the power to require a person to answer questions or produce documents,⁷⁸ and the power to require a person to operate a facility, vessel, aircraft, or machinery or equipment.⁷⁹

The power to require a person to answer questions or produce documents may only be exercised if the member of the Defence Force reasonably believes it is necessary to preserve the life or safety of other persons, or to protect Commonwealth interests.⁸⁰ Failure to comply is an offence.⁸¹ A person may not refuse to comply with such a request on the basis of self-incrimination.⁸² Documents or answers obtained in this fashion will not be admissible against the person in criminal proceedings, except offences relating to false or misleading information or documents.⁸³

The second power, requiring persons to operate facilities, vessels or machinery, may be exercised by any member of the Defence Force where

⁷² Section 51SL(3).

⁷³ Section 51SM(1).

⁷⁴ Section 51SM(2).

⁷⁵ Section 51SM(1)(e).

⁷⁶ Section 51SM(4).

⁷⁷ Section 51SM(5).

⁷⁸ Section 51SO.

⁷⁹ Section 51SP.

⁸⁰ Section 51SO(2).

⁸¹ Section 51SO(3).

⁸² Section 51SO(4).

⁸³ These offences are covered by *Criminal Code* (Cth) ss 137.1, 137.2. The exception is created by *Defence Act* 1903 (Cth) s 51SO(5).

they reasonably believe it to be necessary in order to preserve the life or safety of others.⁸⁴ A person commits an offence if they fail to comply with a request under this provision.⁸⁵ This is, of course, a very wide power as such orders may be given to persons to move ships, for instance, which are quite unconnected with the threat and it may involve significant economic loss for them. However, one can see that these powers need to be in place in case they are needed.

In concluding this section on “Powers” granted to Defence Force members under the *Defence Act 1903* mention should again be made of the fact that s 51W explicitly states that members are not entitled to exercise the powers unless the obligations set out in the stated parts of the Act are complied with. This places a heavy burden on the members of the Defence Force who are charged with giving effect to the operational aspects of the orders. There would be many circumstances where they may not have access to the full facts whilst on operational duty and, even if they were, some of them may not be properly equipped to call them in aid. If there is such a failure then the effect of s 51W is likely to be such that the action, including the exercise of lethal force, is unlawful ie the charges which the member may then be open to face could not only relate to property destruction or damage but in relation to people could extend to causing unlawful death or grievous bodily harm. This is a heavy responsibility to place on the ordinary sailor, soldier or airman who may be the actual operator who fires the gun or rocket or orders them to be fired.

5.6.8 Defence Force and Aircraft Threats

Many of the powers granted under the Act that are mentioned above relate to threats concerning aircraft but in the light of the risks of an aircraft being hijacked and then turned against an important facility, a short further discussion is called for. Because of their very high speeds and thus the reduced time for a response, the situation in relation to aircraft calls for special measures and the *Defence Act 1903* as amended in 2006 makes provision for this.⁸⁶

Although aircraft are not always expressly identified as part of the risk,⁸⁷ the activation provisions are in s 51AB, which have already been discussed. Basically, the authorising ministers are required to be satisfied

84 Section 51SP.

85 Section 51SP(3).

86 Inserted by the *Defence Legislation Amendment Act (Aid to the Civilian Authorities) 2006* Sch 3. Although the general heading to Sch 3 identified “Aviation incidents”, the only part of the amended Act that carried this aviation identification was Pt IIIAAA, Div 3B, commencing with s 51SR.

87 Aircraft are, however, expressly mentioned in Pt IIIAAA, Div 3B, where the heading, and text, mention the powers relating to aircraft.

that there would be, or is likely to be, a threat in the Australian offshore area to Commonwealth interests.⁸⁸ The special powers given to Defence Force members that would be ordered to apply in such circumstances are detailed in Div 3B and include the power to use force against an aircraft, up to and including destroying the aircraft.⁸⁹ These special powers specified in this part of the Act that only apply in the offshore area are similar to the special powers that apply more widely, mentioned above, and they lay the same requirements on the Defence Force members before they may be used.⁹⁰ These include the requirement for superior orders, that the orders are not manifestly unlawful, that the measures are reasonable and necessary and so on. The order must be by the authorising minister and be in writing, and the minister must have regard to Australia's international obligations, although these authorisation requirements may be waived if the Defence Force member believes on reasonable grounds that a sudden and extraordinary emergency exists.⁹¹

A difficult decision may well have to be made about whether to destroy a hijacked aircraft with innocent passengers onboard. In a thoughtful article Simon Bronitt and Dale Stephens discuss this issue and the balancing of the destruction of innocent life against the possible destruction of more and other lives and property and discuss the various aspects in the balance.⁹² The scenario about aircraft, however, is one that needs to be kept in mind when considering the powers and responsibilities that arise. At least the principle of responsible government of ministers is recognised in that, provided time allows, the minister is the one who gives the order to initiate the process.

5.7 Restrictions on the Use of Force

In exercising these powers under the *Defence Act 1903*, s 51T sets out that a member of the Defence Force must only use such force as is "reasonable and necessary in the circumstances".⁹³ Further, the section sets out in specific detail some particular circumstances when the member, using force against a person, must not do anything that is likely to cause the

⁸⁸ The order can also be made where "domestic violence would occur or would be likely to occur in Australia that would, or would be likely to, affect Commonwealth interests" and the State or self-governing Territory is unable or likely to be unable to protect the Commonwealth interests against the domestic violence: s 51AB(1)(a) and (b).

⁸⁹ They begin with s 51SR.

⁹⁰ Section 51ST.

⁹¹ Section 51(4)-(8).

⁹² S Bronitt and D Stephens "Flying under the Radar – The use of lethal force against hijacked aircraft: Recent Australian Developments" (2007) 7 *OUCLJ* 265.

⁹³ Section 51T. It is a common provision mentioned in several places in the Act that applies to the exercise of powers under Divs 2, 2A, 3, 3A, 3B or 4 subject to specific sections on the use of force.

death of, or grievous bodily harm to, the person unless the member on reasonable grounds believes it necessary to protect life, or prevent serious injury to another person (including the member).⁹⁴ Frankly the great amount of detail set out in the Act, while reasonable from a legal point of view, makes it difficult for the members of armed forces themselves when caught up in the heat of a dangerous and violent situation. Even though they are usually exposed to a range of scenarios during training exercises to tease out legal nuances, if something unexpected occurs they are hardly then in the position to seek detailed legal advice about the meaning and effect of s 51T.

There is one part of s 51T that is deserving of further mention. Whilst most of the section relates to the use of force to protect life or limb, s 51T(2B) provides that such force may be used to protect a "designated critical infrastructure". This takes the scenario to the level of causing the death of persons to protect property; not an easy decision to be made for anyone. This raises the difficult decision of when lethal force may be used not only to cause the death of the offenders, but also the deaths of innocent persons; who may be mere bystanders on, for instance, an oil platform, or hostages held, for instance, in a ship or aircraft.

In considering the topic of the reasonable use of force, the orders given to Defence Force members for any particular operation, often called the "Rules of Engagement", are an important consideration. These rules usually encapsulate the law and apply them to the operational situation in which the Defence Force members take part. They are not considered here and it must suffice merely to mention their existence and their importance. In considering this topic of reasonable force the question often arises on fisheries and immigration enforcement operations and particularly when vessels suspected of unlawful fishing or people smuggling flee the scene and refuse to stop for search. If it is a foreign vessel and it flees the Australian jurisdiction then a "hot pursuit" situation arises, but it also may arise totally within the Australian jurisdiction. In international law the test of reasonable force in all of the circumstances⁹⁵ is the same as set out in the *Defence Act 1903*. The difficulty about firing at or into another vessel is that it cannot be known where the persons onboard that vessel may be. Even firing at the stem or the stern does not avoid the problem. In a fishing or smuggling vessel not all of the crew may be offenders and it is often the situation that many of them are

⁹⁴ Section 51T(2)-(3).

⁹⁵ In the Australian context Cameron Moore discusses the point in C Moore, *ADF on the Beat: A legal analysis of offshore enforcement by the Australian Defence Force* (Ocean Publications, 2004), pp 123ff "Firing at or into"; including the two leading international cases on the point: *I'm Alone (Claim of the British Ship "I'm Alone" v United States)* Joint Interim and Final Reports of the Commissioners, 1933 and 1935, 29 *American Journal of International Law* 326 (1935); and *Red Crusader*, 35 *International Law Reports* (1962).

ignorant of where the vessel is and whether it is offending fishing laws. There is not space to develop this issue further but these aspects of the Act raise difficult operational and legal questions.

5.8 Defence of Superior Orders

As is well known, the defence of “superior orders” to unlawful conduct is not available under Australian law in the absence of some express statutory provision to the contrary.⁹⁶ In the *Defence Act* the issue is dealt with by setting out the many and varied obligations and requirements on the authorising ministers and the members of the Defence Force. The precise question of superior orders as a defence is dealt with in several sections, the context of which will now be addressed.

For a start, as mentioned above, Defence Force members are not entitled to exercise these powers if the obligations on the members have not been complied with.⁹⁷ The second point is that the applicable substantive criminal law is that of the Jervis Bay Territory.⁹⁸

The aspects of superior orders are expressly addressed in s 51WB, which provides that a criminal act by a member of the Defence Force under that part of the *Defence Act*⁹⁹ under an order of a superior does not relieve the member of criminal responsibility.¹⁰⁰ However, the section then provides that it is a defence to the criminal act, provided it was under an order of a superior, there was a legal obligation to obey it, it was not manifestly unlawful, the member had no reason to believe that the circumstances had changed in any material respect since given or that it was based on a mistake as to a material fact and the action taken was reasonable and necessary to give effect to the order.¹⁰¹ It may be seen that these same obligations appear in other parts of the Act, as mentioned above, and that their repetition is, no doubt, to put this important aspect of the law beyond any doubt.

⁹⁶ The defence of “superior orders” was thoroughly tested at the Nuremberg War Trials, which are generally regarded as the well-documented basis for their acceptance into international criminal law.

⁹⁷ Section 51W.

⁹⁸ Section 51WA. The laws applicable in Jervis Bay are those from the Australian Capital Territory (*Jervis Bay Territories Acceptance Act 1915* s 4A), and the relevant ones would include offences contrary to the *Criminal Code* (Cth) and *Crimes Act 1914* (Cth).

⁹⁹ Part IIIAAA; which encompasses all of the powers discussed above. Bronitt and Stephens address this question of “superior orders” in the Australian context in S Bronitt and D Stephens “Flying under the Radar – The use of lethal force against hijacked aircraft: Recent Australian Developments” (2007) 7 *OUCLJ* 265 at 273-275.

¹⁰⁰ Section 51WB(1).

¹⁰¹ Section 51W(2). There is also a general obligation on the Defence Force only to use reasonable and necessary force: s 51T.

It may be noted that these requirements are all cumulative, so a failure to meet any one will mean that the defence to carrying out the order is not available. There may be other defences depending on the charge laid, which may include those available under the *Defence Force Discipline Act 1982* (Cth), the Jervis Bay criminal law, or some other statute that may have application in the particular circumstance. There is not space to do more than mention these aspects but any of these laws could have application offshore; again it depends on the circumstances.

5.9 Cooperation with Police

In the event of a serious threat of violence it is important that the Defence Force work well with the police forces of the Commonwealth, State and self-governing Territory governments. The Chief of the Defence Force must "as far as is reasonably practicable" cooperate with State and Territory police forces and undertake those tasks that the police force so request, which is to be in writing.¹⁰² The Chief of the Defence Force must not, however, allow the Defence Force to be used to stop or restrict protest, civil dissent or industrial action.¹⁰³ These issues, however, mainly relate to activities in a State, meaning on the land of a State.

When it comes to the offshore areas one finds the complications of the Offshore Constitutional Settlement 1979 (OCS 1979) are raised once again, as discussed in Chapter 2. The Act does not deal with the complications raised by this, except to mention "internal waters" from time to time.¹⁰⁴ Internal waters are in the State. What aspect is not addressed is the complication involved in the waters from the baseline for three miles out to sea, over which area the adjacent State or Northern Territory has been granted jurisdiction under the OCS 1979. It is not appropriate to develop this point further here but complications could arise in these waters as to who is entitled to exercise what powers in the Commonwealth and State matrix of laws and jurisdictions.

5.10 Military Commissions

From time to time, especially when there is widespread warfare, there is a need for the armed forces to establish special military commissions to act as courts or tribunals to hear and determine various charges. In the present context of offshore laws, one or more military commissions could be established in ships or offshore installations in any part of the world, including, in appropriate circumstances, in a foreign country. There are

102 Section 51F.

103 Section 51G.

104 Section 51D(1A)(b) is an example.

none at the moment but the topic is mentioned as the need could arise in the future and if such a commission were established then the laws governing it would be part of Australia's offshore laws.

Military commissions are usually established for the purposes of hearing offences against the criminal law that are not suitable for hearing by courts martial.¹⁰⁵ There is no reason why their jurisdiction should not be extended to hearing civil cases, if the need were to warrant it, but it would not generally be desirable. There are already numerous Australian courts and tribunals and one or more of them could handle most situations. Further, if a military commission were to be established there may be a lack of a sufficient number of skilled persons to operate it to a sufficiently high standard of administration of justice.

These commissions are "military" in the sense that the personnel involved in their establishment and running are military personnel, although those charged before them may be military or civilian personnel. Care needs to be taken that they are not established to avoid the courts system and the proper standards of administration of justice. An example of the latter phenomenon is the commission established by the United States under the administration of President Bush to deal with those persons incarcerated by his administration at Guantanamo Bay.¹⁰⁶

However, if the necessary structures for the proper administration of justice, such as suitable venues,¹⁰⁷ competent officials, a fair system of law and qualified and experienced judges and lawyers, are not available then the establishment of military commissions may well be justified. An example of such justification is where there is occupation of previous enemy territory and there is a need to establish the rule of law by the military until the civilian structure is erected. Another is where there is a need to regulate military personnel but the charges are not suitable for the ordinary courts martial system. Their background and use, especially the widespread use of them by the United States, is set out in the article by

¹⁰⁵ Courts martial are appropriate for hearings that have some element that comes under the many particularities of persons serving in the Defence Force. There are charges that have no equivalent in the ordinary criminal law and there are many circumstances where, due to geographical or other circumstances, charges that are known to the ordinary criminal law still could not suitably be held in a civilian court system. One example, for instance, of the latter would be where military secrets relating to enemy operations may be revealed in the course of the hearing. In a development of the courts martial system, the 2008 amendments to the *Defence Force Discipline Act 1982* created a permanent Australian Military Court in place of courts martial and Defence Force magistrates, but its constitutional structure was successfully challenged in the High Court in *Lane v Morrison* [2009] HCA 29 and it was struck down as not being a court under Chap III of the Constitution.

¹⁰⁶ For one of many excellent articles on the shortcomings of these commissions, see HG Fryberg "Military Commissions: Should Australian have some?" (2008) 82 *ALJ* 636.

¹⁰⁷ Probably the Australian Military Court could also sit at an offshore installation. *Defence Force Discipline Act 1982* (Cth) s 117 provides that the Australian Military Court can sit anywhere inside or outside Australia.

Justice Fryberg.¹⁰⁸ For a thorough discussion of the law regarding Australian Military Courts, see the High Court decision in *Lane v Morrison*.¹⁰⁹

It is not appropriate to deal with military commissions in any further detail and it suffices for present purposes to mention that they are frequently established offshore and that there is no reason why the Australian laws should not establish one or more of them in the future.

5.11 Piracy

Under international law, piracy is considered an offence of universal jurisdiction and the United Nations Law of the Sea Convention 1982 (UNCLOS) obliges all states to “cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State”.¹¹⁰ Piracy is one of the limited exceptions under the UNCLOS of the right of a flag state to exercise exclusive jurisdiction on the high seas over its ships.¹¹¹ States are authorised and are in fact obliged to seize pirate ships or aircraft and to arrest persons onboard. The persons and property are then subject to the laws of the state whose vessel seized them.¹¹²

Chapter IV of the *Crimes Act 1914* creates the offence of an “act of piracy”¹¹³ which is defined as:

- act of piracy* means an act of violence, detention or depredation committed for private ends by the crew or passengers of a private ship or aircraft and directed:
- (a) if the act is done on the high seas or in the coastal sea of Australia—against another ship or aircraft or against persons or property on board another ship or aircraft; or
 - (b) if the act is done in a place beyond the jurisdiction of any country—against a ship, aircraft, persons or property.¹¹⁴

The *Crimes Act 1914* provides for offences of piracy, voluntarily operating a pirate ship, etc, and it applies to acts performed in Australia, or on the high seas or any other place beyond the jurisdiction of any country.¹¹⁵ Each of the States and the Northern Territory also have provisions in their criminal laws against piracy.¹¹⁶ It is important to note the limited

¹⁰⁸ See HG Fryberg “Military Commissions: Should Australian have some?” (2008) 82 *ALJ* 636 at 637.

¹⁰⁹ [2009] HCA 29.

¹¹⁰ UNCLOS Art 100; for the UNCLOS provisions about piracy see Arts 100-107.

¹¹¹ See UNCLOS Art 92.

¹¹² UNCLOS Art 105.

¹¹³ Section 52.

¹¹⁴ Section 51.

¹¹⁵ Section 53.

¹¹⁶ For details see C Moore, *ADF on the Beat: A legal analysis of offshore enforcement by the Australian Defence Force* (Ocean Publications, 2004), pp 40-41.

definition of piracy, as the word “piracy” is sometimes inappropriately used to describe other criminal acts that occur at sea. For example, a high-jacking crime onboard a ship where the ship’s own crew or passengers take control of the ship, rather than boarding the ship from a second ship or aircraft, does not necessarily amount to piracy. Similar crimes against offshore platforms, as opposed to ships, are covered by other international conventions.¹¹⁷

Members of the Defence Force are empowered under the *Crimes Act 1914* to take enforcement action to seize a ship or aircraft that the member reasonably believes to be a pirate-controlled ship or aircraft, or anything on board connected with the piracy.¹¹⁸

5.12 Salvage Claims

Defence Force members, especially those in the navy, often respond to vessels and persons in distress at sea and, from time to time, welcome assistance for its own vessels and personnel in distress. The priority in salvage is to ensure the preservation of life and property at sea and protection of the marine environment. The navy may provide this assistance in full ie until the vessel or persons are delivered to a safe place, or in part pending the arrival of professional salvors and equipment. In every case the provision of salvage is subject to naval operational priorities. A valid salvage claim arises when a person, acting as a volunteer, saves or contributes to saving a vessel, cargo or other recognised property from danger at sea.¹¹⁹ The salvage reward is paid by its owners from the value of the saved property. No salvage reward is owed by persons whose lives are saved but the amount of the salvage reward from property saved may thereby be increased.¹²⁰

The basis for the Australian law of salvage lies in the *Navigation Act 1912*, as supplemented by international conventions, the traditional international law of salvage and the maritime law generally. Salvage is of

¹¹⁷ One of the motivations for amendments to the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* was a recognition that maritime terrorism would not necessarily fall within the definition of piracy, because the crime is not done for private ends but for political purposes. *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988* and its *Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf 1988*, both entered into force 1 March 1992. The convention applies to ships and the protocol extends the requirements of the convention to fixed platforms.

¹¹⁸ Section 54. Members of the Australian Federal Police are similarly empowered.

¹¹⁹ For a discussion of the law of salvage in Australia see M White, “Salvage, Towing, Wreck and Pilotage” in M White (ed), *Australian Maritime Law* (Federation Press, Sydney, 2nd edn, 2000), Ch 9 and M White, *Australasian Marine Pollution Laws* (Federation Press, Sydney, 2nd edn, 2007), Chs 5, 10. The wider law of salvage will not be dealt with in any detail in this chapter.

¹²⁰ *Navigation Act 1912* s 315 and *International Convention on Salvage 1989* Art 16.

ancient origin and is not addressed here except in so far as its law has some peculiarities when naval or other government ships or personnel are involved.

Civil ships and personnel have an obligation to go to the assistance of those in peril at sea and to render some salvage services in certain circumstances. Apart from that, salvage of ships, cargo, lives and appurtenances can be commercially remunerative and may justify departure from the ordinary course of commerce at sea. For the naval and other government forces, however, further and different considerations may apply. They may have other and higher operational priorities, or their government may have a particular policy, or the senior officers may decide that they have not the skills, personnel or equipment to render the service. These considerations apply to all government forces and departments but their application in salvage matters usually falls to the navy.¹²¹

Occasionally a government ship or other property requires salvage at sea and in such cases salvage claims may be made against the Commonwealth, for example, for salvage services rendered to a naval ship.¹²² Salvage claims and the salvage reward calculation apply in such circumstances as if the naval ship were privately owned. In the case of a naval ship being salved the Commonwealth is the only party to the salvage claim against it.

Where a naval ship renders successful salvage services to some other ship, and the elements of the law of salvage are satisfied, the Commonwealth and the crew are entitled to claim salvage reward.¹²³ Some of the particularities of the Defence Force, mainly relating to its command structure and the use of a government ship or aircraft for the salvage, need special provisions and these are addressed in Pt IXC of the *Defence Act 1903*. It provides that, without affecting the right of the Commonwealth to claim salvage for salvage services performed by a naval ship, the members the crew of the naval ship may claim salvage in respect of those services.¹²⁴ However the claim by the crew may only be made with the approval of the Chief of Navy¹²⁵ and the commanding officer of the ship is statutorily authorised to accept an offer in settlement of the claim which is binding on all crew members.¹²⁶ Any salvage reward is first to be applied to the payment of the Commonwealth's expenses in providing the salvage services. The balance is to be apportioned between the Commonwealth and crew members either in accordance with a settlement

¹²¹ The author has discussed the matter more fully in his chapter on the topic, at n 119 above.

¹²² *Navigation Act 1912* s 329B.

¹²³ Section 329C.

¹²⁴ *Defence Act 1903* s 117A(1).

¹²⁵ Section 117A(2).

¹²⁶ Section 117A(3), (4).

agreement, a decision of a court or tribunal or, in any other case, in the proportion of 80 per cent to the Commonwealth and 20 per cent apportioned amongst each of the crew members. The minister has power to increase the crew proportion from 20 per cent up to 25 per cent for exceptional services during the salvage operations.¹²⁷ Amongst the crew members themselves, the apportionment is to be as provided in the regulations.¹²⁸

Lloyd's Open Form is a common standard form salvage agreement between a ship (and its cargo) and a salvor and it is universally accepted as being fair to all interests involved in salvage.¹²⁹ It may be entered into by the captain of the vessel in distress and the salvage contractor and, because it is in a standard form, it may be entered into quickly during the crisis. The Lloyd's Open Form may be amended by the insertion of special terms. This is of use to the navy, as a term may be inserted stating that the salvage services may be terminated at any time as, for example, where the naval ship receives a high priority tasking.

5.13 Conclusions

As may be seen from what has been set out in this chapter, the law relating to the structure and powers of the Defence Force when ordered to deal with any offshore situation is complex. This is so whether the circumstances are related to terrorism, unlawful fisheries, unlawful immigration by boat, or drugs and other smuggling. If one were to overlay this (peaceful) situation with a war or warlike operations, the situation becomes even more complex. If violent crime is added to this the detailed powers and obligations set out in the *Defence Act 1903* make the whole situation of the applicable laws very complex indeed.

The members of the Defence Force have a particularly difficult situation from the legal point of view as their powers are not only those set out in the *Defence Act 1903*, but they must also look to the powers and obligations set out in the fisheries, immigration, crimes, navigation and other laws. This point has also been addressed in the relevant chapters on those topics (Chapters 6, 7 and 8). As has been clearly stated by Moore: "A single act or a legislative scheme could do much to remedy this problem".¹³⁰ These complex laws should be simplified, a point which is addressed in more detail in the concluding chapter of this book.

¹²⁷ Section 117AA(2).

¹²⁸ Section 117AB. See M White, "Salvage, Towing, Wreck and Pilotage" in M White (ed), *Australian Maritime Law* (Federation Press, Sydney, 2nd edn, 2000), p 277, for commentary.

¹²⁹ See *ibid*, pp 270-272.

¹³⁰ C Moore, *ADF on the Beat: A legal analysis of offshore enforcement by the Australian Defence Force* (Ocean Publications, 2004), p 171 "Conclusion".

DEFENCE LAWS

It is possible that the proposed Maritime Powers Bill will address these aspects of the *Defence Act 1903*, but no mention of it was made in the actual speech by the Minister nor in the accompanying media release, both of which are mentioned in the Memorandum on the proposed Bill in the front of this book. When the committee charged with actually drafting the Bill sets to work it may well vary the provisions from what has already been said. It remains to be seen, therefore, what amendments, if any, are made to the *Defence Act 1903* or related legislation.

Chapter 6

Offshore Immigration Laws

- 6.1 Introduction
- 6.2 Immigration and the Australian Constitution
- 6.3 Australian Maritime Zones and Immigration
 - 6.3.1 Territorial Sea
 - 6.3.2 Contiguous Zone
 - 6.3.3 Migration Zone
 - 6.3.4 Refugees
 - 6.3.5 Australia's Excised Offshore Places
 - 6.3.6 The Torres Strait and its Protected Zone
- 6.4 Offshore Laws in Relation to Illegal Immigration by Sea
 - 6.4.1 Powers of Officials to Deal with Unlawful Immigrants
 - 6.4.1.1 Detention, Removal and Deportation
 - 6.4.1.2 Boarding at Sea
 - 6.4.1.3 Hot Pursuit
 - 6.4.1.4 Use of Force
 - 6.4.1.5 Detention, Arrest and Further Powers
 - 6.4.2 Powers of the Australian Defence Force
 - 6.4.3 Immigration Detention
 - 6.4.4 Offshore Migration Offences
 - 6.4.5 Health issues
- 6.5 Review and Appeal Processes
- 6.6 The Rudd Government's Reforms
- 6.7 International Agreements
- 6.8 Related Commonwealth Acts
 - 6.8.1 Australian Citizenship Act 2007
 - 6.8.2 Extradition Act 1988
 - 6.8.3 Australian Passports Act 2005
- 6.9 Some Leading Cases
 - 6.9.1 The Tampa Incident and the "Pacific Solution"
 - 6.9.2 Validity of Arrest on Foreign Ship in Territorial Sea: *R v Disun*
 - 6.9.3 Reasonable Suspicion: *Ruddock v Taylor*
 - 6.9.4 Constitutional Power over Aliens: *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*
 - 6.9.5 Minister's Personal Decision not Reviewable: *Singh v Minister for Immigration and Multicultural Affairs*
 - 6.9.6 Permanent Detention is Possible: *Al-Kateb v Godwin*
- 6.10 Conclusions

6.1 Introduction

The regulation of immigrants into Australia has been a major issue ever since the British penal settlement was established in New South Wales in 1788. In general usage, “immigration” means the Australian government’s control over persons entering Australia. The current Federal statute applicable to Australia’s offshore immigration jurisdiction is the *Migration Act 1958* (Cth). The object of the Act is to regulate, in the national interest, the entrance into, and presence in, Australia of non-citizens.¹ The *Migration Act* consequently regulates this by providing visas permitting non-citizens to enter or remain in Australia.²

The *Migration Act 1958* applies to all persons entering or seeking to enter Australia. The term “immigration” extends to persons seeking entry into Australia whether permanently or temporarily and an immigrant includes a person who, having entered a country without an intention to settle there, later seeks to remain in the country permanently.³ To constitute an “immigrant” within the meaning of the Act it is not necessary that the person seeking entry should have an intention of permanently settling in Australia as an intention to land is all that is required; and a person cannot be an immigrant into their own country.⁴ Persons who do not enter the country voluntarily, such as stowaways on ships or fishers detained at sea and compulsorily brought into port, are also subject to Australia’s immigration laws. The test of whether a person is an immigrant or not is one of fact, not of intention on the part of the potential immigrant.⁵

The *Migration Act 1958* does not expressly define “Australia”. The *Acts Interpretation Act 1901* (Cth) establishes a general presumption that “Australia”, in a geographical sense, is the Australian land and includes the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands but not any other external territory.⁶ “Australia” also includes the “coastal sea” of Australia,⁷ which in turn includes the territorial sea.⁸ The *Migration Act* also deems any resource installations attached to the seabed (offshore petroleum platforms) and any sea installations (offshore platforms other than petroleum ones) to be part of Australia.⁹ The *Migration Act* extends to prescribed territories, namely, the Coral Sea

1 *Migration Act 1958* (Cth) s 4.

2 Section 4(2).

3 *O’Keefe v Calwell* (1949) 77 CLR 261 at 275 per Latham CJ.

4 *Potter v Minahan* (1908) 7 CLR 277 at 306 per O’Connor J.

5 *Chia Gee v Martin* (1905) 3 CLR 649 at 654 per Griffith CJ.

6 *Acts Interpretation Act 1901* s 17(a).

7 Section 15B(1).

8 Section 15B(4).

9 *Migration Act 1958* ss 8, 9. For more detail on the laws relating to offshore platforms and sea installations see Chapter 3.

Islands Territory, the Territory of Cocos (Keeling) Islands, the Territory of Christmas Island and the Territory of Ashmore and Cartier Islands which are all deemed to be part of Australia for the purposes of the Act.¹⁰ The Act attempts to clarify the meaning of to enter, leave or remain in Australia, but without much success.¹¹

The Act defines the terms to enter, remain in or leave "Australia" as referring only to the "migration zone"¹² but sets out that this does not mean that the Act does not, for other purposes, apply outside that zone.¹³ Most of the offlying islands and installations are excluded from the "migration zone".¹⁴

As for visas, there are many different types and this chapter could not possibly deal with all of the types or their details. Full details concerning most of them are set out in the *Migration Act 1958*. Many offences are created for persons voluntarily entering or remaining in Australia without the requisite visa. An exception is made for persons compulsorily detained by Australian officials offshore and then forced to enter Australia's ports or other jurisdiction¹⁵ although they may, of course, be charged with the offence which gave rise to their being detained. The crews of foreign ships trading to Australia may be given a maritime crew visa which covers them while their ship is in and about Australian waters.¹⁶

Because the *Migration Act 1958* is the primary legislation relating to immigration into Australia it is appropriate to note a little about its structure. It is divided into nine parts with Pt 1 addressing "Preliminary" matters such as meanings of words and phrases and some general policy matters. As noted above, Pt 1 includes that the objective of the Act is to regulate non-citizens. It also provides that Parliament affirms the principle that a minor shall be detained as a last resort,¹⁷ a principle which, sadly, was honoured in the breach during the period of the Howard government.¹⁸

Part 2 of the Act is the main part relating to regulation of incoming migrants, legal and illegal. It contains some 350 pages of legislation and deals with "Control of arrival and presence of non-citizens". It is not possible to deal with it all here. Some aspects are mentioned in more

¹⁰ Section 7. See further for the laws relating to these areas in Chapter 10.

¹¹ See s 6.

¹² Section 5(1).

¹³ Section 6.

¹⁴ See s 5 and the definition of "excised offshore place" for the complete list and see also "the migration zone" definition.

¹⁵ Section 43(3) is an example.

¹⁶ Section 38B.

¹⁷ Sections 4, 4AA.

¹⁸ The Hon John Howard, Prime Minister and the Hon Phillip Ruddock, Minister for Immigration.

detail below, but for present purposes it suffices to say it deals with visas, sponsorship, immigration detention, offences in relation to entry into and remaining in Australia and ships and aircraft crews and the extensive powers granted to government officers to board, search, detain and confiscate. Part 3 deals with regulating migration agents, Pts 4 and 4A cover requirements for accurate information and offences for false information, and Pts 5 to 8 provide an extensive structure for review of decisions made under the Act. The final part, Pt 9, deals with various miscellaneous but nonetheless important provisions.

Before turning to certain of those aspects, however, the constitutional basis for these powers needs to be mentioned.

6.2 Immigration and the Australian Constitution

The legislative power of the Federal Parliament with respect to immigration is derived from several parts of s 51 of the Australian Constitution. The Federal Parliament has the power to make laws with respect to "naturalization and aliens",¹⁹ "immigration and emigration",²⁰ "the influx of criminals",²¹ and "external affairs".²² The immigration power under s 51(xxvii) includes the regulation and care of child immigrants until absorbed into the Australian community.²³

There is, of course, an overlapping of these constitutional powers but the "naturalization and aliens" head of power provides the legislative basis for the *Migration Act* 1958 provisions that apply to aliens by imposing burdens, obligations and qualifications, including deportation. A law with respect to nationalisation may remove a person's alien status, either absolutely or conditionally. A "non-citizen" is an alien for the purposes of the *Migration Act* and their deportation is valid unless they have been naturalised.²⁴ The Act has the usual provision that it be read and applied so as not to exceed Commonwealth power under the Constitution²⁵ but its statutory powers are not to prevent the exercise of any executive power.²⁶ The High Court has original jurisdiction in matters where the Commonwealth is a party of Commonwealth officers,²⁷ which is the usual case where litigation involves migrants, and the Parliament

¹⁹ Section 51(xix).

²⁰ Section 51(xxvii).

²¹ Section 51(xxviii).

²² Section 51(xxix).

²³ *R v Director-General of Social Welfare (Vic); Ex parte Henry* (1975) 133 CLR 369.

²⁴ *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28; *Singh v Commonwealth* (2004) 222 CLR 322; [2004] HCA 43.

²⁵ Section 3A.

²⁶ Section 7A.

²⁷ Constitution s 75.

may not constrain the manner in which otherwise valid cases may be brought before the High Court in its original jurisdiction.²⁸

There are, of course, a huge number of cases concerning immigration but these remarks are sufficient to indicate that these constitutional powers have been supported by case law and, it may be said, that most of these constitutional cases have upheld the legislation so often that these powers are almost beyond argument. It is convenient, therefore, to move to the next section of this chapter, which is the important issue of relevant offshore zones.

6.3 Australia's Maritime Zones and Immigration

Every coastal state has offshore zones and it is important to ascertain in which zone an immigrant is located in order to determine the extent to which Australia can enforce its immigration jurisdiction upon that person. The international and Australian law about zones are more fully set out in Chapter 2 but it may be helpful to readers to set out a summary of them here.

There are four principal maritime zones under the United Nations Convention on the Law of the Sea 1982 (UNCLOS) and they are given effect in Australian domestic law by the *Seas and Submerged Lands Act* 1973 (Cth).²⁹ The zones are the territorial sea, the contiguous zone, the EEZ and the outer continental shelf. The maritime zones regulate Australia's sovereignty or jurisdiction and each is measured from the baseline. In only two of these zones is jurisdiction granted to the coastal state over immigration and they are the territorial sea and the contiguous zone.

6.3.1 Territorial Sea³⁰

Australia's territorial sea has the same meaning as in Arts 3 and 4 of UNCLOS.³¹ It may extend to a maximum of 12 nautical miles from the baseline³² and Australia has claimed this breadth with the exception of some islands in the Torres Strait.³³ The normal baseline for measuring the breadth of the territorial sea is the low water mark along the coast itself or around islands lying close to it³⁴ but where a river flows directly into

28 *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601; [2008] HCA 28.

29 The Act extends to all the territories: s 4.

30 See UNCLOS Pt II, Div 1.

31 *Seas and Submerged Lands Act* 1973 s 3(1).

32 UNCLOS Art 3.

33 For discussion of the Torres Strait, see Chapter 12.

34 Article 5.

the sea the baseline is a straight line across the mouth of the river³⁵ and this is also the case for many bays. Waters on the landward side of the baseline of the territorial sea remain part of Australia's internal waters.³⁶ Sovereignty in respect of the territorial sea water column, its bed and subsoil, and in respect of the airspace above it, is vested in and exercisable by the Crown in right of the Commonwealth.³⁷

6.3.2 Contiguous Zone

Australia's contiguous zone extends 24 nautical miles from the baseline,³⁸ which is 12 nautical miles beyond the outer limit of the territorial sea. Within its contiguous zone a coastal state, such as Australia, may exercise such control as is necessary to prevent and punish any infringements relating to "customs, fiscal and immigration or sanitary laws" within its territory or territorial sea.³⁹ Immigration is, therefore, expressly included in this jurisdiction. The contiguous zone essentially acts as a buffer zone, allowing Australia to prevent persons from loitering just beyond its territorial sea for the purpose of entering it and committing unlawful acts. The rights of control that Australia has within its contiguous zone are exercisable in accordance with applicable Commonwealth, State and Territory laws.⁴⁰

6.3.3 Migration Zone

The migration zone is important as it identifies the area in which the law requires a non-citizen to hold a valid visa in order to enter and remain in Australia legally.⁴¹ A person present in the migration zone but lacking a valid visa is defined in the *Migration Act 1958* as an "unlawful non-citizen".⁴²

The meaning of "Australia" has been touched on above and the meanings of to "enter Australia", "leave Australia" and "remain in Australia" for the purposes of this Act, are to enter, leave or remain in Australia's migration zone.⁴³ The migration zone consists of the land area of the States and the internal territories (ie the Northern Territory and the Australian Capital Territory) and some external territories but not those offshore territories that have been excised, as to which see under (section

35 Article 9.

36 Article 8.

37 Article 6.

38 Article 33.

39 Article 33.

40 *Seas and Submerged Lands Act 1973* s 13A (Note).

41 Sections 13-14.

42 Section 14.

43 *Migration Act 1958* s 5(1).

6.3.5).⁴⁴ The migration zone also includes the sea within the limits of a port.⁴⁵ These limits on the “migration zone” do not prevent the *Migration Act 1958* from extending to persons outside it but who are otherwise subject to Australian laws.⁴⁶ Certain offshore islands were excised from the migration zone under the Howard government but this was reversed in 2009, as to which see under.

Most of the disputes relate to persons entering Australian jurisdiction and this will be dealt with in more detail. As to departure, however, a person leaves Australia when the person leaves the “migration zone”⁴⁷ except if on a vessel that does not go to a foreign country, or other than for transit purposes, or one who remains as a passenger or crew member and is outside the migration zone for no longer than 30 days.⁴⁸

6.3.4 Refugees

Humanity demands that those persons unfortunate enough to have to flee from their own country for their lives or their safety deserve special consideration and protection. The safe haven state may agree to give them succour only until the risk passes in their homeland or, in some cases, may allow them to take up permanent citizenship. There are a great many conventions on these obligations and Australia is a state party to most of them.⁴⁹ The basic test for a refugee, which is the test that Australia applies, is a person “with a well founded fear of persecution” as a result of the person’s race, religion, nationality or political opinion.⁵⁰

Refugees need a special category of permission to stay and under the *Migration Act 1958* this is provided as a “protection visa”. There are many categories of visa set out in the Act and in order to be issued with a protection visa,⁵¹ a person must be a non-citizen present “in Australia”⁵² to whom the minister is satisfied that Australia has an obligation under the refugees convention and protocol. The Australian government has overseas diplomatic stations which process applications for refugee status, but many refugees flee and end up trying to enter Australia, often by necessity, without having gone through the correct channels. For the right to claim a protection visa as set out in the *Migration Act* a claimant

44 Section 7. Chapter 10 discusses the laws in the offshore territories.

45 Section 5(1).

46 Section 6.

47 Section 5, definition of “leave Australia”.

48 Section 80.

49 *Convention relating to the Status of Refugees*, Geneva, 28 July 1951 [1954] ATS 5, and its protocol, New York, 31 January 1967 [1973] ATS 15, is the main one.

50 *Migration Act 1958* s 36(4).

51 See *Migration Act 1958* s 36. See also *Migration Regulations 1994* subclass 866 (protection visa).

52 Section 36(2)(a). See also *ibid*. The regulations have much detail about visas, as well as other matters, and require careful perusal.

needs to enter the migration zone which is, therefore, important and it is to this aspect that the next section is directed.

6.3.5 Australia's Excised Offshore Places

On 27 September 2001, the Federal government passed a series of legislative instruments that aimed to tighten Australia's migration borders. This was part of the Howard government's so-called "Pacific Solution", which arose in response to the *Tampa* incident that had taken place in August and early September of that year (see 6.9.1 under). The amendments designated certain offshore areas as being excised from Australia's migration zone and a new class of person was created known as an "offshore entry person".⁵³ An offshore entry person was expressed to be one who entered an excised offshore place and become an unlawful non-citizen as a result.⁵⁴

The amended *Migration Act 1958* prevented any such person from applying for a protection visa, and the excised offshore places, as defined in the Act, were:

- the Territory of Christmas Island;
- the Ashmore and Cartier Islands;
- the Coco (Keeling) Islands;
- the Coral Sea Islands Territory;⁵⁵
- all islands that form part of Queensland and are north of latitude 21 degrees south;⁵⁶
- all islands that form part of Western Australia and are north of latitude 23 degrees south;⁵⁷
- all islands that form part of the Northern Territory and are north of latitude 16 degrees south;⁵⁸
- Australian sea installations;⁵⁹ and
- Australian resources installations (offshore oil and gas platforms).⁶⁰

The purpose and effect of the amendments was to excise the places listed above from the migration zone to limit the ability of offshore entry

⁵³ *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth) and the *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (Cth).

⁵⁴ Section 5(1). This section was inserted by the *Migration Amendment (Excision from Migration Zone) Act 2001* Sch 1, s 3.

⁵⁵ Section 5(1)(d), the definition of "excised offshore place". Also the *Migration Regulations 1994* reg 5.15C and the *Migration Amendment Regulations 2005* (No 6).

⁵⁶ *Ibid.*

⁵⁷ Section 5(1)(e), as prescribed in *Migration Regulations 1994*.

⁵⁸ Section 5(1)(e), as prescribed in *Migration Regulations 1994*.

⁵⁹ Section 5(1)(f).

⁶⁰ Section 5(1)(g).

persons to make valid visa applications.⁶¹ This had serious consequences for refugees and asylum seekers as these places were the most likely landing places when travelling to Australia by sea, which many of them, known colloquially as “boat people”, did. The amendments prevented these refugees from making a valid visa application⁶² with the effect that they were denied the rule of law that should otherwise have been available to them. Such persons were only able to obtain a visa if the minister,⁶³ believing it to be in the public interest, exercised a personal discretion and determined that the person may apply for a visa.⁶⁴ Furthermore, the minister was not obliged to exercise that discretion even if so requested.⁶⁵ The amendments allowed for the immediate detention and removal of unauthorised arrivals (see 6.4.3 below).⁶⁶

These amendments were highly controversial as they went against the main tenets of humanitarian treatment for refugees, as set out in the treaties to which Australia was a party. It is suggested that although illegal entrants should be detained until processed by law, these persons were removed to detention centres in Papua New Guinea and Nauru and denied access to legal redress and legal advice.⁶⁷ A particularly sad aspect of this government policy resulted in many children being detained in detention centres for years, with the not unexpected damage to their mental wellbeing. The excised offshore amendments did not affect Australian citizens or permanent residents or non-citizens who held valid visas.

In 2008 the new Rudd Labor government announced an end to the Pacific Solution and the new Immigration Minister stated that part of the new Federal government’s immigration policy included the continued excision of Christmas Island and the Ashmore Reef from the immigration zone (see 6.6 below).⁶⁸ Since early 2008 these boat people have been taken to proper detention facilities, usually at Christmas Island, where they are

61 Section 5(1); Department of Immigration and Citizenship Fact Sheet 81.

62 Section 46A(1). This section was inserted by the *Migration Amendment (Excision from Migration Zone) Act 2001* Sch 1, s 4.

63 The responsible minister in the Howard government was the Hon Phillip Ruddock MP.

64 Section 46A(2).

65 Section 46A(7).

66 Sections 189(3)-(5), 198A.

67 In all under the Pacific Solution between September 2001 and June 2007 a total of 1637 people were detained of whom 1153, or 70 per cent, were ultimately resettled in Australia or other countries and the last 86 refugees were released from the Nauru detention centre and all resettled in Australia, with that centre closing in March 2008; see speech by Minister Evans “Address to the 2008 National Members’ Conference on the Migration Review Tribunal and Refugee Review Tribunal”, 29 February 2008.

68 Steve Cannane, Interview with Chris Evans, Minister for Immigration and Citizenship (Radio National 16 January 2008). Senator Chris Evans, “New Directions in Detention – Restoring Integrity to Australia’s Immigration System” (Australian National University, Canberra, 29 July 2008), available at <www.minister.immi.gov.au/media/speeches/2008/ce080729.htm>.

able to access legal advice and are processed according to law and decency into their respective categories. The personal discretion power has, however been retained. The problem is, of course, a long term one.

6.3.6 The Torres Strait and its Protected Zone

The Torres Strait is a special area in Australia's offshore seas because it is the home area of the Torres Strait people who, being of Melanesian culture, are a different ethnic group from the Aboriginal people and the Papuan people. The Torres Strait Islanders place a high cultural value on the sea and they have traditionally had close trading and cultural links with the Papuans, the inhabitants to their immediate north in the area. This special area is the subject of the *Torres Strait Treaty*, signed between Australia and Papua New Guinea in December 1978, which gives a special status to the people in it and to Papua New Guinea citizens who are traditional inhabitants, details of which are further addressed in Chapter 12. This treaty delineates the boundaries between Australia and Papua New Guinea and, amongst other things, limits Australia's immigration jurisdiction in the "Protected Zone". The protected zone⁶⁹ is the main area of the Torres Strait, the principle purpose of its establishment being to "acknowledge and protect the traditional way of life and livelihood of the traditional inhabitants including their traditional fishing and free movement".⁷⁰

Areas that are part of Australia's migration zone in, or in the vicinity of, the protected zone are protected areas under the *Migration Act 1958*.⁷¹ An "inhabitant of the Protected Zone" is a citizen of Papua New Guinea who is a traditional inhabitant.⁷² Torres Strait Islanders and coastal people of Papua New Guinea travelling to a protected area in connection with traditional activities are given statutory rights in relation to fishing and other activities and Papua New Guinea traditional inhabitants are not required to hold an Australian visa.⁷³ It may be seen that the Torres Strait is, therefore, excluded from certain aspects of non-citizens being required to have a valid visa. The easy movement of Papua New Guinea citizens in the Australian waters in the Torres Strait has given rise to problems with protecting the Australian borders against smuggling of narcotics, goods and people. Further detail about the Torres Strait is set out in Chapter 12.

⁶⁹ *Migration Act 1958* s 5(1). The "Protected Zone" is established under *Torres Strait Treaty* Art 10 with its area set out in Annex 9.

⁷⁰ *Torres Strait Treaty* Art 10(3); [1985] ATS 4.

⁷¹ Section 5(1).

⁷² Section 5(1).

⁷³ Section 42(2). See also *Torres Strait Treaty* Art 11. However, the minister has the power to declare as undesirable any specific "inhabitant of the Protected Zone" and to refuse permission for that person to enter or remain in Australia: s 16.

6.4 Offshore Laws in Relation to Illegal Immigration by Sea

The laws applying offshore in relation to illegal immigration have been touched on above but they are extensive and complex. The *Migration Act* 1958 has many provisions concerning them and they also impact on other legislation. This section will deal with some of the more prominent of those aspects of the powers of government officials relating to them. It is possible that the proposed Maritime Powers Bill, mentioned at the front of this book, will amend some of the provisions about offshore enforcement powers. However, exactly what amendments will be proposed, when the Bill is likely to be debated in both Houses of Parliament and what the outcome of this will be, all remain to be seen.

6.4.1 Powers of Officials to Deal with Unlawful Immigrants

The powers of officials are set out in the main in Pt 2 of the *Migration Act* 1958, which part extends over some 300 pages of legislation and covers 12 divisions. Much of Pt 2 is directed to the various types of visas and the circumstances under which they may be issued, but Divs 9 to 12 are concerned primarily with the detention, removal, deportation and the offences with which unlawful non-citizens may be charged. In Pt 2, Divs 6, 7 and 7A are concerned with detention and removal, Divs 9 and 10 with deportation and the associated costs, Div 11 with the duties of masters of vessels (and offshore installations) in relation to mustering and identifying their crews and Div 12 with offences in relation to unlawful entry into and remaining in Australia.

These aspects impinge on the freedom of the individual so, of course, the Act must set out the powers that may be exercised, by whom and in what circumstances to achieve these regulatory ends. Out of the numerous provisions in the *Migration Act* 1958 mention will now be made of the important ones relating to offshore jurisdiction and the likely ones on which readers may wish some identification and comment.

6.4.1.1 *Detention, Removal and Deportation*

The *Migration Act* 1958 confers wide powers and duties upon an officer who knows or reasonably suspects that a person is an unlawful non-citizen. Officers must detain such a person who is in the migration zone or who is outside the migration zone and seeking to enter it.⁷⁴ However, if such a person is in or seeking to enter an excised offshore place then the officer has a discretion whether to detain the person or not.⁷⁵

⁷⁴ Section 189(2).

⁷⁵ Section 189(3), (4).

Detention powers are also available over persons whose visas have been cancelled or are liable to cancellation⁷⁶ but, mercifully, the Act provides a person must be released on evidence of being an Australian citizen or otherwise lawfully in the country. The Act also makes other provisions about detention, including the grounds that may lead to release and that the minister has a personal discretion but is not duty bound to consider the exercise of it.⁷⁷

Officers are also obliged to remove a long list of unlawful non-citizens from Australia and this is so even if the persons are eligible in many circumstances to be granted a visa but have not been granted one.⁷⁸ This includes the power to place, restrain or remove such a person from a vehicle or vessel whether inside or outside Australia.⁷⁹ If the spouse, either alone or with dependent children, so requests they too must be removed with the person.⁸⁰ An offshore entry person may be forcibly taken to a declared foreign country and there is power to forcibly bring transitory persons into Australia from a foreign country.⁸¹

The “officers” who are given these powers are officers from immigration and customs departments, Federal, State and Territory police⁸² and members of the Australian Defence Force.⁸³ Some aspects of police powers offshore are mentioned in Chapter 4. The powers of members of the Australian Defence Force are mentioned later in this chapter and were also mentioned in more detail in Chapter 5.

The *Migration Act 1958* also has wide powers of deportation, most of which are concerned with deporting persons convicted of a serious criminal offence.⁸⁴ The powers to recover the costs of deporting such persons are also covered.⁸⁵ As these powers seldom arise from an offshore situation mere mention here will suffice.

Other aspects of the Act also deserve to be noted. An officer may require the master of a vessel, or the person in charge of a resources or a sea installation, to muster the crew who, in turn, may be required to produce identification.⁸⁶ If a crew member is missing the master must report it.⁸⁷ There are also numerous offences provided in the Act for

⁷⁶ Section 191.

⁷⁷ See ss 190-197B.

⁷⁸ Section 198. However, under the *Convention Relating to the Status of Refugees 1951*, a country should not return refugees to the unsafe country from whence they fled or to any other unsafe country: see Art 33 r 1 (the principle of non-refoulement).

⁷⁹ Section 198A(2).

⁸⁰ Section 199.

⁸¹ Sections 198A, 198B.

⁸² Section 5(1).

⁸³ Sections 189(5), 198A(5).

⁸⁴ Division 9; ss 200-206.

⁸⁵ Division 10; ss 207-224.

⁸⁶ Division 11; ss 225-227.

⁸⁷ Section 228. Maritime crew visas are dealt with under s 38B.

unlawful entry into and for remaining in Australia and other activity associated with fraudulent behaviour related to immigration.⁸⁸

6.4.1.2 *Boarding at Sea*

Boarding a foreign vessel at sea can be controversial in law and dangerous for the boarding party and the *Migration Act 1958* deals with certain aspects concerning it. There are, however, three introductory points to make about boarding a foreign ship at sea. The first is that international and domestic laws have some complexity when it comes to the authorities of one state seeking to board a ship flagged with another state. Basically it is an infringement of the foreign sovereignty to do it and so it is only permitted by law in limited circumstances. The two main circumstances regulating it relate to the zone in which the foreign ship is steaming at the time of the creation of the reason for boarding, ie the zone at the time the offence was committed, and the gravity of the offence. The second point is that the *Migration Act 1958* is somewhat bizarre in that it provides for the Australian vessel to request to board the foreign ship and then provides that they have the power to board anyway whether permission is given or not. Finally, similar powers given to the commander of a ship are also given to the commander of an aircraft.⁸⁹ This at first instance may seem an unlikely event for fixed wing aircraft event but it is sensible from the point of view of the commander of a helicopter wishing to board a foreign ship by either landing on it or hovering over the ship to allow personnel to abseil down a line to the foreign ship's deck.

Turning to the relevant powers under the *Migration Act 1958*, the commander of a Commonwealth ship (or aircraft) may request to board in the various circumstances set out in the Act which are carefully drafted to accord with the international law set out in UNCLOS. When the request is made to an Australian ship it may be made anywhere at sea except in the territorial sea of a foreign country.⁹⁰ When the request is to a foreign ship the circumstances depend on where that ship is. If it is in the Australian territorial sea the Act gives that power and requires that the request may be for any of the purposes of the Act.⁹¹ If that ship is in the contiguous zone or within 500 metres of an offshore resources or sea installation it may be made to identify the master or if there is a reasonable suspicion that the ship has been or will be involved in a contravention or an attempted contravention of the Act.⁹² If a mother ship is outside Australia's contiguous zone, and not within 500 metres of

88 Part 2, Div 12.

89 Sections 245E, 245F(2).

90 Section 245B(3).

91 Section 245B(2).

92 Section 245B(4)

an Australian resources or sea installation, the request may be made provided the commander reasonably suspects the ship was or will be involved in "direct support" of a contravention in Australia of the *Migration Act 1958*.⁹³

The request to board is to be made as soon as practicable after the contravention occurs. A request to board a foreign ship can also be made outside Australia's contiguous zone if Australia has an agreement with the flag country to do so.⁹⁴ Finally, the request may be made in respect of a ship that is not flying a flag of any country, or is flying a flag it is not entitled to fly, and the commander wishes to establish the identity of the master's ship.⁹⁵ It should be noted that these powers may not be used if a ship is in the territorial sea of some other country, which is, of course, because that territorial sea is in the sovereignty of that country and boarding another ship is certainly not innocent passage. In this situation the Australian government should request the assistance of the other country's government.

Now comes the bizarre part of the drafting in that a failure to comply with a request to board constitutes an offence under the *Migration Act 1958* except if there is a reasonable excuse or it is a ship without nationality.⁹⁶ The "request" is even still "made" if there is no master or if the master did not receive it or did not understand it.⁹⁷ The *Migration Act 1958* also includes other powers to board certain ships after a request is made and also in some circumstances when no request is made.⁹⁸ The powers that may be exercised after boarding will be addressed shortly.

Before leaving this part of the Act it is worth noting that the Act uses in its subheadings the phrase "high seas" and this phrase can cause some confusion. It is unfortunate that UNCLOS did not actually define the high seas but merely used that phrase in the heading and then set out the provisions concerning it and applied them to the seas that are not included in the EEZ, the territorial sea or internal waters or archipelagic waters.⁹⁹ Before UNCLOS the high seas were those seas beyond territorial waters but since UNCLOS came into force in 1994 the terminology is still sometimes addressed to that old meaning. Since UNCLOS came

⁹³ Section 245B(5). The role of a mother ship is discussed in Chapter 7. Essentially it is a ship that directly supports smaller vessels which are dependent on the mother ship. The mother ship role is different from the role played by a factory ship, that processes the catch, or a cargo vessel, that transports the catch from sea to port. Of course, depending on the construction of the vessel, these roles may be combined in the one ship but it is important to know their differences.

⁹⁴ Section 245B(6).

⁹⁵ Section 245(7). The power to board ships without a flag (nationality) is provided in s 245G.

⁹⁶ Sections 245B(10), (11); 245F(1), (3).

⁹⁷ Section 245B(9).

⁹⁸ Section 245F and 245G.

⁹⁹ UNCLOS Art 86.

into force, however, it is preferable to use the phrase “high seas” to refer only to those seas beyond the EEZ. When the *Migration Act 1958* uses the phrase “high seas” the meaning in its text varies but it certainly is not referring to waters beyond the EEZ. The heading does not, of course, influence the clear meaning of the text that follows it but clarity is a virtue and this is not clear.

6.4.1.3 Hot Pursuit

Hot pursuit is well known to the law, including the international and domestic law, and it applies to the situation where a coastal state’s ship pursues another ship outside its jurisdiction for an offence or a suspected offence committed within the jurisdiction. In popular terms it means having a right of hot pursuit into the high seas from the state’s own seas, but the right ceases where the pursued vessel enters the jurisdiction of a foreign state, usually meaning entering its territorial sea. The *Migration Act 1958* makes provision for this but uses the phrase “to chase” rather than “hot pursuit”.

Under the Act the commander of a Commonwealth ship has the power to chase or to continue the chase of a foreign ship for boarding.¹⁰⁰ This power is exercisable where the master of the ship has failed to comply with a request to board,¹⁰¹ and the power is still exercisable where no request was made at all but the commander of the Commonwealth vessel could have made such a request immediately prior to the commencement of the chase.¹⁰² The Act provides, consistent with international law, that the chase can be by more than one Commonwealth ship and continued even if sight is lost but not if the pursuit is interrupted.¹⁰³ The drafting would have been simpler had it followed the usual form of just providing the power to board. Insisting on providing for a so-called “request” adds nothing as the power to board and in practice at sea an order to heave to or make a lee for the boarding party nearly always precedes a boarding. Boarding at sea can be extremely dangerous for the boarding party and their safety should be paramount. The Act also provides for power to “chase” an Australian ship outside the Australian territorial sea¹⁰⁴ in much the same way as for foreign ships.

6.4.1.4 Use of Force

An important part of the *Migration Act 1958* deals with the use of force in a hot pursuit situation. The Act follows international law and provides

100 Section 245C.

101 Section 245C(1).

102 Section 245C(3).

103 Sections 245C(4), (5).

104 Section 245D. Powers to require aircraft to land for boarding are found in s 245E.

that “reasonable force” may be used and that this includes that it may fire at or into the chased ship to disable it or compel it to heave to for boarding.¹⁰⁵ What is reasonable force depends on the circumstances and historically the Australian defence and departmental officers have a fine record of not using lethal force. After all, the issue is only unlawful immigrants, unlawful fishing, and so on. In the case of violent criminals the situation is quite different but the discussion here is in the context of unlawful but not violent immigration practices.

There is not space here to discuss the international law on the subject of what amounts to reasonable force to compel a vessel to stop at sea. Suffice to say on lethal use of force that a shot into a vessel by any calibre of gun is likely to lead to wounding or even to killing one or more persons; women and children not excepted. The Australian practice should be maintained of firing into another vessel only in self-defence and this only after all other methods have been tried and failed. A final point to make is that, as has been mentioned, a boarding party is at great risk in rough seas when boarding another vessel and the boarding party personnel are entitled to protection of their life and limb. These hazards already exist, whether the boarding is boat-to-boat or when made down a rope from a helicopter, so use of force is important to protect them from the further risks involved if they are given a hostile reception.

6.4.1.5 *Detention, Arrest and Further Powers*

Division 13 of Pt 2 of the *Migration Act 1958* gives wide powers in relation to the examination, search and detention of vessels although, because of space constraints, not all of these powers will be mentioned. By way of background the reader should have in mind that a customs, immigration, fisheries or defence vessel may come on or be expressly ordered to investigate a vessel at sea which is suspected of any number of offences. The usual procedure is to put a boarding party onboard that will inspect the vessel, its passengers and crew and generally look it over. If there is sufficient evidence to form a reasonable suspicion of illegal activity then detaining the vessel and insisting it proceeds to a suitable port is the only sensible procedure. Powers are necessary, therefore, for this to be done. Of course, boarding and forcing a vessel to enter port is a major interference with the vessel, its business and all those onboard and it is important that these powers be exercised with restraint.

Under the Act, an officer has power to detain a vessel and to move it to a port or other place, including within Australia’s territorial sea or contiguous zone, if the officer reasonably suspects the ship has been involved in the contravention of the *Migration Act 1958*.¹⁰⁶ This power can

105 Section 245C(6).

106 Section 245F(8).

even be exercised against foreign vessels outside Australia, if it is suspected the contravention occurred within Australia.¹⁰⁷ The power of moving the vessel to bring it in to port includes moving it across the high seas.¹⁰⁸

An officer may also arrest without warrant any person found on the ship if the officer reasonably suspects that the person was involved in the commission or attempted commission of an offence. Further, if the ship was arrested in Australia, the officer retains the power of arrest whether the offence was committed inside or outside Australia.¹⁰⁹ The Act provides that any exercise of the power of arrest in Australia's contiguous zone remains subject to Australia's obligations under international law.¹¹⁰ If an officer detains a ship, the officer may detain any person found on the ship and bring the person to the migration zone, or may take the person to a place outside Australia.¹¹¹

The *Migration Act 1958* confers numerous other powers upon officers, including the power to search people on certain ships,¹¹² to move or destroy hazardous ships,¹¹³ and to conduct examinations, searches and detention.¹¹⁴ An "officer" with powers under the Act is defined to include immigration, customs and police officers but the powers under this particular section of the Act are also conferred upon members of the Australian Defence Force.¹¹⁵

In conclusion it should be noted that the powers mentioned above are circumscribed under the Act and the drafting is detailed and convoluted. It requires detailed perusal to understand what powers are conferred and the many circumstances under which they may lawfully be exercised.

6.4.2 Powers of the Australian Defence Force

The Royal Australian Navy has a large contingent of patrol boats, as well as other vessels and some aircraft, and these are routinely employed in patrolling Australia's offshore waters. The Royal Australian Air Force has aircraft patrolling offshore and from time to time special army units, such as the Special Air Services, are employed for boarding at sea from a helicopter. As a result Australian Defence Force personnel are regularly required to enforce the laws relating to immigration, fisheries and customs and are particularly called in aid when illegal conduct is likely to

107 Section 245F(8)(c).

108 Section 245F(8AA).

109 Section 245F(3)(f)(i).

110 Section 245F(4).

111 Section 245F(9).

112 Section 245FA.

113 Section 245H.

114 Division 13.

115 Sections 5, 245F(18).

have any associated violent aspects. The primary role of the Australian Defence Force, however, is defence of the country from armed and organised attack and this primary role has been blurred with the role of the civil regulatory functions in Australia's offshore waters. This is a topic that is addressed in the concluding chapter of this book. However, when acting in a regulatory role the defence personnel need, of course, powers to deal with the situations with which they are confronted.

Under the *Migration Act 1958* members of the Australian Defence Force have numerous powers. These include the power to move offshore entry persons to a declared safe country,¹¹⁶ such as when the *Tampa* people were moved to Nauru (see 6.9.1). Members of the Australian Defence Force must also detain unlawful non-citizens found in the migration zone or an excised offshore place or persons who are "in Australia" but outside those zones but seeking to enter either of them.¹¹⁷

Members of the Australian Defence Force also have the powers to board, search and arrest certain ships that have been mentioned above,¹¹⁸ which includes the power to move people from a detained ship into the migration zone or to a place outside Australia and to search people and property on board a detained ship.¹¹⁹ These are just the powers in the *Migration Act 1958* and the Australian Defence Force powers were addressed in further detail in Chapter 5.

6.4.3 Immigration Detention

Suspected illegal immigrants need to be detained in a suitable place to enable officials to investigate them and for the immigrants to have access to reasonable services, including from health and legal officers, while their status is checked. Under the Act this is called immigration detention and to detain someone under the *Migration Act 1958* means to take into, or to keep in, immigration detention.¹²⁰ Immigration detention includes being held by, or on behalf of, an officer in a detention centre, or in a prison or remand centre of the Commonwealth, a State or a Territory, or in a police station or watchhouse.¹²¹

As has been set out above, the *Migration Act 1958* provides for the immediate detention and removal of unauthorised arrivals¹²² and a person so detained must be kept in immigration detention until that person

¹¹⁶ Section 198A with "officer" defined as including the Australian Defence Force: s 198A(5).

¹¹⁷ Section 189, especially subs (5).

¹¹⁸ See also Div 12A generally and especially s 245F.

¹¹⁹ Section 245F(18) defines officer as including the Australian Defence Force.

¹²⁰ Section 5(1).

¹²¹ Section 5(1).

¹²² Sections 189, 198, 198A.

is removed from Australia, deported, or granted a visa.¹²³ There are restrictions and constraints, but this is the general tenor of the Act.

As noted above, under the Howard government, whilst Mr Ruddock was the Immigration Minister, many restrictions were placed on the ability of “boat people” to access justice generally and on the jurisdiction of the courts to hear complaints of unlawful detentions. This gave rise to numerous actions before the High Court in its original jurisdiction, a jurisdiction which could not be ousted as it was protected by the Constitution.¹²⁴ This led, of course, to a distortion of the proper judicial procedures but eventually the process was sorted out. The rights to challenge detention under the Act are important and they are mentioned below, but it should be noted that the Act still provides that a court must not order the release of a person in immigration detention.¹²⁵

6.4.4 Offshore Migration Offences

Of course, with its large number of regulatory requirements, the *Migration Act 1958* creates numerous offences by persons other than those accused of entering into and remaining in Australia.¹²⁶ It is an offence for the master, owner, agent, charterer and operator of a vessel to bring a non-citizen into Australia on that vessel, unless the non-citizen has a valid visa or is eligible for a special category visa.¹²⁷ They also commit an offence if an unlawful non-citizen is concealed on their vessel when the vessel arrives in the migration zone.¹²⁸ The *Migration Act 1958* also prohibits a person from taking part in bringing into Australia a non-citizen under circumstances from which it might reasonably be inferred that the non-citizen intended to enter Australia in contravention of the Act.¹²⁹ These provisions place the onus on carriers to ensure the people on board are legally entitled to enter Australia. Other offences under the Act include organising a group of non-citizens to be brought into Australia or harbouring them once in the country;¹³⁰ presenting forged documents to an officer;¹³¹ misusing a visa;¹³² contravening a working condition in a visa;¹³³ entering into a marital relationship or pretending to be a de facto

123 Section 196.

124 Section 75.

125 Section 183.

126 Part 2, Div 12.

127 Section 229.

128 Section 230.

129 Section 233. There have been, of course, a large number of prosecutions under these provisions.

130 Sections 232A, 233A.

131 Section 234.

132 Section 236.

133 Section 235.

spouse in order to obtain permanent residence;¹³⁴ and making false or misleading statements.¹³⁵ Immigration detainees can also be liable under the Act for escaping from immigration detention and for manufacturing, possessing, using or distributing a weapon.¹³⁶

6.4.5 Health Issues

Certain criteria must be met by non-citizens entering Australia and one such criterion is the protection of the public interest. If the health or physical or mental condition of an applicant for a visa is relevant to the grant of a visa, the minister may require that person to undergo a medical examination.¹³⁷ The regulations require that a visa applicant be free from a disease or a condition that may threaten public health or pose a danger to the Australian community.¹³⁸

The test also excludes those persons whose medical conditions are likely to require them to receive health care or community services, and where such services would likely result in a significant cost to the Australian community.¹³⁹ The minister may cancel a visa on many grounds one of which is if the presence of its holder in Australia would pose a health risk to the Australian community.¹⁴⁰ These requirements are all sensible and it is one of the reasons why boat people should be taken to a suitable place for a screening in relation to these and other matters.

6.5 Review and Appeal Processes

The Commonwealth has a comprehensive process for review of administrative decisions. Most of the general decisions are reviewable by the Administrative Appeals Tribunal under the *Administrative Appeals Tribunal Act 1975* (Cth) and there are some other Tribunals with a limited and specialised jurisdiction. The basic Commonwealth system is that a review is available before a tribunal on the merits of the facts and the law and from there an appellate system is available to the Federal Court on points of law and then by leave to the High Court. Under the *Migration Act 1958* there are two specialist tribunals and there is also access to the Administrative Appeals Tribunal. These provisions are extensive, covering some 140 pages of legislation. They are convoluted and disorderly and they are overly detailed in that many of the provisions contained in

134 Part 2, Div 12, Subdiv B.

135 Section 334.

136 Sections 197A, 197B.

137 Section 60.

138 *Migration Regulations 1994* reg 4005(a), (b). See also reg 5.16.

139 Regulation 4005(c).

140 Section 116(e).

the Act should be in regulations, rules or practice directions. They involve review by or appeals to the Migration Review Tribunal, the Administrative Appeals Tribunal, the Refugee Review Tribunal, the Federal Court and the High Court. Sufficient information is addressed below to give a general overview of these provisions but, of course, space constraints prevent any great detail being set out.

Part 5 of the Act sets out details of what decisions are reviewable by the Migration Review Tribunal and that its jurisdiction includes reviewing decisions as to visas being granted, or not granted, revoked or not revoked. A disturbing aspect of the Act is the amount of power it gives personally to the “minister”, including power to issue a certificate that a decision not be changed or, even more disturbing, that it not even be reviewed.¹⁴¹ The various provisions in Pt 5 have detailed constraints about by whom, how, when and where an application for review must be made to the Migration Review Tribunal, which indicates a major attempt by the government to attempt to control and restrict reviews. The Tribunal has the power to take evidence on oath and summons persons and documents, breaches of which are an offence.¹⁴² In giving its decision, the Tribunal may uphold the decision below, or overturn it and make its own orders in lieu. The minister again comes into the decision-making matrix as the minister personally may substitute the decision of the Tribunal for one more favourable to the applicant if it is in the public interest to do so but the minister must then cause a statement to be made before each House of Parliament about it.¹⁴³

In a worrying breach of the rules of natural justice, the Act gives the minister power to issue a certificate that the disclosure of certain evidence would be contrary to the public interest and that the Tribunal may take it into account but must not disclose it to any person and in other parts of the Act a similar certificate gives a discretion to the Tribunal as to whom the information will be disclosed.¹⁴⁴ Having set out its powers in its earlier sections, Part 6 then goes on to establish the Migration Review Tribunal and sets out the basis for the appointment and removal of members, and for a registry.

If the Principal Member of the relevant Migration Review Tribunal considers the matter involves an important principle of general application the matter may be referred to the Administrative Appeals Tribunal, and the President of that Tribunal may accept the referral or decline it.¹⁴⁵ The Administrative Appeals Tribunal may also conduct reviews under other parts of the Act.¹⁴⁶

¹⁴¹ Section 339.

¹⁴² Sections 363, 370-372.

¹⁴³ Section 351.

¹⁴⁴ Sections 375A-378.

¹⁴⁵ Sections 381, 382.

¹⁴⁶ Section 500.

Review of decisions relating to those claiming refugee status, however, go to the Refugee Review Tribunal rather than to the Migration Review Tribunal.¹⁴⁷ Where an application for a visa relating to a person who claims refugee status is refused, the applicant can apply to the Refugee Review Tribunal for a merits review of the decision,¹⁴⁸ which should be done within 28 days after notification of the decision.¹⁴⁹ As with the Migration Review Tribunal, the Refugee Review Tribunal, when reviewing the decision, has all the powers and discretions exercised by the original decision maker.¹⁵⁰ Again as with the Migration Review Tribunal, where a decision involves an important principle or issue of general application the Refugee Review Tribunal can refer the decision to the Administrative Appeals Tribunal.¹⁵¹ The minister again comes into the decision making matrix as the minister may substitute the decision of the Refugee Review Tribunal¹⁵² or the Administrative Appeals Tribunal¹⁵³ for one more favourable to the applicant if it is in the public interest to do so and in this case the minister must cause a statement to be made to both Houses.¹⁵⁴

The *Migration Act 1958* is replete with legislative interference with the due process of law and jurisdiction of the courts. One example is that the High Court, the Federal Court and the Federal Magistrates Court have jurisdiction in relation to migration decisions to the exclusion of all other courts.¹⁵⁵ As part of this process Pt 8 of the Act contains complex provisions and tables about “privative clause decisions” and jurisdictions of courts and Pt 8A addresses restrictions on court proceedings. The High Court has original jurisdiction under s 75(v) of the Constitution with respect to relief in which a writ of mandamus or prohibition is sought against a Commonwealth officer, which is often the case in migration actions. However, hearing such matters is not the function of Australia’s

¹⁴⁷ *Migration Act 1958* Pt 6.

¹⁴⁸ Section 411. A decision by the minister not to grant refugee status is reviewable under the *Administrative Decisions (Judicial Review) Act 1977*, at least as the legislation stood in 1985; *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290. The High Court applied this case in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379. In *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1 the High Court cited *Mayer* but did not consider it to be directly relevant on the facts. In *Mok Gek Bouy v Minister for Immigration, Local Government and Ethnic Affairs (No 1)* (1993) 47 FCR 1 and *Minister for Immigration and Ethnic Affairs v Singh* (1997) 72 FCR 288, the court cited and followed *Mayer* with respect to a separate issue, namely, the time at which a person’s refugee status should be considered.

¹⁴⁹ Section 412.

¹⁵⁰ Section 415.

¹⁵¹ Section 443.

¹⁵² Section 417.

¹⁵³ Section 501J.

¹⁵⁴ Section 501J.

¹⁵⁵ Section 484.

High Court, so the matter is likely to be promptly referred to some other court or tribunal, probably the Federal Magistrates Court.¹⁵⁶

Concern has been expressed about the Executive manipulation of the right to a court hearing in some circumstances. This concern is reinforced by what is contained in Pt 9, the “Miscellaneous” provisions. Included in this is a provision that prevents an “offshore entry person” (ie a person who has landed by boat in an “excised” part of Australia without a visa) and a “transitory person” (ie an offshore entry person who has been forcibly removed from the excised area to detention) from commencing proceedings to challenge the Commonwealth in relation to that person’s status, detention or entry.¹⁵⁷ There is not space to deal in detail with the provisions of Pt 9 and, of course, a country must have powers to protect its citizens from criminal activity especially if it is violent. That being said, other concerning aspects of Pt 9 include that the minister may personally decide about protection visas in certain cases,¹⁵⁸ or may exclude certain persons from Australia.¹⁵⁹ Also, law enforcement and intelligence agencies may supply a migration officer with certain information on which the officer may act, but the officer may not disclose it further, and is not required to disclose it to a court, tribunal, parliament or parliamentary committee or to the applicant.¹⁶⁰

Readers will have discerned misgivings, even dismay, about certain provisions of the *Migration Act 1958*. Some of these were introduced under the Howard government and some of them while pre-existing were administered in a brutal manner. This book is about offshore laws and is not a political treatise but an understanding of the political issues gives a better understanding of the offshore provisions of the *Migration Act*. The treatment of refugees, and some other potential migrants, was an election issue in 2007 and the outcome was the election of the opposition party to office. Against this background it is appropriate to mention some details of changes to these laws that have been signalled. Disappointingly they have not all, however, yet been implemented.

6.6 The Rudd Government’s Reforms

The Rudd Labor government was elected in November 2007 on a platform that included a commitment to amend Australia’s offshore immigration policy by bringing an end to the Pacific Solution, to establish a

¹⁵⁶ Section 476B so provides.

¹⁵⁷ Sections 494AA, 494AB. The section cannot, and does not attempt to, remove the constitutional right to commence proceedings in the High Court under s 75 of the Constitution. The terms “offshore entry person” and “transitory person” are defined in s 5 of the Act.

¹⁵⁸ Section 502.

¹⁵⁹ Section 503.

¹⁶⁰ Sections 503A, 503B.

refugee determination tribunal for better treatment of refugees, and to remove laws that preclude access to legal advice, to the courts and to the right to natural justice generally.¹⁶¹ After taking office the new government announced the closure of the offshore processing centres on Nauru and Manus Island which were some objectionable aspects of the Pacific Solution.¹⁶²

Another significant act was the abolition of temporary protection visas and temporary humanitarian visas.¹⁶³ These visas were previously granted to successful applicants for refugee status but expired after three years, after which time the person had to reapply for asylum. Although temporary protection visa holders could work they had limited access to social security, health and education benefits¹⁶⁴ which left many of them in a parlous condition. The amended system provided arrivals who came under Australia's protection obligations with a permanent protection visa. The amendments also provide that holders of the previous temporary protection visas and temporary humanitarian visas were eligible to apply for a permanent resolution of status visa¹⁶⁵ without the need to reassess protection obligations (subject to meeting health, character and security criteria).

On 29 July 2008 Minister for Immigration and Citizenship, Senator Chris Evans, announced a policy containing values that would "guide and drive" Australia's immigration policies.¹⁶⁶ The first of these values was that mandatory detention remains "an essential element of strong border control". Secondly, three groups of persons would be subject to mandatory detention, namely, all unauthorised arrivals, for the purpose of conducting health, identity and security checks; unlawful non-citizens who present unacceptable risks to the community, and unlawful non-

161 See Senator Chris Evans, "Address to the 2008 National Members' Conference of the Migration Review Tribunal and Refugee Review Tribunal", Melbourne, 29 February 2008, available at <www.minister.immi.gov.au/media/speeches/2008/ce08-29022008.htm>.

162 Steve Cannane, Interview with Chris Evans, Minister for Immigration and Citizenship (Radio National 16 January 2008). See also Senator Chris Evans, "New Directions in Detention – Restoring Integrity to Australia's Immigration System" (Australian National University, Canberra, 29 July 2008), available at <www.minister.immi.gov.au/media/speeches/2008/ce080729.htm>.

163 *Migration Amendment Regulations 2008 (No 5) (Cth)*. See also Senator Chris Evans, "New Directions in Detention – Restoring Integrity to Australia's Immigration System" (Australian National University, Canberra, 29 July 2008), available at <www.minister.immi.gov.au/media/speeches/2008/ce080729.htm>.

164 See *Migration Regulations 1994 (Cth)* Sch 2, subclass 685. See also M Flynn and R LaForgia, "Australia's Pacific Solution to Asylum Seekers" (2002) *Lawasia Journal* 33.

165 Subclass 851.

166 Senator Chris Evans, "New Directions in Detention – Restoring Integrity to Australia's Immigration System" (Australian National University, Canberra, 29 July 2008), available at <www.minister.immi.gov.au/media/speeches/2008/ce080729.htm>.

citizens who repeatedly refused to comply with their visa conditions. A further element of the government's policy was that children and, wherever possible, their families, would not be placed in immigration detention centres. This goes even further than s 4AA of the *Migration Act 1958*, which provides that minors only be detained as a measure of last resort.¹⁶⁷ The fourth value was that indefinite and arbitrary detention was not acceptable, and the fifth was that detention should only occur as a last resort and for the shortest possible period. The policy stressed that people in detention should be treated fairly and reasonably and that the conditions of detention should respect the inherent dignity of the human person.

This new approach did not fundamentally alter Australia's previous immigration policy and many features of the Pacific Solution remained. Mandatory detention remained as a core element of Australia's immigration policy and detention centres would continue to be used for conducting health and security checks. The detention centre on Christmas Island would remain to deal with the arrival of boat people from the north.¹⁶⁸ The listed offshore territories would remain excised from Australia's migration zone, including Christmas Island and the Ashmore and Cartier Reefs, and arrivals there would be processed at Christmas Island.¹⁶⁹ Persons arriving in excised offshore places would still not be able to apply for a visa.

In 2009 legislation was introduced to remove some of the injustices. An Act protected some of the personal details relating to detainees, another Act abolished the detention debts imposed for the period of detention and, importantly, another Bill sets out seven values to provide for a proper and fair framework for detention.¹⁷⁰

It is appropriate to conclude this section by noting the review of Australia's policy of dealing with illegal immigration is continuing¹⁷¹ and amendment of offshore legislation relating to immigration will likely continue at a fast pace.

¹⁶⁷ Section 4AA. See *Migration Amendment (Detention Arrangements) Act 2005* (Cth).

¹⁶⁸ Senator Chris Evans, "New Directions in Detention – Restoring Integrity to Australia's Immigration System" (Australian National University, Canberra, 29 July 2008), available at <www.minister.immi.gov.au/media/speeches/2008/ce080729.htm>.

¹⁶⁹ *Ibid.*

¹⁷⁰ *Migration Amendment (Protection of Identifying Information) Act 2009*; *Migration Amendment (Abolishing Detention Debt) Act 2009* and the *Migration Amendment (Immigration Detention Reform) Bill 2009*. Also see the *Migration Legislation Amendment Act (No 1) 2009* which removes unfair restrictions placed on detainees in tribunal and court hearings.

¹⁷¹ On 10 June 2008, the Federal Parliament's Joint Standing Committee on Migration announced a wide-ranging inquiry into immigration detention in Australia. Joint Standing Committee on Migration, "New Inquiry into Immigration Detention" (Media Alert, 10 June 2008).

6.7 International Agreements

As mentioned at the outset of this chapter, there are numerous international agreements relevant to Australia's offshore immigration laws. It is not possible to discuss them here but readers may wish to keep in mind that many of the legislative provisions about migration are based on Australia's commitments made through such agreements.

The Department of Foreign Affairs and Trade maintains a comprehensive library of treaties to which Australia is a party or is considering becoming a party, which are available on the Department's website.¹⁷²

6.8 Related Commonwealth Acts

The *Migration Act 1958* is the main Act relating to migration but for completeness mention should be made of related legislation that touches on migration issues.

6.8.1 Australian Citizenship Act 2007

The *Australian Citizenship Act 2007* (Cth) repealed the *Nationality and Citizenship Act 1948* (Cth), which was the first Act to create the status of "Australian citizen" as a distinct nationality from a British one. The 2007 Act specifies which persons may become an Australian citizen and the requirements to be satisfied before Australian citizenship can be obtained. Some people acquire Australian citizenship automatically,¹⁷³ while others may acquire citizenship by application.¹⁷⁴ Amendments to the Act in 2007 introduced an Australian citizenship test, which aims to ensure that all persons applying for Australian citizenship are aware of Australia's values, history, culture, national emblems and parliamentary system. Persons with Australian citizenship are lawful citizens of Australia and are quite unaffected by provisions of the *Migration Act 1958* as that Act only relates to non-citizens.¹⁷⁵

6.8.2 Extradition Act 1988

The *Extradition Act 1988* deals with the extradition of persons to and from Australia. One of the principal objects of the Act is to codify the law for court proceedings that determine whether or not a person should be allowed to be extradited overseas, without determining the guilt or

¹⁷² <www.dfat.gov.au> and its "Australian Treaties Library" is at <www.austlii.edu.au/au/ther/dfat/>.

¹⁷³ Part 2, Div 1.

¹⁷⁴ Part 2, Div 2.

¹⁷⁵ *Australian Citizenship Act 1973* is still in force but its purpose appears only to relate to the continuation of some pre-existing legislation.

innocence of the charge brought by the foreign country.¹⁷⁶ The Act also facilitates requests by Australian officials for extradition back to Australia from other countries.¹⁷⁷ For the purposes of this Act, external territories and ships and aircraft registered in Australia are deemed to be part of Australia.¹⁷⁸

An extraditable person is one who is accused of committing an extradition offence in a foreign country and either a warrant for the arrest of that person has been issued, or the person has been convicted of the offence but has not served the sentence.¹⁷⁹ In summary, the Act provides legal procedures for the extradition of such a person from Australia to extradition countries¹⁸⁰ and to New Zealand,¹⁸¹ as well as for the extradition of persons from other countries to Australia.¹⁸²

6.8.3 Australian Passports Act 2005

Passports are an essential document for international travel as they are the primary means of identification and regulation of travellers. Under the international system of cooperation passports are also useful in regulating illegal conduct, including illegal trans-border movements. In Australia the regulatory powers are in the *Australian Passports Act 2005*. Under this Act Australian citizens are entitled to a passport and it gives the minister the power to issue passports to them but this is subject to many disqualifying provisions about their character and criminality.¹⁸³ Under these powers the minister has a discretion not to issue a passport if the minister suspects that the person would be likely to engage in conduct that may threaten the security of Australia or a foreign country or may endanger the health or safety of others.¹⁸⁴

Once issued the minister has power to cancel Australian passports for good reason.¹⁸⁵ Australian passports are not to be issued to children who do not have the consent of all of their parents or guardians to travel overseas except in special circumstances.¹⁸⁶ They are usually recorded on their parent's or guardian's passport. Appeals from reviewable administrative decisions lie to the Administrative Appeals Tribunal.¹⁸⁷

176 Section 3(a).

177 Section 3(b).

178 Section 8(2).

179 Section 6.

180 Part II.

181 Part III.

182 Part IV.

183 Section 7, 8.

184 Sections 11-19.

185 Section 22.

186 Section 11.

187 Sections 48-50.

6.9 Some Leading Cases

While this chapter could not possibly cover the massive amount of case law relating to immigration, there are some leading cases to which reference ought to be made in order for the reader to have some background about them.

6.9.1 The Tampa Incident and the “Pacific Solution”

The northern and eastern maritime boundaries of Australia are readily accessible by boat and this is an issue in relation to border protection. This is especially so with the Indonesian maritime border as the Indonesian people are excellent seafarers and quite capable of travelling to the northern Australian islands and coastline. Smuggling of illegal immigrants by some of them is a problem from time to time and this section deals with one of those times. As one of the Australian judges, called to preside over a trial relating to this activity, put it:

The introduction of illegal immigrants into Australia threatens this country's national security in many ways. It is a growing problem which requires Australia to take the necessary steps to protect itself.¹⁸⁸

Illegal immigrants by sea, known as “boat people”, gained much publicity as a result of the *Tampa* case in 2001. The *MV Tampa* was a Norwegian cargo ship, on its ordinary voyage from Australia to northern ports, the captain of which responded to the emergency call and rescued 433 people, mainly Afghan refugees, together with the crew from a wooden fishing vessel sinking in the Indian Ocean north of Christmas Island. Initially the *Tampa* headed north for Indonesia, but at the demand of some of the passengers, some of whom threatened to commit suicide, the captain turned around and sailed to Christmas Island, an Australian Territory. When the vessel was approximately 13.5 nautical miles off Christmas Island, the Administrator, acting on the request of the Australian Cabinet Office run by then Prime Minister Howard, closed the island's port so the *Tampa* could not land the rescued people there.¹⁸⁹ Departmental officers formally requested the captain of the *MV Tampa* not to enter Australian territorial waters. The captain of the *Tampa* then declared his own vessel as one in distress and called for help, a call that

¹⁸⁸ *Ilam v Dando* (1999) 109 A Crim R 47; [1999] WASCA 129 at [13] per McKechnie J. An appeal from the magistrate's sentence by the crew of an Indonesian vessel illegally smuggling persons to Christmas Island after leaving from west Java, where they were apprehended alongside the wharf.

¹⁸⁹ Some investigation may be called for to uncover whether this closure was lawful. As may be seen from Chapter 10, the *Local Government Act 1995* (WA) s 10.7 then applied, including to the only port. An investigation would reveal if a request from the Commonwealth officers should have been acted on by the Administrator under a Western Australian ordinance.

the Australian government ignored in the main, until armed Australian Defence Force personnel, under orders from the Australian government, boarded the vessel and took control of it. The rescued asylum seekers were taken off and forcibly transported by an Australian navy ship to Nauru for processing. The crew of the sunken Indonesian boat were subsequently charged with various offences for smuggling these people.¹⁹⁰

Litigation ensued in the Federal Court by humanitarian groups seeking habeas corpus, mandamus and injunctive and other relief to try to get the rescued persons before a court to be heard. The primary judge, North J, held that the refugees were detained aboard the vessel by the government's acts without lawful authority, and made orders for the release of the refugees onto the Australian mainland, there to be dealt with according to law.¹⁹¹ The government appealed and, by majority, the appeal was allowed, mainly on the ground that the executive power under the Constitution supported this action.¹⁹² Special leave to appeal to the High Court was refused.¹⁹³

At the appeal the majority, French and Beaumont JJ, held that absent statutory abrogation, the power conferred by s 61 of the Constitution¹⁹⁴ was sufficient to authorise the Executive to prevent a vessel from docking at an Australian port and to restrain a person or vessel from proceeding into Australia or to compel a person or vessel to leave.¹⁹⁵ One issue was whether the *Migration Act 1958* covered the field and thus deprived the Executive of power, but the majority held that it did not deprive the Executive of this power.¹⁹⁶ The steps taken in relation to the vessel, which had the purpose and effect of preventing the refugees from landing on Australian soil and arranging for their forcible removal from Australian territorial waters, were held to be within the scope of this

190 See *R v Disun* (2003) 27 WAR 146; [2003] WASCA 47. After an earlier trial in the District Court this was the appeal by the crew against conviction and the Crown against sentence. One issue was whether the police could board this foreign registered vessel lawfully, even though it was in Australia's territorial sea, to arrest and later charge them with "people smuggling", an offence under s 232A of the *Migration Act 1958*. The trial judge and the Full Court held that they were lawful arrests.

191 *Victorian Council for Civil Liberties Incorporated v Minister for Immigration and Multicultural Affairs* (2001) 110 FCR 452; 182 ALR 617; [2001] FCA 1297 (first instance).

192 *Ruddock v Vadarlis* (2001) 110 FCR 491; [2001] FCAFC 1329 (on appeal, Full Court).

193 *Vadarlis v Minister for Immigration and Multicultural Affairs* (High Court, Gaudron, Gummow and McHugh JJ, M93/2001, 27 November 2001).

194 Section 61 provides: "The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth". Under the Australian system of government this power is exercised by the Cabinet acting through the government ministers.

195 *Ruddock v Vadarlis* (2001) 110 FCR 491 at 544 per French J. Beaumont J agreed with French J and added some further reasons of his own.

196 Ibid at 545 per French J.

Executive power.¹⁹⁷ Nothing done by the Commonwealth amounted to a restraint upon the freedom of the refugees, as they had neither right nor freedom to travel to Australia.¹⁹⁸

The minority judge, Black CJ, held in effect that the detainees should be brought before a court to be heard and the Executive did not have the wide powers that it claimed. He held that the very Act to deal with such situations, the *Migration Act 1958*, covered this situation and the Executive power was thereby ousted. The Commonwealth argued against the application of the *Migration Act* because its then provisions required that the refugees be dealt with according to law ie in accordance with its provisions.¹⁹⁹

Following the *Tampa* incident, the then Australian government implemented what became known as the Pacific Solution. The aim of this policy was to prevent an asylum seeker who arrived in an offshore place in Australia from invoking the provisions of the *Migration Act 1958* and applying for a protection visa. This policy was implemented by virtue of a package of legislation passed on 27 September 2001 that excised certain areas from Australia's migration zone (see 6.3.5 above). The government also negotiated a series of agreements with two Pacific Island nations, Nauru and Papua New Guinea, whereby boats would be intercepted before they arrived on the Australian mainland and the persons on board would be detained in those Pacific nations until their refugee status was determined. Australia would pay the costs incurred by the Pacific nations for holding the asylum seekers and processing their claims.²⁰⁰

As mentioned above in Section 6.6, the Howard government lost office to the Rudd government at the end of 2007 and the Pacific Solution was ended and the detention centres in Papua New Guinea and Nauru closed. The centre in Christmas Island was and is the main centre for processing boat people who land in those areas of Australia's maritime borders. It suffices to conclude by stating that the *Tampa* affair coloured the whole of the treatment of refugees, as most of the passengers in these boats were subsequently found to be refugees once they had access to the rule of law. With an extra 433 persons onboard the *Tampa* was, of course, unseaworthy. A disappointing maritime aspect was that the senior

197 Ibid at 545-546 per French J.

198 Ibid at 547-548 per French J.

199 Ibid at 495-508 per Black CJ.

200 For further information on the *Tampa* case, see, amongst numerous writings, M White, "Tampa Incident: Shipping, International and Maritime Legal Issues" (2004) 78 *ALJ* 101, and M White, "Tampa Incident: Some Subsequent Legal Issues" (2004) 78 *ALJ* 118; E Willheim, "MV Tampa: The Australian Response" (2003) 15 *Int J Refugee Law* 161; F Brennan, *Tampering with Asylum: A Universal Humanitarian Problem* (University of Queensland Press, Brisbane, 2003); M Tsamenyi and C Rahman (eds), *Protecting Australia's Maritime Borders: The MV Tampa and Beyond* (Wollongong Papers on Maritime Policy No 13, 2002); D Marr and M Wilkinson, *Dark Victory* (Allen & Unwin, Sydney, 2003).

officers of the Australian Maritime Safety Authority did not discharge the statutory object their Act, which was to "promote maritime safety" in relation to the *Tampa*.²⁰¹

6.9.2 Validity of Arrest on Foreign Ship in the Territorial Sea: R v Disun

As mentioned above, the Australian authorities, led by armed forces, boarded the *Tampa* when it was offshore from Christmas Island seeking assistance. The authorities subsequently charged the master and crew of the vessel conveying the persons to Australia, the KM *Palapa 1*, and they came to trial in the District Court in Perth. The charges were, in effect, for organising to bring groups of non-citizens into Australia²⁰² and they were convicted and sentenced. At an application for stay of the trial and on appeal to the Court of Criminal Appeal in the Supreme Court of Western Australia²⁰³ an argument was advanced that the arrest and removal ashore were not lawful as the *Tampa* was a foreign-flagged ship and so the Australian law did not apply to give power to arrest.

The Western Australian Full Court rejected this argument on the basis that "there is no rule of international law which is to the effect that persons on board private ships entering Australian territorial waters are immune from local jurisdiction".²⁰⁴ There is not space here to develop the issues about when the "Internal Economy Rule" applies, which means when the ordinary law of the flag state applies to the ship. Suffice to say that the High Court subsequently decided that the Australian laws may apply to a ship in an Australian port, equally applicable in its territorial sea subject to rights of innocent passage, if the law is expressed so to apply.²⁰⁵ In the case of Mr Disun, who was the master of the *Palapa 1*, the Act was so expressed and his conviction was upheld.

6.9.3 Reasonable Suspicion: Ruddock v Taylor

In *Ruddock v Taylor*,²⁰⁶ a British subject who had lived in Australia since childhood but who had never been naturalised had his transitional permanent visa cancelled twice under the *Migration Act 1958* on the ground that he did not satisfy the character test.²⁰⁷ On each occasion the decision to cancel his visa was made after he had served prison sentences for serious offences and the decisions were twice quashed on appeal to the

201 *Australian Maritime Safety Act 1990* s 2A.

202 An offence under *Migration Act 1958* s 232A.

203 *R v Disun* [2003] WASCA 47 per Murray, Anderson and Templeman JJ.

204 *Ibid* at [18] per Anderson J, with whom Murray and Templeman JJ agreed.

205 *Re Maritime Union of Australia; Ex parte CSL Pacific Shipping Inc* (2003) 214 CLR 397; [2003] HCA 43.

206 (2005) 222 CLR 612; [2005] HCA 48.

207 Section 501(2).

High Court. Each time his visa was cancelled he was detained in immigration detention as an unlawful non-citizen. Mr Taylor claimed damages against the Commonwealth and the minister for false imprisonment. The defendants relied upon s 189(1), which requires an officer to detain a person where the officer knows or reasonably suspects the person is an unlawful non-citizen. This was the case on each occasion after release from prison.

Gleeson CJ, Gummow, Hayne and Heydon JJ, with Callinan J agreeing (McHugh and Kirby JJ dissenting) held that s 189 requires an officer to detain a person provided the officer has the requisite knowledge or reasonable suspicion that the person is an unlawful non-citizen. This section refers to the officer's subjective knowledge or suspicion. It thus operates in respect of people who may not in fact be unlawful non-citizens. Further, provided an officer has the requisite belief or suspicion, the detention of person in question remains lawful even where it is subsequently revealed the officer's belief was mistaken. Even if the decision to cancel a visa is unlawful, that does not mean the resulting detention is also unlawful.²⁰⁸

The court held that the issue was whether the belief of the officer was reasonable. Whether or not the grounds for suspecting a person to be an unlawful non-citizen are reasonable must be judged against what was known or reasonably capable of being known at the relevant time. A belief or suspicion may be reasonable even if founded on a mistake of law.²⁰⁹ Ultimately, the court held that the officers in this case had acted in good faith, based on a reasonable suspicion. The respondent's detention had therefore been lawful as required under the *Migration Act 1958*.

6.9.4 Constitutional Power over Aliens: Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs²¹⁰

In this case, the applicant challenged the validity of various provisions in the *Migration Act 1958*. The applicant and others were Cambodians, all but one of whom came to Australia by boat without a visa. Section 54L provided that such "designated persons" (generally known as a "boat people") must be kept in custody and only released upon being removed from Australia or granted a permit. Section 54N allowed an officer to detain a "designated person" who was not in custody at the time the section commenced.²¹¹ The applicant submitted these provisions were

208 (2005) 222 CLR 612 at 622-623 per Gleeson CJ, Gummow, Hayne and Heydon JJ.

209 Ibid at 625-627 per Gleeson CJ, Gummow, Hayne and Heydon JJ.

210 (1992) 176 CLR 1.

211 The *Migration Legislation Amendment Act 1994* (Cth) renumbered ss 54L and 54N as ss 178 and 180 respectively. The current provisions are contained in *Migration Act 1958* Pt 2, Div 6.

invalid as they purported to confer judicial power upon the Executive, contrary to Ch III of the Constitution. However, Mason CJ, Brennan, Deane, Dawson, Toohey and McHugh JJ held the provisions were valid under s 51(xix) of the Constitution, which granted power over "naturalization and aliens". They held that the detention of "designated persons" did not amount to punishment²¹² and the Commonwealth had the power to detain non-citizens.²¹³

Brennan, Deane and Dawson JJ held that Parliament's power to make laws with respect to aliens includes not only the power to make laws providing for the expulsion or deportation of aliens by the Executive but extends to authorising the Executive to restrain an alien in custody to the extent necessary to make the deportation effective.²¹⁴ In short the court held that the legislative power conferred by s 51(xix) of the Constitution extends to conferring upon the Executive authority to detain an alien in custody for the purposes of expulsion or deportation and that such authority constitutes an incident of executive power.²¹⁵

6.9.5 Minister's Personal Decision not Reviewable: *Singh v Minister for Immigration and Multicultural Affairs*²¹⁶

This case was heard before Matthews J in the Federal Court of Australia. Singh had been convicted in 1998 on four counts of supplying a prohibited drug. In 1999, the minister decided to deport Singh pursuant to the *Migration Act 1958*, which allows the minister to order the deportation of non-citizens convicted of an offence in Australia.²¹⁷ The minister also declared the applicant to be an "excluded person",²¹⁸ which prevented Singh from applying to the Administrative Appeals Tribunal for a review of the deportation decision. This meant that the minister's decision was not subject to merits review. The only course available to the applicant was to seek judicial review from the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

Matthews J rejected the applicant's submission that the minister's issuance of a certificate under s 502 was an exercise of judicial power and

²¹² (1992) 176 CLR 1 at 27-28, 34-35 per Brennan, Deane and Dawson JJ.

²¹³ Ibid at 10 per Mason CJ, 32 per Brennan, Deane and Dawson JJ, 46 per Toohey J, 57-58 per Gaudron J, 65-66 per McHugh J.

²¹⁴ Ibid at 30-31 per Brennan, Deane and Dawson JJ.

²¹⁵ The issues in the case included whether the amended Act legalised detention retrospectively and whether it precluded the courts from reviewing the detention of designated persons where the detention itself was not unlawful, so it is an authority on those points as well.

²¹⁶ (2000) 173 ALR 313; [2000] FCA 0485.

²¹⁷ Section 200.

²¹⁸ Section 502(1).

therefore invalid. Her Honour held that a decision to deport a non-citizen, and any decision incidental thereto, is not an exercise of judicial power and does not infringe Ch III of the Constitution. The minister's declaration that the applicant was an excluded person was incidental to the minister's decision to deport the applicant and so was not an exercise of judicial power. The applicant's case was dismissed. It revealed an example of the lack of a merits review of administrative decisions and the most concerning provisions in the *Migration Act 1958* where the minister made a "personal decision" instead of the tribunal making it and then being subject to merits review in the usual way.

6.9.6 Permanent Detention is Possible: *Al-Kateb v Godwin*²¹⁹

Al-Kateb v Godwin was another case that considered the application of the *Migration Act 1958* and its consequences for the individual. In this case, a stateless person arrived in Australia and was placed in immigration detention. His application for a protection visa was refused. He wrote to the minister asking to be removed from Australia, but removal did not take place because attempts to obtain the necessary international cooperation from another country to take him were unsuccessful. He consequently remained in detention as the authorities were reluctant to release him.

The High Court upheld the Commonwealth's constitutional ability to hold a person in indefinite immigration detention, even in circumstances where there is no real prospect of the person being removed from Australia. McHugh, Hayne, Callinan and Heydon JJ (Gleeson CJ, Gummow and Kirby JJ dissenting) held that ss 189, 196 and 198 required an unlawful non-citizen to remain in immigration detention pending removal even if removal from Australia was not reasonably practicable in the foreseeable future. The court held these provisions did not contravene Ch III of the Constitution because they were not punitive in nature.²²⁰

Although the judgments in the last several cases were not specifically related to the offshore laws as such, those laws did apply offshore to boat people and so are relevant from that point of view. These cases also reveal in part the concern expressed in the text about the *Migration Act 1958* having provisions where the "personal" decisions of the minister are brought into play. These provisions offend the rule of law in that many of them are not reviewable by an independent court or tribunal even though they may have the most profound consequences on the personal liberties of the persons to whom the decisions are directed.

219 (2004) 219 CLR 562; [2004] HCA 37.

220 Another issue in the case was whether the then s 54R, that a court was not to order the release of a designated person, was valid. The majority held that it was invalid in that particular form.

6.10 Conclusions

It may be seen from this chapter that those immigration laws that apply offshore from Australia are complex, convoluted and, in some respects, overly officious at best and contrary to the proper administration of justice at worst. They are applied by numerous departmental officers, including immigration, customs, fisheries, defence and police, both Federal and State.

The complexity and detail of the legislation makes it difficult to apply it effectively and fairly. Further, some of the immigration laws do not apply to some of the offshore islands because those areas have been excised from these laws being applied. This increases the difficulties.

Most of the more controversial laws concerning the treatment of unlawful immigrants, especially genuine refugees, were enacted in amendments to the *Migration Act 1958* during the Howard government. It is suggested that the period of the Howard government saw a low point in the treatment of refugees in that they were not detained and then separated from other non-citizens who entered Australia waters without authority. It is to be hoped that under the Rudd government the amendments already made to the *Migration Act 1958* and the application of those laws by the departmental officers will see more humane treatment for refugees who arrive by boat. Of course, unlawful non-citizens who are not refugees will need to be treated on their merits and those with criminal backgrounds or criminal intention need to be identified and treated appropriately.

This and other chapters demonstrate the need for simplification and greater coordination of the laws relating to offshore regulatory and enforcement powers. It is to be hoped that the proposed Maritime Powers Bill, mentioned at the front of this book, will achieve this. It remains to be seen, however, whether the drafting of the Bill, and then its passage through both Houses of Parliament, will see an eventual Act that is beneficial in this regard or whether it just adds further complexity to this area of law.

Chapter 7

Offshore Fisheries Laws

- 7.1 Introduction to Australian Fisheries Laws
- 7.2 Fisheries Zones, Boundaries and Arrangements with Australia's Neighbours
 - 7.2.1 The Australian Fishing Zone
 - 7.2.2 Indonesian Boundary and Agreements
 - 7.2.3 East Timor Boundary, Joint Petroleum Development Area and Other Agreements
 - 7.2.4 Torres Strait
 - 7.2.5 Australian Antarctic Territory
 - 7.2.6 Other Maritime Boundaries
- 7.3 Illegal, Unreported and Unregulated Fishing in Australia
- 7.4 Fisheries Management Act 1991 (Cth)
 - 7.4.1 General Outline
 - 7.4.2 Searches
 - 7.4.3 Hot Pursuit
 - 7.4.4 Use of Force
 - 7.4.5 Protection from Civil or Criminal Proceedings
 - 7.4.6 Offences
 - 7.4.7 Powers of Defence and Police Personnel
- 7.5 Forfeiture
 - 7.5.1 Introduction
 - 7.5.2 Forfeiture in Face of Sale by Admiralty Court
 - 7.5.3 Forfeiture on Allegation of an Offence
- 7.6 Other Fisheries Acts
- 7.7 Some Leading Cases in Enforcement
 - 7.7.1 The Volga Litigation
 - 7.7.1.1 Forfeiture of the Vessel: Olbers v Commonwealth
 - 7.7.1.2 Stay Pending Trial: Olbers v Commonwealth
 - 7.7.1.3 Bail and Conviction of Crew: Lijo v Director of Public Prosecutions (Cth)
 - 7.7.1.4 Security for Costs: Olbers v Commonwealth and Australian Fisheries Management Authority
 - 7.7.1.5 Volga ITLOS Case: Russia v Australia
 - 7.7.1.6 Final Disposal of the Volga
 - 7.7.2 Viarsa 1 Litigation; Ribot-Cabrera v R
 - 7.7.2.1 Bail
 - 7.7.2.2 Viarsa 1 Trials
 - 7.7.2.3 Final Disposal of Viarsa 1

- 7.7.3 Bunkers Case; FV Taruman
- 7.7.4 Japanese Whaling; Humane Society v Kyodo Senpaku Kaisha
- 7.7.5 South Australian Fishing Boundary; Raptis v South Australia
- 7.7.6 Chen Long Detention
- 7.7.7 Trepang Fishing Vessels Detention
- 7.7.8 Southern Bluefin Tuna Arbitration
- 7.7.9 The Inter-Tidal Zone Case; Northern Territory v Arnhem Land Aboriginal Land Trust
- 7.8 Conclusions

7.1 Introduction

The Australian fisheries jurisdiction is large in area and complex in law¹ with its laws underpinned by the numerous international agreements. Some of these agreements deal with the maritime boundaries, so they establish the outer limits of the Australian jurisdiction. Some of them deal with the regulation of fish stocks and the protection of the marine habitat so they dictate the regulation of those who fish in the Australian fishing zone and how they do it. Other international treaties relate to the protection of the marine environment from ships and fisheries activities. Finally, some of them relate to the enforcement of fisheries laws and so these impact on how the Australian authorities deal with Australian and foreign fishers to ensure it is done according to law. It is not possible to deal with these international treaties in this chapter because that would be a book in itself. It will, therefore, concentrate on the Australian fisheries laws themselves rather than their international underpinning.²

This chapter will, therefore, cover some of the issues concerning the inner boundary and the outer boundary of the Australian Fishing Zone (AFZ). It will then deal with some aspects of illegal, unreported and unregulated fishing and set out the main aspects of the *Fisheries Management Act 1991* and summarise the laws relating to the enforcement aspects under that Act and international law. The chapter then deals with several controversial aspects under the *Fisheries Management Act 1991*, including the unfortunate provisions relating to forfeiture of vessels, catch and other related property. The chapter then addresses a select number of cases out of the many hundreds of cases each year on enforcement. These

¹ A particularly useful book on fisheries is W Gullett, *Fisheries Laws in Australia* (LexisNexis Butterworths, Sydney, 2008), where many of the issues mentioned in this chapter are canvassed in detail. Also see Rachel Baird, *Aspects of Illegal, Unreported and Unregulated Fishing in the Southern Ocean*, Springer, 2006.

² *Chow Hung Ching v R* (1949) 77 CLR 449, and other cases, have all held that provisions in international treaties to which Australia is a party have no direct legal effect in Australia unless incorporated into Australian law through legislation.

cases are selected on the basis of their importance to the laws of the enforcement regime. Some of the outcomes, it is suggested, are unfortunate and bad law, and the policy and the laws and the departmental practices relating to them should be changed. In the concluding summary it is further suggested that some of the policy and departmental practices are unfair and oppressive on simple fishers and that recent indications of a change of policy and practice are long overdue. The regulation of Australian fisheries is by the Commonwealth Department of Agriculture, Fisheries and Forestry although each of the States and the Northern Territory also has regulatory bodies for their areas of jurisdiction.³ It is convenient, therefore, to mention at this stage this separation of Commonwealth and State jurisdiction in relation to fisheries jurisdiction.

As discussed in Chapter 2, the question as to whether the Commonwealth or States had sovereignty over the Australian territorial waters and seabed was determined in *New South Wales v Commonwealth*⁴ (*Seas and Submerged Lands Case*). The majority of the High Court held that the enactment by the Commonwealth of the *Seas and Submerged Lands Act* 1973, which asserted Commonwealth sovereignty over territorial waters, the subjacent seabed and the superadjacent air space, was a valid exercise of the external affairs power in s 51(xxix) of the Constitution because it gave effect to particular international conventions ratified by the Commonwealth.⁵ The Commonwealth jurisdiction ran from the low water mark or historic boundaries. The States retained sovereignty in respect of those waters within bays, gulfs, rivers etc that fell within the territorial limits of the State on federation on 1 January 1901.⁶

The subsequent High Court case of *Pearce v Florencia*⁷ recognised that each State had the power to pass laws to regulate activities in its offshore areas on the basis of providing for the State's "peace, welfare and good government". However, there had to be a connection between the State

³ The Department of Agriculture, Fisheries and Forestry website mentions that DAFF provides policy advice on international fisheries agreements and related issues. These include the Commission for the Conservation of Southern Bluefin Tuna (CCSBT), Indian Ocean Tuna Commission (IOTC), Western and Central Pacific Fisheries Commission (WCPFC), and Pacific Islands Forum Fisheries Agency (FFA). DAFF is also active in the United Nations' Food and Agriculture Organization and the Pacific Islands Forum Fisheries Committee. Other responsibilities include northern illegal fishing, Australia's bilateral relationships with Indonesia and Papua New Guinea, Torres Strait fisheries issues, implementation of the Aquaculture Action Agenda, and coordination of the seafood supply chain, including seafood safety and market and trade strategies: see <www.daff.gov.au>. The Australian Fisheries Management Authority (AFMA), established under the *Fisheries Management Act 1991* (Cth), has the responsibility for the management of Commonwealth fisheries: s 6 "Objectives".

⁴ (1975) 135 CLR 337.

⁵ In particular the *Convention on the Territorial Sea and Contiguous Zone 1958* [1963] ATS 12.

⁶ *Seas and Submerged Lands Act 1973* s 14.

⁷ (1976) 135 CLR 507.

and the activity which the State legislation sought to regulate. In order to settle the dispute over offshore jurisdiction the Commonwealth and the States concluded the Offshore Constitutional Settlement of 1979.

As set out in Chapter 2, the Offshore Constitutional Settlement 1979 provided, amongst other things, that the Commonwealth and the States had agreed that the regulation of fisheries and taking of fish in Australian offshore waters was to be dealt with on a cooperative basis between the States and the Commonwealth. The general position then and now is that State fisheries legislation applies to fishing activities within three miles of the baseline, now known as the “coastal waters”, while Commonwealth fisheries legislation applies beyond that. It is beyond the boundaries of this chapter, mainly because of the extra material and space, to deal with the separate fisheries legislation of the six States and the Northern Territory. Suffice to say that each of them has a fisheries regulatory regime with a raft of legislation that regulates fisheries in their own coastal and internal waters.⁸

Since the Offshore Constitutional Settlement 1979 the inshore edge of the Commonwealth fisheries jurisdiction has moved slightly from the low water mark or historic boundaries established by the *Seas and Submerged Lands Act Case*. The UNCLOS baseline,⁹ as given effect in the amended *Seas and Submerged Lands Act 1973*, is now the determining line and in many areas it departs from the low water mark to follow the straight baselines allowed by UNCLOS. In short the current jurisdictional division is that the States and the Northern Territory have fisheries jurisdiction out to three nautical miles from the baseline or their historic boundaries, so this marks for most purposes the inner edge of the Commonwealth fisheries jurisdiction. The outer edge, however, has its own issues and it is to these issues that attention will now be directed.

7.2 Fisheries Zones, Boundaries and Arrangements with Australia's Neighbours

7.2.1 The Australian Fishing Zone

Australia gave international effect to UNCLOS in 1994 by ratifying the convention and then giving domestic effect to it by amending the *Seas and Submerged Lands Act 1973*. The result was that Australia then claimed its Exclusive Economic Zone (EEZ) out to 200 nautical miles from the baselines. Article 56 of UNCLOS gives sovereign rights to exploit the

⁸ The main fisheries statutes for each of the States and the Northern Territory are: *Fisheries Management Act 1994* (NSW); *Fisheries Act 1994* (Qld); *Fisheries Management Act 2007* (SA); *Living Marine Resources Management Act 1995* (Tas); *Fisheries Act 1995* (Vic); *Fish Resources Management Act 1994* (WA); *Fisheries Act 2005* (NT).

⁹ *United Nations Convention on the Law of the Sea 1982* [1994] ATS 31.

living and non-living natural resources of the seabed and its super-adjacent waters in the EEZ. The living resources are, of course, fisheries. These rights were circumscribed by obligations to respect the rights of others, not to infringe the usual freedoms of navigation and to conserve the living resources and utilise them in a responsible manner, especially where they were migratory or straddling fish stocks.¹⁰ The outer continental shelf does not feature highly in the fisheries profile as the coastal state's rights there are restricted to the seabed and subsoil and its sedentary natural living resources (as well as the mineral non-living ones) so the rights do not include fisheries (except sedentary natural living resources).¹¹



Map 7.1: The Australian EEZ including the EEZ off the Australian Antarctic Territory

Source: Geoscience Australia (as amended)

¹⁰ UNCLOS Pt V, Arts 55-73, has various provisions touching on the coastal states' rights and obligations in the EEZ.

¹¹ UNCLOS Art 77.

As mentioned, under the powers set out in the *Seas and Submerged Lands Act 1973* Australia proclaimed its EEZ, but it needed further legislation to claim the fisheries themselves. This had earlier been done by a series of Acts by the States, giving rise to such test cases with the Commonwealth over fisheries legislation as *Bonser v La Macchia* in 1970¹² and *Pearce v Florencia* in 1976,¹³ which cases have been mentioned and put in context in Chapter 2. There was already Commonwealth fisheries legislation in place when Australia extended its fisheries claims to the outer limit of the EEZ,¹⁴ so the simple drafting technique was used whereby the Australian Fishing Zone (AFZ) was defined to be the same outer waters as the EEZ, which was done in the *Fisheries Management Act 1991* as follows:

Australian fishing zone means:

- (a) the waters adjacent to Australia within the outer limits of the exclusive economic zone adjacent to the coast of Australia; and
 - (b) the waters adjacent to each external territory within the outer limits of the exclusive economic zone adjacent to the coast of the external Territory;
- but does not include:
- (c) coastal waters of, or waters within the limits of, a State or internal Territory; or
 - (d) waters that are excepted waters.¹⁵

So while the AFZ is conterminous with Australia's outer limits of the EEZ, including the EEZ around Australia's external territories, it does not include the three nautical mile coastal waters, waters within the limits of a State or internal Territory nor waters landward of the baselines that do not fall within the limits of a State or Territory.¹⁶ It also does not include waters that are "excepted waters" as proclaimed,¹⁷ nor the Torres Strait Protected Zone, which is regulated, in relation to fish and fisheries, by the *Torres Strait Fisheries Act 1984*; as set out under. Australia's declared EEZ adjacent to the Australian Antarctic Territory is also not part of the AFZ, as discussed in Chapter 9.

12 *Bonser v La Macchia* (1970) 122 CLR 177.

13 *Pearce v Florencia* (1976) 135 CLR 507.

14 The Commonwealth Act was the *Fisheries Act 1952*.

15 *Fisheries Management Act 1991* s 4.

16 Section 5, defines "coastal waters" of a State as, basically, the waters out for three miles from the baselines adjacent to the particular State.

17 The "excepted waters" Proclamation was published in *Commonwealth of Australia Special Gazette* No S52, 14 February 1992 under the *Fisheries Management Act 1991*. The outer limit of the Australian EEZ is set out in the proclamation made on 26 July 1994 under the *Seas and Submerged Lands Act 1973*, and was published in *Commonwealth of Australia Special Gazette* No S290, 29 July 1994. That proclamation entered into force on 1 August 1994.

7.2.2 Indonesian Boundary and Agreements

Fishing in what are now Australian waters by people who are now Indonesians goes back for centuries in that it is well established that Indonesians have long been fishing in the northern Australian waters. As the Australian government steadily negotiated the maritime boundaries with neighbouring countries the Indonesian maritime boundary had to be addressed. As a result, a series of agreements has established a maritime boundary between the two countries which are combined with a fisheries agreement and numbers of other agreements and arrangements.¹⁸

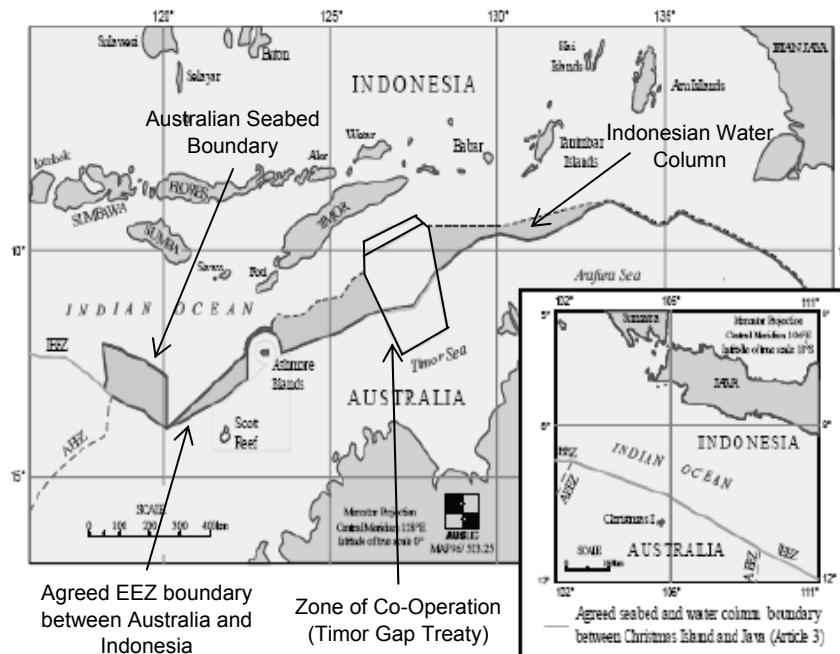
The map below, Figure 7.2 (*see over*), shows this arrangement, including that the water column boundary is not the same as the seabed boundary in some parts. Where they are separated the rights to the water column gives rights to the fisheries in those areas.

A 1992 *Fisheries Cooperation Agreement*¹⁹ provides a framework for fisheries and marine cooperation between Australia and Indonesia, and provides for information exchange on research, management and technological developments, complementary management of shared stocks, training and technical exchanges, aquaculture development, trade promotion and cooperation on illegal fishing. Consultations under the agreement have been held annually, where possible, and there is a Working Group on Marine Affairs and Fisheries.

Overall, the regulation of illegal fishing by Indonesian nationals or boats based in that country is a major problem for Australia but has been much reduced by having clear agreements with the Indonesian government. In recent years the officials of both governments have become more expert in administering the regulatory structure.

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- 18 All of the relevant agreements are to be found on the Department of Foreign Affairs and Trade website, with copies of the actual treaties in its Australian Treaty Series list: see <www.austlii.edu.au/au/other/dfat/>. Relevant ones are: Agreement between the Government of Australia and the Government of the Republic of Indonesia relating to Cooperation in Fisheries [1993] ATS 18; Treaty between Australia and the Government of Indonesia on the Zone of Cooperation an Area Between the Indonesian Province of East Timor and Northern Australia [1991] ATS 9 (the 'Timor Gap Treaty' has since been denounced); Agreement between the Government of Australia and the Government of the Republic of Indonesia Establishing an Exclusive Economic Zone Boundary and Certain Seabed Boundaries [1997] ATNIF 4; Agreement with the Government of the Republic of Indonesia Establishing Certain Seabed Boundaries [1973] ATS 31; Agreement with the Government of the Republic of Indonesia Establishing Certain Seabed Boundaries in the Area of the Timor and Arafura Seas Supplementary to the Agreement of 18 May 1971 [1973] ATS 32; Agreement with Indonesia concerning Certain Boundaries between Papua New Guinea and Indonesia [1974] ATS 26; Agreement between the Government of Australia (and on behalf of Papua New Guinea) and the Government of Indonesia concerning Administrative Border Arrangements at the Border between Papua New Guinea and Indonesia [1974] ATS 27.
- 19 The Agreement between the Government of Australia and the Government of the Republic of Indonesia Relating to Cooperation in Fisheries done at Jakarta on 22 April 1992; [1993] ATS 18 (entered into force 29 May 1993).

AUSTRALIAN OFFSHORE LAWS



Map 7.2. Australia and Indonesia Treaty boundary including the MOU on Traditional Indonesian Fisher's Rights

Source: Geoscience Australia (as amended)

- Notes: 1. For more detail on boundaries, see Map 7.2
 2. For Territory of Ashmore and Cartier Islands, see Chapter 10, Map 10.7.

Further Notes about Map 7.2:

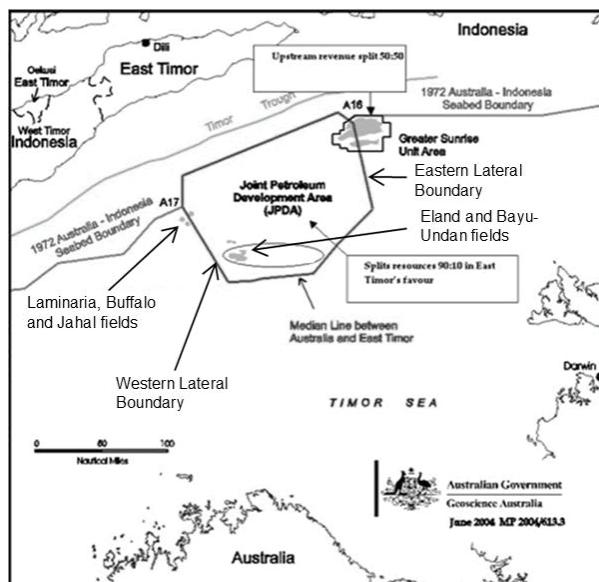
1. The gap in the boundary line south of Timor-Leste is the subject of the Australian-East Timor Agreements that are mentioned in the next section, below, and set out in Chapter 3.
2. The gap in the boundary line south of Java is because this area does not require any agreement between the two nations as the boundaries are sufficiently limited by the respective EEZs.
3. For the MOU see Chapter 10, Map 10.9.
4. The 1997 Sea Boundary Agreement, to the north of Christmas Island, is not in force.

7.2.3 East Timor Boundary, the Joint Petroleum Development Area and Other Agreements

Chapter 3 sets out in some detail the history and current status of the Joint Petroleum Development Area (JPDA) that was established by a series of agreements between Australia and East Timor in relation to sharing the petroleum resources. Fisheries was a minor part of the agreements but the *Treaty on Certain Maritime Arrangements in the Timor Sea 2006* of 12 January 2006 (CMATS) states that East Timor has jurisdiction in relation to the water column in the JPDA, which includes the rights to fisheries there,

but it is silent as to fisheries jurisdiction over sedentary organisms on the continental shelf. Australia and East Timor brought the *Treaty on Certain Maritime Arrangements in the Timor Sea 2006* and the 2003 International Unitisation Agreement for Greater Sunrise into force on 23 February 2007. The treaties establish a framework for the exploitation of the Greater Sunrise gas and oil resources and will see the sharing of upstream government revenues (ie taxes) flowing from the project.

The earlier 2002 *Timor Sea Treaty* gave East Timor 90 per cent of petroleum production government revenue from within the JPDA. In relation to the actual maritime boundary, both Australia and East Timor are bound by the treaty, as amended by *Treaty on Certain Maritime Arrangements in the Timor Sea 2006*, to refrain from asserting or pursuing their claims to rights, jurisdiction or maritime boundaries in relation to the other for 50 years. The two countries have also undertaken not to commence any dispute settlement proceedings against the other that would raise the delimitation of maritime boundaries in the Timor Sea. Consistent with the *Treaty on Certain Maritime Arrangements in the Timor Sea 2006* and associated agreements Australia will continue regulating and authorising petroleum activities outside the JPDA and south of the 1972 Australia-Indonesia seabed boundary. North of that line the East Timor laws apply to fisheries. Further detail on the JPDA is set out in Chapter 3 and Map 7.3, under, gives its geographical setting.



Map 7.3. The Australian and East Timor Agreement on Boundaries and Petroleum Development

Source: Department of Foreign Affairs and Trade Website, <www.dfat.gov.au/> (as amended)

7.2.4 Torres Strait

The Torres Strait is addressed more fully in Chapter 12, but for present purposes, relating to fisheries, mention should be made of the *Torres Strait Fisheries Act 1984* (Cth). The Torres Strait is located between the tip of Cape York and Papua New Guinea. It is a shallow tropical marine environment, with significant seagrass meadows in the central and western parts, and extensive coral reefs forming the northern limit of the Great Barrier Reef in the east. Scattered through the Strait are over a hundred islands, of which only 18 are currently inhabited. The *Torres Strait Treaty*²⁰ was signed by Australia and Papua New Guinea in December 1978 to address this special area between the two countries and it came into force on 15 February 1985. It is concerned with sovereignty,²¹ the maritime boundaries between the two countries,²² the protection of the marine environment, and the way of life and livelihood of traditional inhabitants.²³

The Torres Strait Protected Zone Joint Authority is responsible for the management of commercial and traditional fishing in the Australian area of the Torres Strait Protected Zone and designated adjacent Torres Strait waters. The *Torres Strait Fisheries Act 1984* came into force in February 1985 to give effect and force of law to the treaty. The Torres Strait Protected Zone Joint Authority manages the fisheries in accordance with Commonwealth law in the Australian component of the Torres Strait Protected Zone. These include traditional fishing, those fisheries that Australia and Papua New Guinea have agreed to manage jointly in the protected zone and all commercial fishing. Recreational fishing, including charter fishing, and marketing are managed by the Queensland government through its Department of Primary Industries and Fisheries.²⁴

7.2.5 Australian Antarctic Territory

The Australian Antarctic Territory is more fully addressed in Chapter 9 and it is sufficient for this chapter to mention that the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and the *Antarctic Marine Living Resources Conservation Act 1981* (Cth) are the two main Commonwealth Acts that regulate fisheries there. The maritime boundaries with the countries adjoining the Australian Antarctic Territory are also covered in Chapter 9.

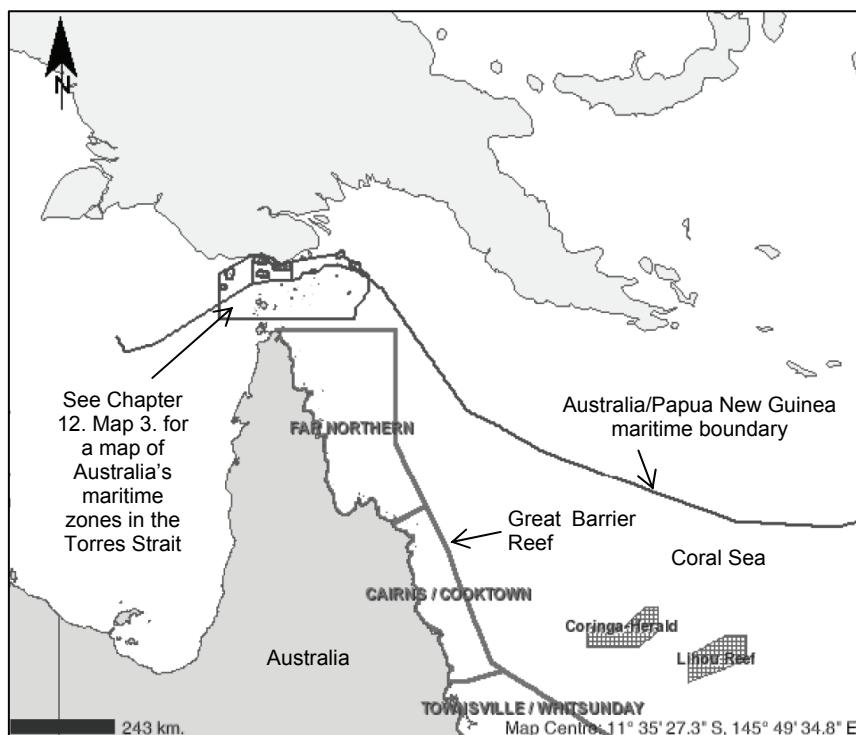
20 *Treaty between Australia and the Independent State of Papua New Guinea concerning Sovereignty and Maritime Boundaries in the Area between the two Countries, including the Area known as the Torres Strait, and Related Matters* signed at Sydney 18 December 1978, [1985] ATS 4. It is a Schedule to the *Torres Strait Fisheries Act 1984* (Cth).

21 Part 2, Art 2.

22 Part 2, Arts 3, 4.

23 Part 4.

24 See Queensland Government Department of Primary Industries and Fisheries, *Torres Strait Commercial Fisheries*, <www2.dpi.qld.gov.au/fishweb/15936.html>.



Map 7.4: The Torres Strait, Australian, West Irian (Indonesia) and Papua New Guinea Boundary and Fisheries Areas

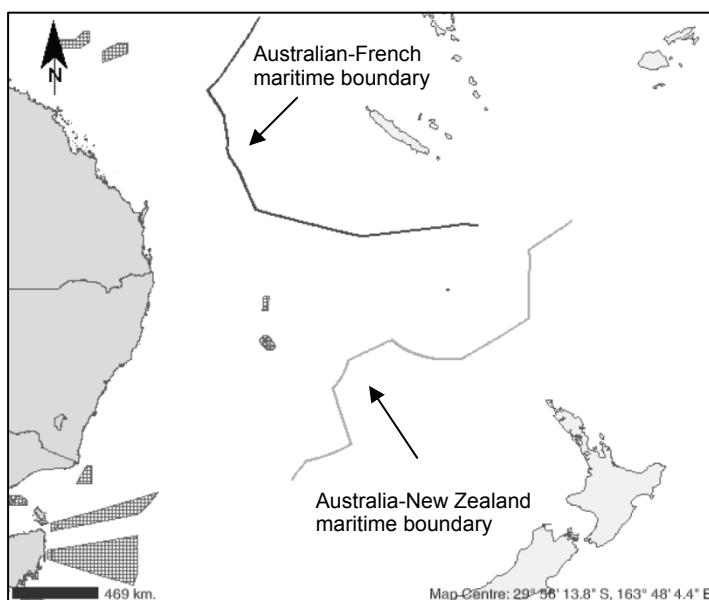
Source: Geoscience Australia (as amended)

7.2.6 Other Maritime Boundaries

Australia has a number of maritime boundaries with other countries and each of them has some fisheries issues but the outer limit of the Australian EEZ or an agreed maritime boundary marks the outer limit of the Australian AFZ even where it is short of the 200 nautical mile limit. There is not time nor space to deal with them here. It suffices to mention that, in relation to New Zealand, the boundaries are agreed and the agencies of the two countries work closely together, so this is a stable and fairly well-managed structure.²⁵ In relation to France, Australia has a

²⁵ *Treaty between the Government of Australia and the Government of New Zealand establishing Certain Exclusive Economic Zone Boundaries and Continental Shelf Boundaries* [2006] ATS 4, signed 25 July 2004.

maritime boundary in the Coral Sea relating to New Caledonia,²⁶ a maritime boundary in the Southern Ocean relating to the Kerguelen Islands and a third boundary abutting the French claim to part of the Antarctic continent.²⁷ Those boundaries are also mentioned in Chapter 9.



Map 7.5: Australian, French and New Zealand Maritime Boundaries

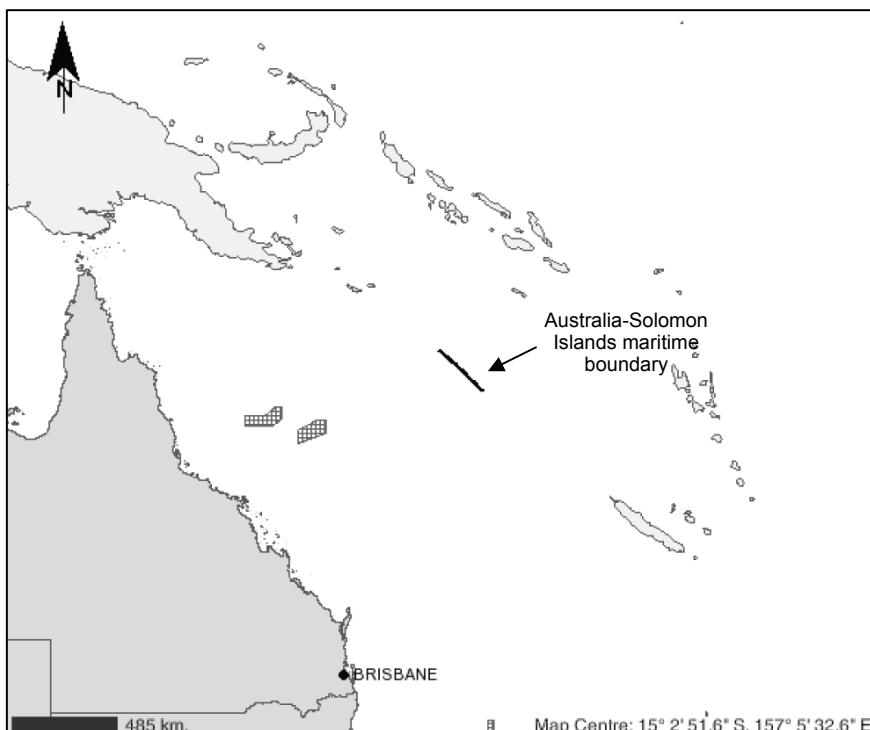
Source: Geoscience Australia (as amended)

The only other Australian maritime boundary is that with the Solomon Islands, which boundary is also in the Coral Sea and which country entered into an agreement with Australia in September 1988 over the joint sea and seabed boundaries.²⁸

²⁶ *Agreement on Maritime Delimitation between the Government of Australia and the Government of the French Republic* [1983] ATS 3, Art 1.

²⁷ Ibid Art 2.

²⁸ Agreement with the Government of the Solomon Islands Establishing Certain Sea and Seabed Boundaries [1989] ATS 12. The agreement entered into force on 14 April 1989.



Map 7.6: Solomon Islands Treaty Boundary

Source: Geoscience Australia (as amended)

7.3 Illegal, Unreported and Unregulated Fishing in Australia

The extent of illegal, unreported and unregulated fishing is difficult to determine but it is a significant problem both in Australian waters and internationally.²⁹ The Food and Agriculture Organization of the United

29 Illegal, unreported and unregulated fishing is a generic description of fishing activity which "undermines efforts to conserve and manage fish stocks in all capture fisheries": R Baird, *Aspects of Illegal, Unreported and Unregulated Fishing in the Southern Ocean* (Springer, 2006); W Gullett, *Fisheries Laws in Australia* (LexisNexis Butterworths, Sydney, 2008); see also Australian Fisheries Management Authority, *Annual Reports* and the Commonwealth Director of Public Prosecutions, *Annual Reports*. Dr Baird's articles on illegal, unreported and unregulated fishing most helpfully set out much of the law and facts; see "Antarctic and Southern Ocean Law and Policy Occasional Paper 11, 2007: Special Edition: Australia and Southern Ocean IUU Fishing" (ASOLP Occasional Paper 11); "Foreign Fisheries Enforcement; Do Not Pass Go, Proceed Slowly to Jail – Is Australia Playing by the Rules?" (2007) 20 *UNSWLJ* 1; "Australia's Response to Illegal Fishing: A Case of Winning the Battle but Losing the Law?" (2008) 23 *IJ MCL* 95.

Nations is one of the main international agencies dealing with the issue.³⁰

Organised illegal, unreported and unregulated fishing has impacted on the Patagonian toothfish stocks in the Southern Ocean adjacent to Heard Island and the McDonald Islands.³¹ Waters off northern Australia where Australia shares maritime boundaries with Indonesia, East Timor and Papua New Guinea are illegally fished by some Indonesian vessels targeting mainly shark fin or reef fish and also by Taiwanese and Chinese vessels. Illegal fishing in these waters has moved from domestic Indonesian fishers to well-organised raiding in the Australian northern waters, although the Australian government has now established firmer control over it and the number of illegal incursions has dropped in recent years.³²

Coastal states have developed a range of responses to combat illegal, unreported and unregulated fishing and Australia has played its part by devoting considerable resources to this end. Australia's response involves patrols by the Royal Australian Navy, customs and fisheries vessels, combined with an active surveillance structure. The Border Protection Command coordinates Australia's offshore maritime security. It is staffed by personnel from the Australian Customs Service, the Department of Defence, the Australian Fisheries Management Authority (AFMA) and the Australian Quarantine and Inspection Service.

This concludes the preliminary points concerning the Australian fisheries and it is now appropriate to turn to the Commonwealth legislation.

7.4 Fisheries Management Act 1991 (Cth)

7.4.1. General Outline

The *Fisheries Management Act 1991* (Cth) is the main Commonwealth legislation that regulates Australian fisheries. It is a large and detailed Act comprising some 400 pages including its Schedules. Schedule 1A relates to the detention of foreign suspected fishers, as to which see under. Schedule 1 is the treaty on fisheries between the government and certain Pacific Island States and the United States. Schedule 2 is the Fish Stocks Agreement and Schedule 3 is the Compliance Agreement. The *Fisheries Management Act 1991* is the main Act relating to regulation of fisheries in

30 The Food and Agriculture Organization of the United Nations website is at <www.fao.org/fishery>.

31 Fishing in the Southern Ocean, including the Australian EEZ adjacent to Heard Island and the McDonald Islands is regulated by the *Convention on the Conservation of Antarctic Marine Living Resources*. The Commission established under the convention is effective in fostering fishing regulation, amongst other things, in the Southern Ocean. For further detail on the laws in the Southern Ocean see Chapter 9.

32 See Australian Department of Agriculture, Forestry and Fisheries website at <www.daff.gov.au> and the AFMA website at <www.afma.gov.au>.

the AFZ and by Australian registered fishing boats or Australian citizens anywhere. It is not in the scope of this chapter to deal with all of its provisions. As the chapter is concerned mainly with those laws relating to jurisdiction it suffices to set out those activities, persons and geographical areas to which the provisions apply, and to mention those powers that Australian fisheries officers, and others, are expressed to have.

Part 1 of the *Fisheries Management Act 1991* sets out the preliminary aspects, including the definitions. The Act applies in the AFZ, and fishers for sedentary organisms on the seabed beyond the AFZ,³³ and to Australian-flagged boats and Australian citizens and companies anywhere.³⁴ The *Fisheries Management Act 1991* does not apply in the Torres Strait Protected Zone,³⁵ as the *Torres Strait Fisheries Act 1984* applies there. The *Fisheries Management Act 1991* also does not apply to recreational fishing by Australian boats, except where it offends a Commonwealth fisheries management plan, nor to those areas under a special management agreement between the Commonwealth and a State or the Northern Territory.³⁶

Part 2 of the *Fisheries Management Act 1991* deals with fishing and the marine environment and Part 3 deals with the overall regulation of fishing activities and sets out provisions about fisheries management, fishing rights, permits and licences. The statutory basis for cooperative management of fisheries between the Commonwealth and the States is set out in Part 5.

Part 6 is concerned with surveillance of fishers and their boats and the enforcement of the Australian laws relating to them. Division 1 provides for fisheries officers and sets out their powers and Divs 2 and 3 provide for fish receiver and port permits respectively. Divisions 4, 5 and 5A provide for the main offences relating to fisheries. Division 5B makes provision for the detention of suspected illegal fishers pending trial.³⁷ In Part 6 there are a considerable number of provisions which are controversial and it is to this enforcement part of the *Fisheries Management Act 1991* to which attention will now be directed.

³³ This is a reference to the Australian outer continental shelf in which Australia has sovereign rights to explore and exploit the natural resources of the seabed and subsoil: UNCLOS Art 77.

³⁴ Sections 8, 9, 12.

³⁵ Section 9.

³⁶ Sections 10, 11.

³⁷ Section 105Q merely states that Sch 1A has effect, which has 53 pages of provisions. It expresses its three main aims as being to provide for the detention in Australia of persons "reasonably suspected" by an officer of having committed an offence involving the use of a foreign boat for a limited period to determine if they are to be charged; to provide for such persons to be searched, screened, identified and given access to facilities to obtain legal advice; and to facilitate the transition of such persons to "immigration detention" under the *Migration Act 1958*. Persons authorised to exercise powers under Sch 1A are "detention officers" authorised by the AFMA and those persons who are officers for the purposes of the *Migration Act 1958* (see Sch 1A, ss 6 and 7).

These enforcement powers apply to a variety of subjects, including foreign boats, Australian boats, premises and vehicles on land, and to boats boarded pursuant to the United Nations Fish Stocks Agreement.³⁸

An officer under the *Fisheries Management Act 1991* has the power to board a vessel in the AFZ or in Australia³⁹ or an external territory.⁴⁰ Once onboard, an officer may search for fish, fishing equipment, documents or records relating to fishing operations.⁴¹ Where there are reasonable grounds to believe that an offence against the Act has been committed, an officer may seize, detain, remove or secure the vessel as well as any fish, fishing equipment or documents relating to the offence.⁴² The vessel may be brought in or directed to come into a place inside Australia, which will usually be the closest port where the vessel and persons on board can be handed over to the appropriate civil authorities for further investigation.⁴³ Additionally, the vessel, fishing equipment and/or fish that are forfeited to the Commonwealth under s 106A of the Act may be seized, as to which see under as they are controversial.

These powers will now be set out in more detail but, before doing so, some remarks about the proposed Maritime Powers Bill, mentioned in the front of this book, are appropriate. That there should be simplification and better coordination of these offshore regulatory and enforcement powers is well demonstrated. At the time of writing information available about this Bill shows that the Minister has in mind this object, which is commendable. It remains to be seen, however, whether any end result will contribute to this outcome or not.

7.4.2 Searches

There are extensive powers of search given to officers under the *Fisheries Management Act 1991* and included in these are that s 84(1)(a)(ii) authorises an officer, after boarding a vessel, to:

-
- 38 The Agreement for the Implementation of the United Nations Convention on the Law of the Sea Relating to the Conservation and Management of Straddling Stocks and Highly Migratory Fish Stocks (the United Nations Fish Stocks Agreement), opened for signature 4 December 1995 [2001] ATS 8 (entered into force generally and in Australia on 11 December 2001). The United Nations Fish Stocks Agreement addresses the long-term conservation and sustainable use of stocks of fish which either straddle the Australian Fishing Zone-high seas boundary or being highly migratory pass through the Australian Fishing Zone.
 - 39 *Acts Interpretation Act 1901* (Cth) s 15B(b) provides that any reference to Australia includes the “coastal sea”. The “coastal sea” includes the territorial sea and sea on the landward side of territorial sea baselines not within the limits of a State or internal Territory. Accordingly, a boarding may occur in internal waters or coastal waters, but it must relate to illegal fishing in the Australian Fishing Zone.
 - 40 Section 84(1)(a).
 - 41 Section 84(1)(a).
 - 42 Section 84(1)(g).
 - 43 Section 84(1)(k), (l), (m).

break open any hold, compartment, container or other receptacle on the boat that the officer has reasonable grounds to believe contains anything that may afford evidence as to the commission of an offence against this Act.

The master of a vessel should first be given the opportunity to open any compartment, container, etc, and this power enables officers to break them open where the master refuses to assist with the search.

In relation to searching people, s 84(1)(aaa) authorises an officer to search without warrant a person on a boat where the officer reasonably suspects it is a foreign boat that has been used in the commission of certain proscribed offences.⁴⁴ The purpose of the search is to find out whether the person has on them a weapon or other dangerous item or a thing that may afford evidence as to the commission of one of the prescribed offences. Further requirements on the conduct of the search are contained in s 84AA, including that the search must be conducted by a person of the same gender and that an officer must not use more force or subject a person to greater indignity than is reasonably necessary to conduct the search.

This express authorisation to search without warrant was inserted in 2005⁴⁵ and previously the *Fisheries Management Act 1991* only expressly authorised searches of persons once the person was detained. However, it was argued that the authority in s 87J, discussed under, to use force to ensure the safety of an officer justifies searches of persons for weapons and other dangerous items, such as fishing knives, subsequent to boarding but before detention. In light of increasing levels of violence by some illegal fishers this extra protection for the boarding personnel seemed quite reasonable.⁴⁶

7.4.3 Hot Pursuit

Section 84(1)(aa) authorises an officer to require a master to stop a vessel for boarding, but sometimes the requirement to stop is not obeyed and

⁴⁴ The proscribed offences are: s 95(2) "Using a foreign boat to fish without proper authorization or contrary to a foreign fishing licence"; s 99 "Using a foreign boat for recreational fishing – strict liability offence"; s 100 "Using a foreign boat for fishing in the AFZ – strict liability offence"; s 100A "Offence of using foreign boat for fishing in AFZ"; s 101 "Having foreign boat equipped with nets etc – strict liability offence"; s 101A "Offence of having foreign boat equipped for fishing", or s 101B "Using boat outside AFZ to support illegal foreign fishing in AFZ".

⁴⁵ By the *Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Act 2005* (Cth).

⁴⁶ The *Annual Reports* of the Commonwealth Director of Public Prosecutions and the Australian Fisheries Management Authority give some details on the more prominent prosecutions, by the Commonwealth Director of Public Prosecutions, and the total detentions and other statistics, by the Authority. Some members of boarding parties have met with life-threatening situations in which personal injuries have been inflicted on them.

the vessel defiantly keeps going. In this case the *Fisheries Management Act 1991* authorises the pursuit of a foreign fishing vessel where it fails to halt for boarding but instead flees out of the AFZ.⁴⁷ This provision is based on the right of hot pursuit in Art 111 of UNCLOS. The enforcement powers in s 84 may be exercised in relation to a foreign fishing vessel where it is pursued from the AFZ into the high seas, but not in the territorial sea of another country without its express permission.⁴⁸ For clarity it is mentioned that “hot pursuit” is a common and well-established rule of international maritime law. Its basic tenets are that the offence, or reasonable suspicion that one has occurred, must occur within the jurisdiction. If the vessel refuses to obey the order to stop whilst in that jurisdiction the enforcement vessel is entitled to pursue it outside it and continue the pursuit until it effects boarding and control over it or until it enters the territorial sea of another country. In this latter case it would be usual for assistance to be sought from the authorities in that country to enforce against it.

7.4.4 Use of Force

As mentioned, there is abundant power in the *Fisheries Management Act 1991* to require a vessel to stop for boarding and search. If the master does not stop the vessel, and it is not an Australian-flagged vessel, the officer is authorised to:

use any reasonable means consistent with international law to stop the boat (including firing at or into the boat after firing a warning shot, and using a device to prevent or impede use of the system for propelling the boat).⁴⁹

The authorisation to use force to stop a foreign vessel was inserted into the *Fisheries Management Act 1991* in 1999⁵⁰ as part of a range of provisions to enhance the enforcement powers available to fisheries officers.⁵¹ Section 84 gives extremely wide powers to the fisheries officers provided the officer has reasonable grounds, as to which see shortly.⁵²

A general authority to use force in the exercise of powers is found in ss 84 and following but an officer has restrictions on what force may be used and these include that it must be necessary to ensure the officer’s

47 Section 87.

48 There is an inconsistency between UNCLOS Art 11 and *Fisheries Management Act 1991* s 84 but there is not space to explore it here.

49 Section 84(1)(aa)(ii).

50 By the *Fisheries Legislation Amendment Act (No 1) 1999* (Cth) similar provisions were also inserted into the *Customs Act 1901* and the *Migration Act 1958*.

51 The Act also introduced provisions to implement the principles, rights and obligations associated with the United Nations Fish Stocks Agreement.

52 Similar powers are given to Defence Force officers and to customs officers, as to which see Chapter 5 and Chapter 8 respectively.

safety or to overcome obstruction in the exercise of powers and, in any case, it must not be more than is reasonably required for the relevant purpose.⁵³

Subject to those restrictions the force used may include using any reasonable means consistent with international law to stop a boat, including firing into it after a warning shot, or immobilising its propeller.⁵⁴ An officer may board, search the boat and people, detain the boat and people and require them to go to a port, seize a boat or equipment, including any that may be used in evidence. Provided there are the necessary "reasonable grounds", powers do not require any warrant and have no other prerequisite for their exercise. They do have to identify themselves as relevant officers, except for the Defence Force members who are in uniform. The powers are extended to certain other officers as well including "prescribed persons" who are defined as members of the Australian Federal Police or the police force of a State or Territory, or a customs officer.⁵⁵

In the use of force it may be relevant to mention that it is the customs officers, as well as the Defence Forces, who are authorised to use firearms, which amendment was implemented in the 1990s due to the growing level of violence being presented against them. The *Fisheries Management Act 1991* expressly authorises customs officers to carry firearms because they may be needed for their personal defence against the criminally minded unlawful fishers.⁵⁶ Some of the fisheries patrol vessels also carry medium calibre guns to enforce compliance from fleeing suspected unlawful fishing vessels.

7.4.5 Protection from Civil or Criminal Proceedings

As is common for public officers who exercise their powers in good faith, the *Fisheries Management Act 1991* contains legal protections for officers in the exercise of enforcement powers. Section 90 provides:

An officer or a person assisting an officer in the exercise of powers under this Act or the regulations, is not liable to an action, suit or proceeding for or in respect of anything done in good faith or omitted to be done in good faith in the exercise or purported exercise of any power conferred by this Act or the regulations.

This provision is fairly wide but, as the powers in relation to foreign fishers are very wide indeed, a specific protection in relation to the exer-

⁵³ Section 87J.

⁵⁴ Section 84(1).

⁵⁵ "Prescribed person" is defined in s 84(8). Section 84(4)(a) requires a prescribed person to produce written evidence of that person's identity when boarding a boat. A failure to do so means the officer is not authorised to remain on the boat.

⁵⁶ *Fisheries Management Act 1991* s 84C; see also *Customs Act 1901* s 189A.

cise of detention and control over foreign fishing vessels was inserted in the Act in 2005.⁵⁷ Section 84(1BA) provides that where an officer exercises certain powers over a vessel, such as seizing it, requiring the master to bring it into Australia or the officer brings it into Australia,⁵⁸ any consequent restraint on the liberty of a person on the boat is not unlawful and any civil or criminal proceedings in respect of the restraint may not be instituted in any court against the officer, a person assisting, the AFMA or the Commonwealth. The jurisdiction of the High Court under s 75 of the Constitution is stated not to be affected by the provision, which is a little curious as the legislature has no such power anyway as it is an express provision in the Constitution.⁵⁹

The insertion of s 84(1BA) brought the *Fisheries Management Act 1991* in line with protections provided in the *Customs Act 1901* and *Migration Act 1958* that were implemented in 2001 in the *Border Protection (Validation and Enforcement Powers) Act 2001* in reaction to the legal challenges to the *Tampa* incident.⁶⁰ The amendments, which were made retrospective, provided that all sorts of actions that were probably unlawful when done during the *Tampa* incident, were subsequently not so.

7.4.6 Offences

Having dealt with the wide powers provided by the *Fisheries Management Act 1991* to the various fisheries and other officers, it is now appropriate to mention some of the offences established by the Act. Part 6, Div 4 of the

⁵⁷ Inserted by the *Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Act 2005*.

⁵⁸ These are available powers pursuant to s 84(g), (k), (l) or (m).

⁵⁹ Section 75 of the Constitution provides, amongst other things, that the High Court has original jurisdiction in all matters: "(iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party ... (v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth". Accordingly, the High Court has original jurisdiction to hear challenges to actions by the Commonwealth and its officers.

⁶⁰ On 26 August 2001 the *Tampa*, a Norwegian freighter, rescued 433 asylum seekers from a sinking Indonesian vessel near Christmas Island, a small island territory of Australia in the Indian Ocean. The *Tampa* was refused entry into the Australian territorial sea by the Australian government and, upon disobeying that directive, was boarded by the Australian Defence Force. The rescued persons were later transferred off the Norwegian freighter and taken to Nauru. For further details on this matter, see Chapter 6. See also M White, "Tampa Incident: Shipping, International and Maritime Legal Issues" (2004) 78 *ALJ* 101; M White, "Tampa Incident: Some Subsequent Legal Issues" (2004) 78 *ALJ* 249; D Rothwell, "The Law of the Sea and the MV Tampa Incident: Reconciling Maritime Principles with Coastal State Sovereignty" (2002) 13 *PLR* 118. The resulting litigation may be found in *Ruddock v Vadalis* (2001) 110 FCR 491 on appeal to the Full Court of the Federal Court and at first instance see *Victorian Council for Civil Liberties Incorporated v Minister for Immigration and Multicultural Affairs* (2001) 110 FCR 452. For further discussion, see also M Head, "The High Court and the Tampa Refugees" (2002) 11 *GLR* 23 and F Field, "The Tampa Case: Seeking Refuge in Domestic Law" (2002) 8 *AJHR* 11.

Fisheries Management Act 1991 is concerned with enforcement generally and s 95 encompasses all persons engaged in commercial fishing in the AFZ. The general offences in relation to fisheries in the AFZ have been set out above and they include offences by Australian fisheries boats.

However in relation to “foreign” boats⁶¹ and their crews the provisions are more specific in that offences are created for all types of fishing ie both commercial and recreational. A person must not use a foreign boat for fishing unless it is licensed or it is a “Treaty boat”⁶² with a treaty licence. It is also an offence to “use” a foreign boat in the AFZ if the person is reckless of the fact that it is foreign, is being used for commercial fishing and is in the AFZ. A similar provision relates to the territorial sea, the difference between them being that in the territorial sea the penalty can include imprisonment. This is because under UNCLOS the penalty for fisheries offences is not to include imprisonment,⁶³ but this provision only applies to the EEZ and does not apply to the territorial sea. Whether providing for imprisonment as a penalty for an offence in the territorial sea is in the spirit of UNCLOS is conjectural but it appears to be lawful.

A considerable number of other offences are created under this part of the Act and only some of them will be mentioned. It is an offence to have in possession, or to be in charge of, a foreign boat equipped with fishing gear that it not stowed unless this is authorised or the vessel is just travelling through the AFZ.⁶⁴ There is a similar offence for the territorial sea but here the penalty can include imprisonment.⁶⁵ It is also illegal intentionally to use a boat that is outside the AFZ to “support” a boat that is illegally fishing inside the AFZ. The Act empowers an officer to deal with the support boat as well as the boat it is supporting.

One of the world-wide mechanisms to control unlawful fisheries is to make it difficult for illegal, unreported and unregulated catch to be landed and sold, so other provisions in Div 5 of the *Fisheries Management Act 1991* relate to foreign boats entering or landing fish in an Australian port without authorisation.⁶⁶ In relation to a treaty boat, it is an offence to

61 A “foreign” boat is one other than an “Australian” boat and the latter is a boat based, owned and built in Australia or registered under the *Shipping Registration Act 1981* (Cth): see s 4 definitions.

62 A “Treaty” boat is a United States registered fishing boat under the *Treaty on Fisheries between the Governments of Certain Pacific Island States and the Governments of the United States of America* signed at Port Moresby on 2 April 197 (Fisheries Management Act 1991 Sch 2): see s 4 definitions.

63 UNCLOS Art 73(3) provides that coastal state penalties for violations of fisheries laws and regulations in the EEZ may not include imprisonment in the absence of agreement to the contrary. The EEZ is defined as an area “beyond and adjacent to the territorial sea”: Art 55.

64 Sections 100A, 101, 101A.

65 Sections 100B, 101AA.

66 Sections 102, 103.

contravene any of the conditions imposed on its operations and the Act provides that a prosecution of one must be authorised by the minister.⁶⁷

Consistent with international law a state is entitled to regulate its own flagged vessels and its citizens or residents wherever they may be in the world. In the case of the *Fisheries Management Act 1991*, offences are created for Australian registered boats and Australian residents who fish or have fish in their possession without authorisation on the high seas, ie beyond the AFZ. In such cases AFMA is authorised to enter into agreements for officials from foreign countries to inspect Australian boats. This especially applies in relation to the United Nations Fish Stocks Agreement and the WCPF Agreement.⁶⁸ Under the *Fisheries Management Act 1991* it is the Australian Attorney-General, not the Fisheries Minister, who is the minister required to authorise such prosecution action, presumably because foreign governments may be involved.⁶⁹

In summary, the *Fisheries Management Act 1991* has extensive provisions relating to the regulation of Australian fisheries in the AFZ. They are sensible ones and have, for the most part, been sensibly applied. The officers who enforce them, from fisheries, customs, police and defence forces, have conducted themselves commendably in the face of difficult conditions and increasing violence from the offenders. In one or two cases they seem to have been overzealous and have gone too far and mention of this will be made shortly in the discussion on some leading cases.

7.4.7 Powers of Defence and Police Personnel

The wide powers that are available for use must, of course, be restricted to personnel who are likely to use them competently, correctly and with restraint. In many parts of the *Fisheries Management Act 1991* "officers" are given these powers. A good illustration of this is s 84, which gives extremely wide powers under the heading "Powers of Officers". These powers are given not only to fisheries officers, but also to customs officers, members of the Australian Defence Force and to members or special members of the Australian Federal Police and the State and Territory police.⁷⁰

Many situations may be envisaged where any or all of these various categories of officers could be needed, depending on the situation. The

67 Sections 104, 105. The minister in practice often personally authorises detentions in high profile cases, as would be expected, even though the Act does not expressly require it.

68 Sections 105A to 105J. The initials stand for the *Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean*, done at Honolulu on 5 September 2002; [2004] ATS 15.

69 Sections 105G, 105J.

70 Section 4 definition of "officer".

naval personnel frequently carry out fisheries enforcement duties where violence against them is a real risk and some of the Special Air Services (SAS) forces of the army have been called in aid for boarding fishing vessels. Customs officers, who have their own fleet of patrol vessels, frequently are called on to act in a mixed situation where customs and fisheries matters arise. Police are needed for control of personnel taken into detention. The fact that any particular situation may call on the skills of four quite different government forces does indicate the desirability of a coast guard, where the one force would carry out these duties, as to which see the discussion in the final chapter of this book.

7.5 Forfeiture

7.5.1 Introduction

It is common for goods and chattels under Australian law that were used in the commission of an offence to be forfeited as part of the penalty imposed by the courts. This happens regularly in such matters as customs offences, when the goods and the vessel used for smuggling the goods are forfeited to the Commonwealth, usually done as part of the penalty by order of the court. These procedures are well accepted but they always depend on the offender having first been convicted, or having pleaded guilty, in a recognised court and it is all done according to proper principles of the administration of criminal law.

Under the Australian fisheries law this used to be the case but the Commonwealth government changed the law in 1999. By amendment, the *Fisheries Management Act 1991* now provides in effect that the vessel and catch are forfeited to the Commonwealth without any conviction at all and not on the order of a judge. Even though some limitations are built in, this provision is quite wrong and a misuse of government powers brought about during the Howard government.⁷¹ The changes came in two categories, one of which was that forfeiture should occur even though the normal Admiralty Court arrest and sale of the vessel had been ordered by the judge to meet the debts of its owners. The second category was that forfeiture should occur on the mere allegation of an offence by a public official that he or she has a reasonable suspicion. The next section of this chapter will discuss the first part of these laws, how they came about and how they are applied and the following section deals with the laws about forfeiture on a mere allegation.

There is no doubt that unlawful fishers should be prosecuted and the Australian government officials do this according to law and with commendable professionalism some hundreds of times a year. The discussion

⁷¹ Australian government under Prime Minister the Hon John Howard was from 11 March 1996 to 3 December 2007.

that follows, however, deals with some concerning aspects of so doing after these 1999 amendments were inserted into the *Fisheries Management Act 1991*.

7.5.2 Forfeiture in the Face of Sale by the Admiralty Court

The forfeiture provisions are contained in Pt 6, Div 6 of the *Fisheries Management Act 1991* and they begin with the normal and usual provisions that if a court convicts a person of certain stated fisheries offences then, provided it was used in the commission of the offence, the court may order the forfeiture of any or all of the boat, the catch or certain other items onboard the boat.⁷² Items so forfeited become Commonwealth property with it having an unfettered title and unlimited interest in them.⁷³

On the other hand there are the time-honoured ordinary Admiralty provisions in maritime law that a party that claims the owner of a vessel owes it money or has breached some legal obligation may cause the vessel to be arrested by the Court as a bond for security against which to enforce any judgment if the outcome of the litigation goes in its favour. If the vessel owner puts up a bond for the estimated amount of the claim, interest and costs, which is very usual, then that bond becomes the security and the vessel is released to go about its business. Both of these systems are of proven utility in maritime commerce, including fisheries.⁷⁴

Some of the amendments to the *Fisheries Management Act 1991* were inserted because the government was not enamoured with the outcome in the case of the *Aliza Glacial*.⁷⁵ The vessel was boarded by Australian fisheries officers and Defence Force personnel on 17 October 1997 near Heard Island, in the Southern Ocean, for unlawfully fishing in the Australian AFZ. The vessel was then escorted to Fremantle, Western Australia and complaints were filed and served against the owner and master under ss 100 and 101 of the *Fisheries Management Act 1991* and on 24 November the ship, its fishing equipment, bait and catch were seized.⁷⁶ Most fisheries vessels have a mortgage or other form of debt and this vessel was no exception. After its detention, not surprisingly, the owner of the *Aliza Glacial* defaulted on loan repayments to its bank mortgagee, Bergensbanken, which then instituted proceedings under the *Admiralty*

72 Section 106.

73 Sections 106AAB, 106AAC.

74 For Australian texts on the subject see D Cremeen, *Admiralty Jurisdiction: Law and Practice in Australia and New Zealand* (Federation Press, Sydney, 2nd edn, 2003); D Cremeen, "Actions in Rem: Arrest of Ships; Maritime Liens" in M White (ed), *Australian Maritime Law* (Federation Press, Sydney, 2nd edn, 2000), Ch 2; M Davies and A Dickey, *Shipping Law* (Law Book Co, Sydney, 3rd edn, 2004).

75 *Bergensbanken ASA v The Ship Aliza Glacial* [1998] FCA 1642 per Ryan J.

76 The seizure was pursuant to *Fisheries Management Act 1991* s 84(1)(g)(i) and (ii).

Act 1988 (Cth) for arrest and sale of the vessel in the usual way, in order to recover the value of its mortgage.

The Commonwealth officers considered that the likely forfeiture of the boat, equipment and catch after any conviction should take priority over the Admiralty Court arrest. On 20 March 1998, five months after detention, Ryan J of the Federal Court made orders, on application by the bank, for the sale of the ship in accordance with the *Admiralty Rules*. As has been mentioned, prior to the 1999 amendments until a conviction was recorded the Commonwealth only had a potential interest in the items but did not have a present right to forfeiture and the Act merely gave the court a discretion to order forfeiture after a conviction.⁷⁷ Despite this court order, AFMA would not release the vessel.

So in *Readhead v Admiralty Marshall, Western Australia District Registry*,⁷⁸ further proceedings were necessary. The issue was whether a purchaser of the ship pursuant to the sale ordered by the court in an action in rem would obtain an unencumbered title to the ship, as had been the law for many years. The AFMA contended that any title after such sale would still be subject to the power of control and detention asserted by the AFMA. Of course, there was no way market price could be obtained, or any price at all probably, if the purchaser could not have clear title to the vessel in the usual way after an Admiralty Court sale.

Ryan J upheld the traditional Admiralty law and held that "a sale by the Marshal pursuant to an order of a Court of Admiralty made within jurisdiction confers on the purchaser an unencumbered title which is good against the whole world".⁷⁹ He noted that the legislature may be taken to have been aware in 1991 (when the *Fisheries Management Act* was enacted) of the wide-ranging powers, including a power of sale, possessed by Courts of Admiralty under the *Admiralty Act 1988*.

One would have thought that this would be the end of the matter, but the AFMA officers still did not comply. On 19 October, a year after the original detention, another application was brought by the Commonwealth, in this case to defer the sale. So the next case was *Bergensbanken ASA v The Ship Aliza Glacial*⁸⁰ in which Ryan J declined to stay the sale for the reasons that the master and the other defendants were still not within the jurisdiction and there was a real likelihood that the prosecutions would never proceed (as the Australian law provides that the accused should be present at a criminal trial). Even if they did return and the trial proceeded, it would not be until January 1999 at the earliest. Further, an

⁷⁷ Section 106 provided: "Upon a conviction of a person under ss 95, 99 or 100 the court may order the forfeiture of all or any of the following: (a) the vessel, net, trap or equipment used in the commission of the offence; (b) fish on board such vessel at the time of the offence; (c) the proceeds of sale of any such fish".

⁷⁸ (1998) 87 FCR 229; [1998] FCA 1173 per Ryan J.

⁷⁹ Ibid at [242]-[247].

⁸⁰ [1998] FCA 1642 per Ryan J.

injunctive order normally requires an undertaking by the applicant to give an undertaking as to damages, which meant in this case to meet all the costs necessarily incurred by the injunction if the court should later so order. The judge noted that the Commonwealth and the AFMA refused to give it and only gave the limited undertaking to pay the costs of maintaining the vessel in detention and they offered no undertaking for the other losses for delaying the sale, such as interest on the mortgage. He also took into account that the deterioration of the physical condition and operating capacity of the vessel was continuing. For these reasons Ryan J ordered that the Admiralty Marshal go ahead and conclude the sale.

As a result of this case the Commonwealth amended the *Fisheries Management Act 1991* to include s 108A which provided that the automatic forfeiture provisions in the Act prevail over the *Admiralty Act 1988*.⁸¹ The given reason for the amendment was to "ensure that Australian enforcement actions are not frustrated by third parties such as foreign mortgagees".⁸²

It is suggested that these amendments arise from an overly zealous minister and Commonwealth officers wishing to attack the criminal fisheries financial sector.⁸³ The object is sound but the means of achieving it quite fail to give sufficient weight to the ordinary rule of law, and in this case to rights of others in the fisheries and the financial sector generally. There is no reason why the civil interest of the bank should be subordinate to those of the Commonwealth which is, after all, charged with upholding all aspects of the law. If the offence will not recur, due to the sale of the vessel, there is no need for interference with ordinary commerce. No doubt the Commonwealth had in mind that if banks were to loan to doubtful fishery companies they deserved to lose their money, but this defies normal commerce. It is not for banks to exercise due diligence in this regard. There are many other lawful and normal powers for use against unlawful fishers that are available to the Commonwealth. Section 108A of the *Fisheries Management Act 1991* should be repealed and the normal law of the Admiralty Court sale of vessels be restored.

81 Section 108A provides: "(1) The seizure, detention or forfeiture has effect despite any or all of the following events: (a) the arrest of the vessel under the Admiralty Act 1998; (b) the making of an order for the sale of the vessel by a court in proceedings brought under the Admiralty Act 1998; (c) the sale of the boat under an order made by a court in proceedings brought under the Admiralty Act 1988.

(2) Subsection (1) has effect regardless of whether the seizure, detention or forfeiture, or the event that was the basis for the seizure, detention or forfeiture, occurred before or after the arrest, making of the order or sale (as appropriate)".

82 Explanatory Memorandum, Fisheries Legislation Amendment Bill (No 1) 1999 (Cth). See also Commonwealth, House of Representatives, *Parliamentary Debates*, 1 September 1999, 9566 (Warren Truss, Minister for Agriculture, Fisheries and Forestry).

83 Ibid; Explanatory Memorandum, Fisheries Legislation Amendment Bill (No 1) 1999 (Cth). For a case note on this see R Gibson, *Maritime Law's Top Australian Hits* (unpublished case note, TC Beirne School of Law, 5 August 2008).

7.5.3 Forfeiture on Allegation of an Offence

The *Fisheries Management Act 1991* has numerous provisions concerning the regulation and enforcement of fisheries laws. It is not possible to mention them all here, but suffice to say that some of them are indeed a little curious. The “automatic forfeiture” provisions under the amended Act are amongst the most curious.⁸⁴

The offences themselves set out in the original parts of the *Fisheries Management Act 1991* are reasonable, in that Australian fishers and their boats have the ordinary rules that they must be licensed or otherwise authorised to fish, use their vessels, or use other equipment, etc.⁸⁵ Many of the provisions are the original sections of the Act which give wide powers of forfeiture only after a conviction.⁸⁶ It is in relation to the amendments and in particular those relating to foreign boats, however, that the laws are quite unreasonable and breach the general rules of the fair operation of the law.⁸⁷ Some of these provisions include the unusual elements that the offender is merely “reckless of a fact” an example of which is that if a person intentionally uses a foreign fishing boat in the Australian AFZ without a licence and the person is “reckless” of it being a foreign boat or “reckless” of the fact that it is used for commercial fishing or is in the AFZ, then the offence is punishable on conviction.⁸⁸

As has been mentioned, an officer has very wide powers and included amongst there are that an officer may seize, detain, remove or secure any fish, boat, net, trap or other equipment if the officer has “reasonable grounds to believe” that they have been involved in contravention of the *Fisheries Management Act 1991*.⁸⁹ An officer may also seize all or any of those objects if they have been forfeited or even if the officer has “reasonable grounds to believe [they] are forfeited”.⁹⁰ The effect of these provisions about having reasonable grounds completely leaves out if the officer believes the grounds alleged are truthful as they must only be “reasonable”. For instance, a person swearing an affidavit must swear that the person “has been told [something] and verily believes”, with the “believes” requirement avoiding lies merely being told by one party to another. This safeguard is not in the *Fisheries Management Act 1991*, which

⁸⁴ They would almost qualify to be included by Alice in her Wonderland. “‘Curiouser and curiouser’ cried Alice (she was so surprised that, for the moment, she quite forgot how to speak good English)”, Lewis Carroll, *Alice’s Adventures in Wonderland* (1865).

⁸⁵ Pt 6, Div 4, s 95 and following.

⁸⁶ Examples are that the court can order a person not to go on a fishing boat for a period (s 98).

⁸⁷ Pt 6, Div 5 relates to enforcement against foreign boats.

⁸⁸ Section 100A.

⁸⁹ Sections 84, 106A and related sections are the key parts of the Act that set out these powers.

⁹⁰ Section 84(1)(ga).

merely has the provision that there must be “reasonable grounds”. This defies the rule of law because if one officer fraudulently or mistakenly states to another officer that a fisheries boat is involved in a contravention, or has been forfeited, then the second officer can take this draconian action of seizing it even though the allegation may be quite false.

The core of the automatic forfeiture provisions are in s 106A. Leaving out inessential aspects of the section, its provisions include that things are “forfeited” to the Commonwealth if a foreign boat is “used in an offence” against many provisions of the Act, or a support boat is “used in an offence”, or a net, trap or equipment that was on a relevant boat was “used in the commission of an offence”.⁹¹ The section goes on to make other provisions but these sections all, most importantly, use the phrase that the thing is forfeited “because it was used in an offence”.⁹² The provisions of the Act go on about other aspects of “automatic forfeiture”⁹³ but sufficient has been set out for present purposes.

On forfeiture and seizure the authorities are obliged to give notice of it to the owner, master or other relevant person relating to the boat and, but within strict time limits, they may challenge the matter in court.⁹⁴ The court may uphold the challenge or if the challenge fails then the vessel, catch and equipment are “condemned as forfeited to the Commonwealth”⁹⁵ unless, at the end of the court proceedings, there is an order:

- (a) for the claimant to recover the property; or
- (b) for the Commonwealth to pay the claimant the proceeds of sale if it has been sold;⁹⁶ or
- (c) for the Commonwealth to pay the market value, if it has been destroyed; or
- (d) a declaration that the thing is not forfeited.⁹⁷

These sections were tested in the Federal Court in *Olbers Co Ltd v Commonwealth* in 2004 when French J⁹⁸ and then the Full Court of the Federal

⁹¹ Section 106A(1)(a),(b),(c).

⁹² Section 106A(2),(3).

⁹³ Sections 106AA-106AE.

⁹⁴ Section 106C.

⁹⁵ Section 106G.

⁹⁶ Sale of the catch is very common, so that it does not spoil or otherwise deteriorate. It can also occur with other property, depending on the circumstances. In Admiralty matters, if the sale is contested, it certainly requires an order of the court. This has the added advantage that the purchaser then obtains good title because the court ordered the sale. The money from the sale is then held pending the outcome of the court proceedings to be paid out as the court orders after conclusion of the litigation.

⁹⁷ Section 106G(3).

⁹⁸ *Olbers Co Ltd v Commonwealth* (No 4) [2004] FCA 229 at first instance. French J was then a Federal Court judge based in Perth. He became Chief Justice of the High Court on 1 September 2008.

Court⁹⁹ were called on to decide on the meaning and effect of these forfeiture provisions, and on other arguments advanced on behalf of the owner and master. Litigation also arose from the *Volga* seizure, but this time at international level before the International Tribunal for the Law of the Sea. Both of these will be commented on under, in Section 7.7 "Some Leading Cases in Enforcement".

Serious consequences can follow "forfeiture", as the Act empowers the Commonwealth officers to dispose of the property or to destroy it. This is the case if the boat is unseaworthy, poses a serious risk to safety, public health or quarantine, poses a serious risk of damage to other property or the environment or the expenses of custody and maintenance between seizure and condemnation are likely to be greater than its value.¹⁰⁰ All or any of these conditions are frequently met when the Commonwealth officers detain a fishing boat and the people and other things within it. Some of the smaller foreign boats that the owners consider seaworthy do not necessarily meet Australian standards because different standards apply. Boats that are not public health risks in many other countries are in that category in Australian hands. Similarly for quarantine requirements, as the mere detention in Australian waters or entry into Australian ports creates the risk and often Commonwealth officers destroy the boats that would not have been destroyed had they not been detained. As to the costs of custody and maintenance, these costs are only incurred because of the detention of the boat because while matters are being investigated the crew are usually detained in detention camps.

The powers under the *Fisheries Management Act 1991* are particularly extensive when used cumulatively. A Commonwealth officer has power to seize the boat, net, trap, fish or any relevant equipment on the grounds of a reasonable belief that an offence has occurred and then, because the Australian standards are applied to boats, equipment etc the Commonwealth officers destroy them and incarcerate the crew.¹⁰¹ In this situation there is concern by fair-minded people that a miscarriage of justice may occur and dire consequences may be imposed upon innocent people. If the owner or crew contest the actions and they subsequently prove that were quite innocent many of these dire consequences cannot be reversed.

Before turning to some of the leading cases under the *Fisheries Management Act 1991*, and especially the *Olbers'* cases, it is convenient to mention the other relevant Commonwealth fisheries legislation.

99 *Olbers Co Ltd v Commonwealth* [2004] FCAFC 262 on appeal.

100 Section 106D.

101 Section 84(1)(ga), (gb), (gc).

7.6 Other Fisheries Acts

The *Fisheries Management Act 1991* has been addressed in detail but it is not, of course, the only Commonwealth legislation concerned with fisheries. There is a great deal of other legislation relating to the structure, regulation and management of the Australian fisheries. The *Fisheries Administration Act 1991* is one of these and it has two main objects. They are to establish an Australian Fisheries Management Authority (AFMA), with functions and responsibilities relating to the management of fisheries on behalf of the Commonwealth, and to establish a Fishing Industry Policy Council with a view to it advising on government policy in relation to the management of fisheries.¹⁰² Naturally there has to be a legislative basis for fisheries quotas and general planning and this is established by the *Fisheries (Validation of Plans of Management) Act 2004*. The purpose of this Act was to provide certainty about the validity of the AFMA fisheries plans of management, both past and future.

The *Fisheries Agreements (Payments) Act 1991* is another relevant Act the purpose of which is to require that the AFMA personnel, in granting licences to foreign or Australian entities, have regard to any agreement as to payment in determining the amount payable for the licences. It also requires the AFMA to refuse to grant a licence where the amount payable has not been paid to the Commonwealth.¹⁰³

The levy on fisheries is established under the two *Fisheries Levy Acts* of 1984 and 1991 respectively which, as might be expected, merely establish the legislative basis for the AFMA to levy charges for fishing concessions, licences, units etc that are made to various entities.

7.7 Some Leading Cases in Enforcement

7.7.1 The Volga Litigation

In January 2002 the *Volga* was a foreign registered vessel that was targeting Patagonian toothfish in or near the Australian AFZ off Heard Island and the McDonald Islands in the Southern Ocean.¹⁰⁴ The *Volga* was apprehended by HMAS *Canberra* and brought into Perth, after which litigation ensued. As required by the *Fisheries Management Act 1991*, notice of seizure and forfeiture was given to the master that the vessel, its nets, traps, equipment and catch were forfeited and proceedings were subsequently instituted by the owner, Olbers Co Ltd, seeking their release and other court orders available under the Act. To avoid the catch deteriorating, the Commonwealth sold the fish and the proceeds of

¹⁰² *Fisheries Administration Act 1991* s 3.

¹⁰³ *Fisheries Agreements (Payments) Act 1991* ss 4-6.

¹⁰⁴ The Territory of Heard Island and the McDonald Islands is dealt with in Chapter 9, where a map of the region will also be found.

sale awaited the outcome of the litigation. Some of the crew were also charged with fisheries offences.

7.7.1.1 *Forfeiture of the Vessel: Olbers v Commonwealth*

In *Olbers v Commonwealth (No 4)*,¹⁰⁵ heard in the Federal Court in Perth before French J,¹⁰⁶ Olbers sought orders that the vessel, equipment and catch were not forfeited, that the boarding and seizure were unlawful and for their return and damages, which relief was opposed by the Commonwealth. In his judgment delivered on 12 March 2004 his Honour held that offences were committed against the *Fisheries Management Act 1991* involving the *Volga* in the AFZ and by reason of the offences the boat, equipment and catch were automatically and validly forfeited. As the vessel had thereby become the property of the Commonwealth there was no basis for any relief and the application was dismissed with costs.¹⁰⁷

In giving his judgment his Honour carefully set out the many relevant provisions of the *Fisheries Management Act 1991*, the evidence in great detail about the boarding and detention of the *Volga* and the arguments advanced on behalf of Olbers. This analysis here of the judgment only relates to its automatic forfeiture provisions which were, however, crucial to the outcome as his Honour held that no complaint could subsequently be made about the matters arising after the forfeiture as the "Commonwealth was merely seizing its own property".¹⁰⁸

Relevant parts of the judgment included:

- (a) a finding, on the balance of probabilities (not the criminal standard of beyond reasonable doubt), that the *Volga* had been fishing illegally in the AFZ and therefore an offence had been committed under s 100 of the *Fisheries Management Act 1991*;¹⁰⁹
- (b) as to the submission that the power of seizure is conditional on a relevant officer having a "reasonable belief" that the boat and equipment are forfeit and that this belief must be held on reasonable grounds and it should identify the offence and the offender, his Honour only held that it was not necessary to make a finding about a named person or persons who committed the offence and it was sufficient that the *Volga* was used.¹¹⁰ The

¹⁰⁵ There were 10 court judgments delivered in the matter, of which the two most prominent were the trial judge, *Olbers Co Ltd v Commonwealth (No 4)* [2004] FCA 229, and the judgment on appeal to the Full Court of the Federal Court, *Olbers Co Ltd v Commonwealth* [2004] FCAFC 262.

¹⁰⁶ Subsequently, on 1 September 2008, French J became Chief Justice of the High Court of Australia.

¹⁰⁷ [2004] FCA 229 at [3], [80].

¹⁰⁸ Ibid at [66].

¹⁰⁹ Ibid at [62], [65].

¹¹⁰ Ibid at [65].

judgment did not address the main point of the submission that it was the officer who held that reasonable belief who had to be identified and the grounds on which that belief was held had to be reasonable in order that the issue may be challenged and tested in the court;

- (c) as to the provision in the *Fisheries Management Act 1991* that the forfeited property is “condemned” in the subsequent litigation by the owner seeking to recover it unless the court makes an order for the claimant to recover it or a declaration that the thing is not forfeited (s 106G), his Honour addressed the cases on forfeiture and condemnation. He appeared to approve of Kitto J’s statement in *Powers v Maher*¹¹¹ that “forfeiture” is an ambiguous word which can mean “taken … or liable to be taken”. However, French J held: “section 106A does not require any judicial determination to give effect to the forfeiture for which it provides albeit a judicial determination may be made if the occurrence is tested in later proceedings. In such proceedings a civil court may make a finding whether the boat has been used in one of the specified offences”.¹¹²

The judgment is controversial for a number of reasons. One is because French J failed to decide adequately the key points that were put to him in the submissions including the point that the reasonable grounds should be identified as being held by an officer on which the whole machinery of forfeiture depends. On the question of the automatic forfeiture, French J set out that the threshold question was, before the vessel was boarded, whether Olbers had ceased to be the owner of the vessel by operation of s 106A, and if that was the case, as has been mentioned, there could be no complaint as the Commonwealth was “merely seizing its own property”.¹¹³ This was important in the light of the submission that the hot pursuit was not conducted lawfully and so the subsequent seizure was unlawful.

His Honour further held:

[T]here is no reason to suppose that forfeiture under s 106A is used in any lesser sense than “forfeiture” under s 106. The question whether property has been forfeited pursuant to s 106A remains contestable after seizure until the exhaustion or non-invocation of the mechanisms for contesting it under subdiv C. That it remains for a time contestable question does not mean that its resolution is in any sense discretionary. The characterisation of a thing as “condemned” as forfeited to

¹¹¹ (1959) 103 CLR 478 at 483; [1959] HCA 52. The case is concerned with customs goods that may be forfeited but the judgment does not contain much juridical analysis.

¹¹² [2004] FCA 229 at [79].

¹¹³ Ibid at [66].

the Commonwealth under s 106E¹¹⁴ does not involve the final transfer of title in something which was forfeited by operation of s 106A.¹¹⁵

It may be seen from this finding that it infers that the subsequent court proceedings have no role to play in the transfer of property and it quite misses the point that the subsequent proceedings may show that there was never any grounds upon which the Act could operate even to attempt forfeiture of the vessel. On the true construction of the Act it is quite open, on the evidence presented to it, for the court to have held that no forfeiture ever did occur in fact and to order suitable relief or, in the alternative, to condemn the vessel which then finalises the passing of property.

The applicant also made numerous other submissions but there is not space here to deal with them and it suffices to mention that they, too, were rejected. *Olbers'* case went on appeal to the Full Federal Court, where the appeal was dismissed in a joint judgment by the three members of the court.¹¹⁶ The judgment upheld the trial judge on all points and was quite clear in its major finding on this forfeiture point. It held:

In relation to the interpretation of s 106A of the Act, it seems to us to be clear, for the reasons given by the primary judge, that the plain and ordinary meaning of s 106A is that the boat, equipment and fish were forfeited to the Commonwealth upon the occurrence of the circumstances comprising the relevant offence.¹¹⁷

The judgment then goes on to consider the meaning of the vessel subsequently being "condemned", under s 106E, and holds that it "does not affect the forfeiture – it adjudicates and records that a forfeiture has already occurred".¹¹⁸ Importantly on this point, however, the Full Court also held that the court proceedings provided "a procedure by which orders can be made providing for the return of the property (or its value) in circumstances where it had not been forfeited eg because the Commonwealth was unable to satisfy the Court that the vessel had been involved in a relevant offence".¹¹⁹ The judgment failed to develop the jurisprudence in that regard, which is a key element of these difficult issues. After the Full Court's judgment the matter rested as special leave

¹¹⁴ Section 106E provides, in effect, that the property is condemned as forfeited to the Commonwealth unless the time limits and other requirements to challenge the detention are met by the owner.

¹¹⁵ [2009] FCA 229 at [74].

¹¹⁶ [2004] FCAFC 262 per Black CJ, Emmett J and the late Justice Selway.

¹¹⁷ Ibid at [13].

¹¹⁸ Ibid at [16].

¹¹⁹ Ibid at [17]. In coming to this meaning of "condemnation" the court relied on the Full Court decision in *Whim Creek Consolidated NL v Colgan* (1991) 31 FCR 469 at 477-478; [1991] FCA 31 per O'Loughlin J, with whom Spender and French JJ agreed.

to appeal to the High Court was subsequently refused on the basis that there was no reason to doubt the correctness of the decision below.¹²⁰

It is suggested that the court was wrong at first instance, and on appeal, and that special leave to appeal ought not to have been refused but should have been granted for more complete argument and thought to be given to the contentious automatic forfeiture provisions in the *Fisheries Management Act 1991*.¹²¹ The judgments suggest that the vessel is forfeited if there are reasonable grounds for believing an offence has occurred. This contains circularity as when it is contested, as was the situation in the *Volga* matter, whether an “offence” has occurred must await the adjudication of the court to decide it. The flaw is exposed if it is posited that no offence was ever committed.¹²² In these circumstances the forfeiture never did occur. This circularity is again shown by the part of the judgment of the Full Court where their Honours held that these subsequent adjudication provisions¹²³ do not “affect the forfeiture – it adjudicates and records that a forfeiture has already occurred”.¹²⁴ This can also be tested by positing that the court finds that the relevant officer never did have any relevant belief, or never did hold the belief on reasonable grounds that the vessel had been forfeited or that an offence had occurred. Tested against these situations, it is quite clear that no forfeiture ever occurred as the preconditions for forfeiture never did exist.

The courts’ propositions can also be tested against the relief the court may order subsequently under the Act if the “forfeiture” is challenged. This includes a declaration that the property “is not forfeited”.¹²⁵ It is quite inconsistent with the finding that the forfeiture “has already occurred” at the time of detention that the court may later declare that the property is “not forfeited”. The better view, it is respectfully suggested, is that the provisions should have been read to mean that the property is “forfeitable” if the preconditions are met and that actual forfeiture only occurs, if at all, at a later date after the court hearing and adjudication has so found.

In analysing the position about the role to be played by the subsequent proceedings the Full Court judgment referred to some prize law to support its decision. It said:

One finds the word “condemned” used in that sense in prize jurisdiction, in some customs legislation and in some other contexts

¹²⁰ *Olbers Co Ltd v Commonwealth* [2005] HCA Transcript 228 per Hayne and Callinan JJ.

¹²¹ *Olbers Co Ltd v Commonwealth* [2005] HCA Transcript 228 (22 April 2005).

¹²² For instance the judgments did not address the situation where, as in the *Viarsa 1* trials of the crew, as to which see section 7.7.2, the jury acquitted all those charged of all offences.

¹²³ Sections 106B-106G.

¹²⁴ [2004] FCAFC 262 at [16].

¹²⁵ Section 106G(3).

where property is forfeited upon the occurrence of a specified event and then a procedure is afforded by which the occurrence of that event can be adjudged and the consequences of it officially recognized and recorded.¹²⁶

However, it is suggested that their Honours misunderstood the role condemnation played in the prize law on which they relied. The purpose of detaining the enemy's vessel in prize law is to force the prize vessel into the jurisdiction of the court for the prize court to adjudicate the matter and, if it is satisfied that it is an enemy ship or cargo, there to "condemn" it. However, the vessel or cargo owners may be able, for instance, to prove that it is not an enemy vessel or cargo so it is not condemned but is released back to the owners. No right, title and interest passes to the arresting party until and unless there is a condemnation order by the court. The whole procedure is done according to law and with care to ensure that the property and other rights of innocent persons, such as allies and neutrals, are protected.

The prize law procedure, rightly understood, was set out nicely by John Colombos, one of the great prize law scholars, as follows:

By long custom, all prizes must be judged, and it is therefore the duty of the captors to bring the vessel or cargo seized into a convenient port for adjudication. The propriety or rather the necessity for acting upon this rule is based on the principle that the property of private persons must not be converted without due process of law.¹²⁷

The effect of failing to prove the captor's case in prize is, as it should be in Australian fisheries law, that the court may "order the property to be released and restored ... and may, further, condemn the captors in damages and costs".¹²⁸

It follows that the prize law procedure does not give comfort to the judgment holding that property passes on the allegation of the official. The real effect of prize law is that there is no conversion of property in the ship or cargo until the court has given the owners the opportunity to a hearing and then, if it considers the evidence warrants it, the court condemns the detained ship and cargo. Only then and only on the order of the court does a change of property rights occur, which is giving effect to the law as it is and as it should be.

There are several other aspects of these two *Olbers'* case decisions that are worthy of further comment. The sanguine manner in which the

¹²⁶ [2004] FCAFC 262 at [16].

¹²⁷ J Colombos, *Law of Prize* (Grotius Society, 2nd edn, 1940), p 308. For the position of prize law in Australia, see M White, "Prize, Prize Salvage, Bounty and Ransom" in M White, *Australian Maritime Law* (Federation Press, Sydney, 2nd edn, 2000), Ch 11.

¹²⁸ Ibid. For a full discussion of the fisheries law, the fisheries enforcement cases and s 106A, see Warwick Gullett, *Fisheries Law in Australia* (LexisNexis Butterworths, 2008) Chapter 8, especially Section 8.70.

court, at first instance, on appeal, and in the High Court special leave application, overturned a fundamental rule of the application of law is concerning. None of the judges expressed reservation or concern that, on the mere "reasonable belief" of a public official, the result is that all property rights in the vessel, catch and gear are forfeited to the government then and there. No judgment even mentioned the fundamental effect that this automatic forfeiture is likely to have on mortgages, registration, competing rights to ownership, the status of the crew as employees, the insurance on the vessel and so on. Neither full judgment gave any consideration, either, to the effect of any subsequent acquittal of the charges that are brought following the detention. It would be an anomalous administration of the law to have a boat, equipment and catch forfeited on the reasonable belief of an offence and yet for the offences on which the forfeitures depend to result in complete acquittals. This is exactly what happened in the *Viarsa 1* cases, as discussed in the next section.

Readers may infer from the discussion above that it is suggested that these *Olbers'* case judgments are bad law and should not be allowed to stand and that they should be not followed, or distinguished or overruled as may be appropriate in similar matters. In the alternative if they are good law, the *Fisheries Management Act 1991* should be amended to return the fisheries law to the ordinary rule that the Commonwealth may detain the vessel and equipment on the reasonable belief of a suitable official, but only so as to secure it for trial and as part of the penalty if a conviction or a plea of guilt results. There could be no objection to a further provision that if the offenders decamp or otherwise offer no defence then, and only then, the boat, equipment and catch are forfeited to the Commonwealth.

7.7.1.2 Stay Pending Trial; *Olbers v Commonwealth*

One of the court matters that arose out of the *Volga* detention occurred when criminal proceedings were commenced against the three crew, see under, and Olbers sought a stay of the proceedings pending the outcome of these criminal charges. The court held there was nothing to suggest that the outcome of Olbers' action against the Australian government would prejudice the criminal proceedings and the motion was dismissed.¹²⁹

The *Olbers'* cases brought by the owners, numerous as they were, were not the only court cases that arose from the detention of the *Volga*, there were other Australian cases and an international one as well. As each one is noteworthy in its own way they will be mentioned.

¹²⁹ *Olbers Co Ltd v Commonwealth and Australian Fisheries Management Authority (No 2)* [2003] FCA 177 per French J.

7.7.1.3 *Bail and Conviction of Crew: Lijo v Director of Public Prosecutions (Cth)*

In *Lijo v Director of Public Prosecutions (Cth)*¹³⁰ the issue was the amount and conditions of the bail of the crew of the *Volga* that the court should order pending their trial. The three accused were Mr Lijo, who was the fishing master of the *Volga*, and his co-accused were Mr Folgar, the first mate, and Mr Eiroa, the fishing pilot, all of whom were of Spanish nationality. The master, a Russian by nationality, had been seriously ill whilst at sea and, sadly, had died in hospital after the vessel was detained and brought to Fremantle.¹³¹ The other officers were all charged with making use of a foreign fishing vessel for commercial fishing in the AFZ, contrary to s 100 of the *Fisheries Management Act 1991*.

On the initial hearing about bail, the magistrate allowed bail for each of them on posting a bond of \$75,000 in cash, surrender of all passports and seamen's papers and ordered that they not leave Perth. These orders were subsequently amended to allow them to return to Spain, but to lodge their passports in Madrid with the Australian embassy. The Commonwealth Director of Public Prosecutions appealed to a single judge of the Western Australian Supreme Court, where the judge set a bond (deposit) of \$275,000 each if they were to leave the jurisdiction.¹³² From there the accused persons appealed to the Western Australian Full Court but in the meantime some of the circumstances concerning the accused persons had changed, so the Full Court considered the bail conditions anew. In the result the Full Court, having taken into account the modest circumstances of these sailors and their dependent families, restored the magistrate's amounts but with a forfeiture order if they did not appear for their trials when required.

As the owner had posted the bail money and satisfied the conditions imposed by the court, all three bailed crew members were subsequently allowed to return to Spain pending trial.¹³³ They reappeared in Perth in due course and on 5 April 2004 Manuel Lijo, Jose Eiroa and Juan Gonzalez pleaded guilty and were convicted of offences contrary to s 100(2) of the *Fisheries Management Act 1991*. Lijo was convicted of two offences and fined \$30,000 in total and Eiroa and Gonzalez of one offence each and fined \$10,000 respectively.¹³⁴

¹³⁰ *Lijo v Director of Public Prosecutions (Cth)* [2003] WASCA 4 on appeal to the Full Court of Western Australia from a single judge which was in turn on appeal from the magistrate who first heard the bail matters.

¹³¹ The facts are taken from the judgment in the Full Court of Olsson J, with whom Anderson and Templeman JJ agreed.

¹³² See *Director of Public Prosecutions (Cth) v Lijo* [2002] WASC 154 per Wheeler J.

¹³³ The *Volga Case (Russian Federation v Australia)*, Prompt Release (2002) at [37]-[49].

¹³⁴ Commonwealth Director of Public Prosecutions, Perth Office, email dated 11 November 2008.

7.7.1.4 Security for Costs; *Olbers v Commonwealth and the Australian Fisheries Management Authority*

In the course of the owner's litigation over forfeiture of the vessel in *Olbers v Commonwealth*, discussed above, the Australian government brought an application for security for the estimated costs to be incurred by the Commonwealth to be given by Olbers for those proceedings: *Olbers v Commonwealth and the Australian Fisheries Management Authority*.¹³⁵ The Commonwealth's application was dismissed by the judge on the main ground that the owner had been placed in the position of a defendant by the legislation, even though it had been forced to be the applicant for the boat's release, and security for costs is not usually awarded against a defendant.¹³⁶

7.7.1.5 Volga ITLOS Case; *Russia v Australia*

There was also an international case arising from the *Volga* litigation which was before the International Tribunal for the Law of the Sea (ITLOS), an international tribunal established in Hamburg, Germany. It was established under UNCLOS and is the other major international tribunal in relation to maritime and law of the sea matters, along with the International Court of Justice, which is based in The Hague, The Netherlands.

The *Volga* was detained in February 2002 and eight months later, in December, Russia, the flag state, brought an application against Australia in ITLOS¹³⁷ for prompt release of the vessel on payment of a reasonable bond or other financial security, which was the first time in ITLOS for both states. Under Art 73(20) arrested vessels and the crew shall be promptly released upon the payment of a reasonable bond or other security and under Art 292 disputes about the release may be submitted to ITLOS. The *Volga Case*¹³⁸ was the sixth application for prompt release to come before the Tribunal. Of the five previous applications, three had required the Tribunal to rule on the merits of whether or not the bond or other financial security required for release was "reasonable" under Art 292(1) of UNCLOS. The two applications on which the Tribunal did not proceed to judgment on the merits were the *Grand Prince Case*, where the applicant failed to establish that the Tribunal had jurisdiction,¹³⁹ and the

¹³⁵ *Olbers Co Ltd v Commonwealth and Australian Fisheries Management Authority* [2002] FCA 1269 per French J.

¹³⁶ Ibid at [13], [19].

¹³⁷ International Tribunal for the Law of the Sea.

¹³⁸ The judgment can be found at <www.itlos.org/case_documents/2002/document_en_215.do>.

¹³⁹ The *Grand Prince Case (Belize v France)* Prompt Release (2001) at [93]-[94]. The judgment can be found at <www.itlos.org/case_documents/2001/document_en_88.doc>.

Chaisiri Reefer 2 Case, where the parties settled the matter themselves.¹⁴⁰ The three applications in which judgment was passed on the reasonableness of the required bond were the *Saiga (No 1) Case*,¹⁴¹ the *Camouco Case*¹⁴² and the *Monte Confurco Case*.¹⁴³ In these three judgments the Tribunal grappled with the task of formulating principles that it could apply to determine what was a reasonable bond.¹⁴⁴

Because the bond is mainly about the amount of money that is reasonable, the facts relating to the money are important. As mentioned above, on arrival in Fremantle for detention, the master and crew had been detained and the vessel and catch were seized.

The catch, some 131 tonnes of Patagonian toothfish and 21 tonnes of bait, was sold for A\$1,932,579.28 and the money held in trust by the Australian government pending a final court order.

The parties were unable to agree on the amount and terms of a bond or other financial security for the release of the vessel. On 2 December 2002 Russia filed an application in ITLOS (Hamburg court registry) seeking release of the three officers, vessel, catch (value) etc on posting a reasonable bond. Australia appeared to defend and subsequently statements (pleadings) and other documents were exchanged in compliance with the rules of the Tribunal and directions given by the court. Oral hearings were held in Hamburg over 12-13 December. Judgment was delivered on 23 December. Russia had offered a bond of only A\$500,000 for the value of the vessel, which was well below its agreed value. There was some basis for a figure lower than actual value as in earlier cases ITLOS had settled on a percentage of the vessel's value for the bond. One main issue in this case was whether Australia was justified in demanding

140 The *Chaisiri Reefer 2 Case (Panama v Yemen)* Prompt Release (2001). See ITLOS Press Release 52, dated 16 July 2001, ITLOS website, <www.itlos.org/news/press_release/2001/press_release_52_en.doc>.

141 The *M/V Saiga (No 1) Case (Saint Vincent and the Grenadines v Guinea)* Prompt Release (1997). The judgment can be found at <www.itlos.org/case_documents/1997/document_en_60.doc>. More analysis of this application can be found in M White, "The New International Tribunal for the Law of the Sea" (1999) *Maritime Studies* March-April 1999 Issue 1; M White, "ITLOS – The First Two Cases" (1999) *International Law News*. In the second *Saiga* case, *M/V Saiga (No 2) Case (Saint Vincent and the Grenadines v Guinea)* Prompt Release (1999), the Tribunal determined the penalty to apply for the wrongful arrest of the *Saiga*. The judgment can be found at <www.itlos.org/case_documents/2001/document_en_68.doc>.

142 The *Camouco Case (Panama v France)* Prompt Release (2000). The judgment can be found at <www.itlos.org/case_documents/2001/document_en_129.doc>.

143 The *Monte Confurco Case (Seychelles v France)* Prompt Release (2000). The judgment can be found at <www.itlos.org/case_documents/2001/document_en_115.doc>.

144 The author has dealt more fully with the prompt release cases in ITLOS, including the *Volga Case*, in M White, "Prompt Release Cases in ITLOS" in TM Ndiaye and R Wolfrum (eds), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (Martinus Nijhoff, 2007), pp 1025-1052.

an extra bond amount in lieu of the *Volga* failing to install and activate an automatic identification system that revealed its whereabouts at any time. No power expressly existed in any convention or any other law for this¹⁴⁵ but Australia said it had inferred or extended powers to demand it.

The majority of the ITLOS judges held that the bond should be in the amount of the value of the vessel A\$1,947,460, but that the extra bond sought by Australia as a condition of releasing the vessel was beyond the strict meaning of UNCLOS Art 292, so was rejected. No order for costs was made. Each state, therefore, had some success and some loss. The result was that the bond or other financial security ordered to be posted was the amount from the sold catch (A\$1,932,579.28), which Australia already had, the value of the vessel (A\$1,947,460), and the bond that each of the three officers had already lodged (A\$245,000) to enable them to have bail and return to Spain. In the result, therefore, the order was an increase in the amount for the value of the vessel (and dismissal of the claim for the extra bond).

7.7.1.6 Final Disposal of the Volga

In fact Olbers never did put up the amount of the bond, so the vessel remained in detention until the outcome of the Australian litigation mentioned above, which was that the forfeiture was confirmed. The money from the sale of the catch was passed into the Australian government consolidated revenue. Tenders were called for disposal of the vessel and the successful tenderer disposed of the *Volga* by scrapping for steel at the Tennix defence shipyard in Fremantle, Western Australia.¹⁴⁶

7.7.2 Viarsa 1 Litigation; Ribot-Cabrera v R

On the morning of 7 August 2003, an Australian Customs and Fisheries patrol vessel, the *Southern Supporter*, operating in the Southern Ocean, obtained radar contact with the *Viarsa 1*, and made preparations to board. The master of the *Viarsa 1* informed the Customs and Fisheries officers that they would not be allowed aboard, denied that the *Viarsa 1* had been engaged in unauthorised fishing and said he would not stop. And stop he did not, so for the next 20 days the *Southern Supporter*, later joined by a South African vessel *John Ross* and a British Fisheries vessel *Dorada*, pursued the *Viarsa 1* across the southern oceans of the world, ultimately boarding her on 27 August 2003 well on her way to South America. The vessel was then returned under escort to Fremantle, Western Australia,

¹⁴⁵ Under the International Maritime Organization conventions such an international system was coming towards fruition, but at this time it was still some years off.

¹⁴⁶ Email from AFMA 23 January 2009, per Mr John Davis, whose assistance on the facts is much appreciated. Assistance is also acknowledged from a conversation on 22 January 2009 with Mr Michael Schwikkard, partner in Jackson McDonald, lawyers, who acted for the owners of the *Volga*.

where five foreign nationals were charged with offences under the *Fisheries Management Act 1991* and then given bail. Ribot Cabrera (captain), Garcia Perez (officer), Fernando Oliviera (officer), Gonzalez Perez (officer) and Reyes Guerrero (crew) were all charged with offences under ss 100A and 101A of the *Fisheries Management Act 1991*.¹⁴⁷

7.7.2.1 Bail

The terms of bail became contentious as none of the men had any family, business or other connection with Australia¹⁴⁸ and so the magistrate's order prevented them from leaving Australia before the trial. The men appealed against the decision, seeking to vary their bail to allow them to return home. The single judge of the Supreme Court dismissed the appeal and a further appeal was made to the Full Court: *Ribot-Cabrera v R*.¹⁴⁹ There were a number of grounds of appeal which mainly turned on well-settled principles of sentencing, but two points from the judgments will be noted here. The first point relates to the effect of international conventions in Australian legislation, in this case fisheries law.¹⁵⁰ It was submitted that because the *Fisheries Management Act 1991* implemented parts of UNCLOS, the provisions of UNCLOS should be taken into account when considering the terms on which bail should be granted.¹⁵¹ Article 73(2) of UNCLOS provides that “[a]rrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security”. While Australia had ratified UNCLOS, the implemented parts in the Australian Act did not include the provisions of Art 73.¹⁵² As is well settled, under Australian constitutional law the “provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into our municipal law by statute”.¹⁵³

¹⁴⁷ Initially Gonzalez Perez was also charged with intentionally having the boat in his charge, but it was not pursued on the retrial: see Commonwealth Director of Public Prosecutions, *Annual Report 2005-2006*, p 33, see <www.cdpp.gov.au/>.

¹⁴⁸ [2004] WASCA 101 at [45].

¹⁴⁹ *Ribot-Cabrera v R* [2004] WASCA 101 per Steytler, Heenan and Le Miere JJ. Some of the facts and issues here discussed were explored in M White and S Knight, “Illegal Fishing in Australia Waters – the Use of UNCLOS by Australian Courts” (2005) 11 *J Int Marit Law* 110. For the background to the Patagonian toothfish industry and the chase of the *Viarsa 1*, see GB Knecht, *Hooked: A True Story of Pirates, Poaching and the Perfect Fish* (Allen & Unwin, 2006); and for the legal issues of illegal, unreported and unregulated fishing, see R Baird, *Aspects of Illegal, Unreported and Unregulated Fishing in the Southern Ocean* (Springer Press, 2006).

¹⁵⁰ The grounds are outlined in full at [2004] WASCA 101 at [43]-[54].

¹⁵¹ Ibid at [54].

¹⁵² Ibid at [58].

¹⁵³ Ibid at [61]. If, however, the Act is unclear in its provisions then notice may be taken of relevant international conventions in construing its true meaning and effect: *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

Heenan J in this case held that while Art 73 was not *binding* on Australian courts, it could be taken into account as a “discretionary consideration” under the terms of the *Bail Act 1982* (WA).¹⁵⁴ While this aspect of the judgment was not central to the ultimate result,¹⁵⁵ its significance lies in establishing that even the provisions of UNCLOS that are not part of Australian municipal law may be relevant for certain purposes when applying Australian municipal law in a fisheries or law-of-the-sea context. The joint judgment of Steytler and Le Miere JJ expressly reserved the point for another day.

The second point is that Heenan J, with whom Steytler and Le Miere JJ agreed, held that it was correct law, as held by the Full Court of the Supreme Court of Western Australia in *Aruli v Mitchell*,¹⁵⁶ that it did not offend the provisions of Art 73 of UNCLOS to impose a prison sentence in default of payment of a fine. This was because that article only provided that the penalty itself for fisheries offences should not include imprisonment.¹⁵⁷ The result of the appeal in *Ribot-Cabrera*'s case was that all three judges concurred in refusing to allow the four men (who were officers), to return to their home countries; but the majority did allow the fifth man, an ordinary seaman, to do so.¹⁵⁸

7.7.2.2 *Viarsa 1 Trials*

The trial of the five accused from the *Viarsa 1* was held in 2004 in the Western Australian District Court, but the jury was unable to reach a verdict so it went to retrial in September 2005. After seven weeks of evidence and two days of deliberation the jury acquitted all five defendants on all counts in the indictment.¹⁵⁹ The Minister for Foreign Affairs expressed his surprise but said the jury's decision had to be accepted, the captain praised Australia's “excellent jury system” and the then Fisheries Minister said he was amazed and issued his shortest press release ever.¹⁶⁰

7.7.2.3 *Final Disposal of Viarsa 1*

The owner of the *Viarsa 1* had lodged a court challenge to the forfeiture of the vessel but, for reasons not able to be ascertained by the author,

154 [2004] WASCA 101 at [16].

155 Ibid at [18].

156 *Aruli v Mitchell* [1999] WASCA 1042 per Kennedy, Pidgeon and Murray JJ.

157 Ibid at [64] per Heenan J.

158 Ibid at [19]-[21].

159 Commonwealth Director of Public Prosecutions, *Annual Report 2005-2006*, pp 33-34.

160 News “Viarsa captain praises justice system”, <<http://news.ninemsn.com.au/article.aspx?id=70618>>; *The Standard*, Hong Kong “Stunned Aussies to appeal toothfish crew acquitted”, <www.thestandard.com.hk/news_detail.asp?we_cat=6&art_i>

discontinued these proceedings. The result was that, under the provisions of the *Fisheries Management Act 1991*, the forfeiture stood and the vessel and catch remained forfeited to the Commonwealth. The money from the sale of the catch was passed to the Commonwealth consolidated revenue while the vessel and equipment was disposed of by tender with the successful tenderer scrapping the vessel in India.¹⁶¹

Discussion has already been set out, above, about this very situation where the Commonwealth automatic forfeiture provisions result in the ownership of a suspected illegal fishing vessel passing to the Commonwealth, but those charged with the offences upon which the provisions depend are acquitted. It is suggested that this offends the basic principles of administration of justice in that there is a substantial penalty visited on the supposed offenders but they are acquitted of any offence. It may be said that the owners of the *Viarsa 1* had the option of continuing with the litigation but the onus lies on the wrong party in this situation. Anyway, it is not in the interests of justice that a party that has already been subjected to substantial litigation should be made to continue with even more of it. It is suggested that the provisions of the *Fisheries Management Act 1991* should be that if there is an acquittal of the charges the forfeiture provisions should lapse. In other words, as suggested above, the law should be that the forfeiture provisions in the Act should, at worst, be "forfeitable" provisions.

Under the present law there is also the possibility of an outcome between the two litigious streams, the civil one and the criminal one, if the different litigation should result in different outcomes. For instance, if the litigation for recovery by the owner results in success for the owner but the criminal litigation results in convictions of the owner's employees, the crew, or the other way around. In either case there should only be the one outcome. This is yet another reason why the law in this instance needs to be reviewed.

7.7.3 The Bunkers Case; FV Taruman

In September 2005 the FV *Taruman*, a Cambodian-flagged deep sea vessel, was detained in Hobart on suspicion of having previously illegally fished in the AFZ off Macquarie Island, south of Tasmania, and found to have 143 tonnes of Patagonian toothfish. A jury later convicted the master and fishing master of the charges relating to illegal fishing.¹⁶² They

161 Email from AFMA 23 January 2009, per Mr John Davis.

162 Joint Press Release by Ministers for Justice and Customs and the Minister for Fisheries on 23 September 2006. The master, Enrique Dominguez, was fined \$53,000 and the fishing master, Alfonso Amoedo, was fined \$65,000. Both were convicted of one offence each under s 101A(2) and s 101A(1) of the *Fisheries Management Act 1991*; see Commonwealth Director of Public Prosecutions, *Annual Report 2006-2007*, pp 19-20. Also see *R v Amoedo and Dominguez* [2006] NSWDC 187 and [2006] NSWDC 188 for rulings during the trial.

were fined a total of A\$118,000, the vessel was forfeited, valued at A\$2 million, and so was the catch, valued at A\$1.5 million.¹⁶³

A dispute arose over who had the right to the bunkers (the diesel oil for running the engines) and whether they constituted the property that was forfeited to the Commonwealth with the *Taruman: Scandinavian Bunkering AS v Bunkers on Board Ship FV Taruman*.¹⁶⁴ The Commonwealth argued that the fuel bunkers were part of the boat and so they were automatically forfeited. The plaintiff had an interest in the bunker fuel and commenced in rem proceedings claiming them under the *Admiralty Act 1988* (Cth). As mentioned above, s 108A of the amended *Fisheries Management Act 1991* provides that the seizure, detention or forfeiture of a boat has effect despite the arrest of the boat under the *Admiralty Act*, the making of an order for the sale of the boat by a court in proceedings brought under the *Admiralty Act 1988*, or the actual sale of the boat by court order. The Commonwealth argued that even if fuel bunkers did not come within the forfeiture provisions of the *Fisheries Management Act 1991*, the plaintiff nevertheless could not commence an action in rem under the *Admiralty Act*.

Kiefel J,¹⁶⁵ with whose outcome the other two members of the court agreed, discussed the *Aliza Glacial* litigation and the resultant 1999 amendments to the *Fisheries Management Act 1991*.¹⁶⁶ She held that in matters of Admiralty or maritime jurisdiction, a proceeding cannot be commenced as an action in rem against "a ship or other property" except as provided by the *Admiralty Act 1988*. In the circumstances she held that it was not sensible to suggest that an owner may lose the fishing vessel but retain the fuel and the word "boat" in ss 106A and 108A includes the bunkers on the vessel. All these judges were persuaded by the decisions in Admiralty cases even though the bunkers are not included in the meaning of "ship" in the *Admiralty Act*.¹⁶⁷ However, the court held that the provisions of the *Fisheries Management Act 1991* prevailed and so the Commonwealth did have the right to claim the bunkers.¹⁶⁸

163 Joint Press Release by Ministers for Justice and Customs and the Minister for Fisheries on 26 September 2006.

164 (2006) 151 FCR 126 per Ryan, Tamberlin and Kiefel JJ.

165 Justice Susan Kiefel was then a member of the Federal Court, but on 3 September 2007 she was made a member of the High Court of Australia.

166 (2006) 151 FCR 126 at [137]-[141].

167 *Admiralty Act 1988* (Cth) s 3.

168 (2006) 151 FCR 126 at [143] and following and in particular see Kiefel J's "conclusions" at [98], [99].

7.7.4 Japanese Whaling: Humane Society International Inc v Kyodo Senpaku Kaisha Ltd

Another case for mention concerns the whaling by the Japanese whaling fleet in the Southern Ocean. This was litigated in *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* over a series of decisions.¹⁶⁹ The result was that the Australian laws relating to it being an offence to take, amongst other marine animals, whales in the Australian whale sanctuary zone, which was the AFZ, was upheld. The Japanese whaling fleet actions were held to be unlawful so far as they operated in Australian waters. The case and surrounding circumstances are more fully dealt with in Chapter 9 Section 9.7 Whaling.

7.7.5 South Australian Fishing Boundary; Raptis v South Australia

A different fisheries issue arose in *Raptis v South Australia*,¹⁷⁰ where the exact position of an historical boundary of South Australia fell to be determined as there was a need to determine whether South Australian or Commonwealth laws applied to the fisheries in the area. The fisher had a Commonwealth licence, but not a South Australia State one, and was fishing more than three miles offshore when the South Australian fisheries officers seized the catch because of a lack of a South Australian licence. The matter was removed to the High Court where the Commonwealth claimed the waters in question were not waters within South Australian State waters.¹⁷¹ By letters patent issued in 1836 the Province of South Australia was constituted¹⁷² and its boundaries were established and the seaward boundary included “all and every the Bays and Gulfs thereof together with the Island called Kangaroo Island and all and every the Islands adjacent to the said Island or to that part of the mainland of South Australia”. This was sufficient description in 1836 but with better surveying over the following 100 years it became somewhat imprecise.

The High Court held, by majority, that these waters of Spencer Gulf and St Vincent’s Gulf, which are nearby waters to Kangaroo Island where the fish were taken, were not within the territorial limits of South Australia. The result was that, by majority, fishers were entitled to fish there with only a Commonwealth licence. (The geographical intricacies of the

¹⁶⁹ At first instance Allsop J in [2004] FCA 1510. In the Full Court in *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2006] FCAFC 116 per Black CJ, Moore and Finkelstein JJ. Before Allsop J again in [2007] FCA 124 and [2008] FCA 3.

¹⁷⁰ (1977) 138 CLR 346; [1977] HCA 36.

¹⁷¹ By proclamation under *Fisheries Act 1952* (Cth) s 7 the Governor-General declared all those waters “other than waters that are within the territorial limits of a State or Territory of the Commonwealth” to be “proclaimed waters” for the purpose of the Act.

¹⁷² Under 4 & 5 Will IV c 95 1834 (Imp).

arguments and gazettals about the South Australian boundaries are fully set out in the report of the case but will not be entered into here.)

7.7.6 Chen Long Detention

In 2006 the Australian government detained a fisheries vessel some 197 nautical miles offshore from Australia which, 30 days later, it had to release as there was no evidence on which to bring any charge. The facts are as follows.¹⁷³

The *Chen Long* was a 75 metre steel-hulled freighter with refrigerated cargo spaces, registered in China and with 18 crew aboard, when it was sighted by a coast watch aircraft at anchor three nautical miles inside the AFZ. HMAS *Dubbo* was directed to the *Chen Long* and ordered to board it, where its papers and cargo were inspected. The vessel was detained as a mother ship but in fact it was a fisheries cargo vessel, with some 639 tonnes of fish cargo onboard. It was escorted to Darwin where the crew were forced to leave their vessel and were incarcerated in a detention centre and an expensive maintenance team was put in charge of the *Chen Long* as ship keepers to care for the vessel and cargo. The Commonwealth Director of Public Prosecutions, after receiving a brief on the matter, subsequently advised that there was no evidence to ground a successful prosecution and, after 30 days in detention, the crew were released and returned to the vessel which then sailed. The *Chen Long* detention did not reflect well on the minister or the AFMA.

In international maritime law there is a difference between a mother ship, which has smaller dependent fishing vessels (dories, dinghies, rubber duckies, etc) and a cargo ship, which merely transports the catch by other vessels from the fishing grounds to market in dedicated refrigerated cargo holds. A mother ship may be detained if the dories etc are illegally fishing because the mother ship is an integral part of the illegal operation and liable for offences by its dependent dories. A fisheries cargo ship may not be detained unless that vessel itself is actually infringing the law, as it is an independent unit from any fishing vessel. In the case of the *Chen Long* it was a cargo ship. It was not fishing at all and nor was it capable of being a mother ship. Although the government officers had their suspicions, there was no sufficient evidence to take the vessel into detention.

The government later stated that some of the cargo was probably caught illegally in Indonesian waters and Minister Abetz made two state-

¹⁷³ The facts are taken from questions to and answers by the Minister for Fisheries, Forestry and Conservation, Senator the Hon Eric Abetz, on 11 May 2006; Senate Official Hansard No 4, 2006, pp 174-177; Press Releases by Senator Abetz of 13 February and 10 March 2006; Press Release by Australian Fisheries Management Authority of 16 February 2006; see website <www.mffc.gov.au> and <www.afma.gov.au>.

ments which may be described as unfortunate. His press release stated that the detention sent a message "to foreign vessels that if they enter Australian waters, [they] must have legitimate reasons to do so".¹⁷⁴ This is bad law and, in fact, is contrary to law as foreign vessels have every right to be in the EEZ without giving any reason to the Australian government or anyone else provided there is no evidence of offending the Australian law.¹⁷⁵

The second unfortunate statement by the minister was that the Australian government would consider changes to the Australian laws that would prevent Australian waters becoming a safe haven for vessels that have "acted illegally in the waters of other nations".¹⁷⁶ The effect of this statement is that Australian laws would make unlawful an offence committed in a foreign country against *that* country's laws, with the result that Australian courts would be called on to deal with prosecutions attempting to enforce Indonesian law. This is not feasible and, indeed, is not a sensible concept of the law. The correct way to deal with assisting a foreign country in prosecutions is to provide evidence to that country for a prosecution in that country's courts. This is an Executive act and does not require any amendment to Australian law.

In the result the detention of the *Chen Long* cost the Australian taxpayer some A\$348,509 costs incurred by the AFMA, some \$131,220 costs incurred by the Department of Immigration for detention of the crew, and some further uncosted amount to the Department of Defence for HMAS *Dubbo*.¹⁷⁷ No doubt there were other costs as well. From the foreign vessel's point of view, the crew members should not have been dragged into Darwin and incarcerated for 30 days and the vessel owner should not have lost the use of the vessel for some time over and above that period.

7.7.7 Trepang Fishing Vessels Detentions

Whilst it did not lead to litigation, an incident of overzealous and insufficiently skilled officers in the AFMA occurred in 2008 when nine Indonesian fishing vessels were detained and brought to port, where they were charged with illegally taking trepang (beche-de-mer). Five of the vessels were destroyed without their having any say in the matter and the crews were incarcerated in detention.¹⁷⁸ They were charged with

174 Press Release of 13 February 2006.

175 UNCLOS Pts V (EEZ) and VII (High Seas) and in particular the freedoms of navigation in the EEZ mentioned in Art 58.

176 Press Release of 10 March 2006.

177 Costing calculations as set out by the minister in the Senate on 11 May 2006 in answer to a question on notice from Senator Ludwig, see Senate Hansard, pp 176-177.

178 Senate Standing Committee on Rural and Regional Affairs and Transport Estimate Hearings, 27 May 2008, pp 189-195.

taking trepang even though there was no trepang onboard and no satisfactory evidence that they had done so. The only grounds for their detention was the presence of certain diving gear onboard and some fish traps, which was later shown to be used lawfully in pursuit of their peaceful and legal fisheries. The crews were released and the Australian taxpayer had to pay compensation, and the Indonesian government complained about the actions.¹⁷⁹

On another occasion, after two days of a trial of a fisheries matter the Northern Territory Supreme Court trial judge directed the jury to acquit on the evidence presented and discharged them.¹⁸⁰ In that case their defending lawyer summed the matter quite moderately when he said that it "was hard to see any benefit to the Australian public" from the prosecutions.¹⁸¹

In conclusion on these cases on fisheries enforcement one notes that of course pursuit and enforcement against illegal fishers is the right of every coastal state¹⁸² but it should be done according to law. There are several hundred prosecutions each year and in most of them the Australian officials do very well and it is not to be expected that all should succeed. However, the cases mentioned just above are cases where prosecutions should not have been brought and they bring no credit on the officials or the Australian system of justice.

7.7.8 The Southern Bluefin Tuna Arbitration

The issue of the total allowable catch that should be allowed annually of the Southern Bluefin Tuna fish stocks was in contention between Australia and Japan for many years. Australia, along with New Zealand, maintained that the amount being taken by Japanese fishers was putting the fish stock at risk, to which Japan did not agree. Eventually Australia and New Zealand commenced proceedings in ITLOS in 1990 which, as provided in UNCLOS and its rules, had jurisdiction to deal with provisional measures only unless the parties agreed to substantive matters but in this case the parties opted for arbitration.¹⁸³ The order of the Tribunal on provisional matters was that each party was to act in a restrained manner pending the arbitration. There were two international agreements involved, the Southern Bluefin Tuna agreement¹⁸⁴ and UNCLOS. The arbitral panel held that the dispute provisions of the Southern Bluefin Tuna

179 *West Australian* 16 May 2008, "Indonesian fishers win payout".

180 ABC News "Indonesian fishermen win trepang case", 12 September 2008.

181 *Ibid.*

182 UNCLOS Art 73.

183 *Australia v Japan; New Zealand v Japan (Southern Bluefin Tuna Case)* ITLOS Cases No 3 and 4 (1999).

184 *Convention on the Conservation of Southern Bluefin Tuna*, to which all of Australia, New Zealand and Japan were parties.

convention, which merely required that parties in dispute keep trying to agree on the matter, prevailed over the provisions of UNCLOS, which provided that an arbitral panel could decide the matter and make an award.

In the result the arbitrators held that the panel had no jurisdiction and that the parties should continue to negotiate.¹⁸⁵ This occurred and, in the end, the parties subsequently came to an agreement on the matter. It may be noted, however, that the reasoning that led to the decision is dubious. Once the arbitration panel found, as it did, that there were two relevant dispute resolution provisions and the claimants relied on one of them which had a determination provision, UNCLOS in this case, then it is suggested that that required the panel to make a decision on the merits. That the other relevant convention did not so require did not, it is suggested, relieve the panel from its obligations.

7.7.9 The Inter-Tidal Zone Case; Northern Territory v Arnhem Land Aboriginal Land Trust

The extent of the rights of Indigenous Australians to their fisheries was and is an issue that is still being explored. Native title claims were first recognised in Australia by a High Court decision in 1992 in *Mabo's* case.¹⁸⁶ Then in a 2001 decision of the High Court the *Croker Island Case*¹⁸⁷ held that the Australian common law did recognise native title offshore, but it did not give exclusive rights to the fisheries there. These cases did not address the rights in the inter-tidal zone which zone and rights can be extensive in the north of Australia as the tidal range is very high and the inter-tidal flats are extensive and are host to a huge quantity of fish and crabs. In 2008 the High Court decision in *Northern Territory v Arnhem Land Aboriginal Land Trust*¹⁸⁸ granted exclusive fishing rights to the Aboriginal Land Trust over the inter-tidal zone, it being important to note that the Trust had been granted title over this inter-tidal zone. Most land title, of course, only extends to the high water mark and so does not cover the inter-tidal zone.

The case was based on the statutory rights granted to the Arnhem Land Aboriginal Land Trust under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). These rights were quite extensive and included

¹⁸⁵ *Southern Bluefin Tuna Award: New Zealand v Japan; Australian v Japan*, 27 August 1999, Award 4 August 2000; reported <www.worldbank.org/icsid/>. For an Australian article on this decision see D Horowitz, "Case Notes – Southern Bluefin Tuna Case (*Australia and New Zealand v Japan*) (Jurisdiction and Admissibility)" (2001) 52 *MULR* 810.

¹⁸⁶ *Mabo v Queensland* (No 2) (1992) 175 CLR 1. The offshore native title cases are also discussed, in slightly more detail, in Chapter 12.

¹⁸⁷ *Commonwealth v Yarmirr* (2001) 208 CLR 1; [2001] HCA 56.

¹⁸⁸ [2008] HCA 29.

giving to the Trust a grant in fee simple, the rights to which extended down to the low water mark. The dispute was over whether those rights over this zone were exclusive so that they could if they chose exclude all others, or whether they were subject to the rights of those who held a licence to fish there under the *Fisheries Act 2005* (NT). As fisheries is a major industry and is closely tied to extensive tourism, this matter aroused considerable controversy, hence the matter being taken to the High Court. By a 5-2 majority the court held that the fee simple grant did give the right to exclude others from that inter-tidal zone. A subsequent statement by a spokesman for the Trust said that he was sure that something sensible could be worked out in a cooperative manner about the fisheries in that zone.

It should be emphasised that the case was decided in favour of the Trust on the basis that Northern Territory law gave them a grant in fee simple to the inter-tidal zone so the case did not decide the rights to the inter-tidal zone in places where no such grant had been made. That issue will need to be decided on a case by case and place by place basis on another day.

7.8 Conclusions

Australia has been blessed with abundant offshore fisheries resources and their proper management and regulation is a matter of national importance. The laws in this regard were, for many years, somewhat simple but were entirely proportionate and appropriate. The amount of illegal, unreported and unregulated fishing was not large and a reasonably small regulatory and enforcement effort was sufficient for apprehension and trial of offenders. However in or about 2000 the targeting of Australian offshore fisheries increased substantially in both the northern waters and the Southern Ocean. A measured approach to their enforcement did require a major lift and as a result immense resources were directed towards regulation and enforcement of offshore fisheries laws.

In the course of these endeavours, however, there were major amendments to the legislation and it is unfortunate that some amendments distorted the formerly proportionate and appropriate provisions of the *Fisheries Management Act 1991*. The two main amendments that are addressed in this chapter are those where the Commonwealth has sought to overrule the ordinary Admiralty law whereby if a vessel is detained for alleged offences then the mortgagee or other creditor may not act to request the Admiralty Court to order the sale of the vessel and the proceeds be applied as may be appropriate. The Commonwealth has legislated to make the forfeiture of the vessel and catch to have priority and to override these long-standing laws. Serious consideration should be given to reversing this amendment to the *Fisheries Management Act 1991*.

The second main amendment is where the Commonwealth has sought to overturn the ordinary application of criminal law of detention of property until trial and there to abide the outcome of the court orders on penalty if there is a conviction, including forfeiture, or for the court to order its immediate release if there is an acquittal. The Commonwealth officers have amended the *Fisheries Management Act 1991* to purport to forfeit all right title and interest in fisheries property to the Commonwealth on what is, in effect, the mere allegation of a government official that he or she holds a reasonable belief that a forfeiture has occurred because an offence has been committed. The amendments were not well drafted but the discussion in the chapter of the decisions of the Federal Court in the *Olbers*' cases reveals that the court did not do well in the construction of the meaning and effect of the amendments. As set out in the text of this chapter, it is suggested that the Full Court decision be overturned or in the alternative those amendments to the *Fisheries Management Act 1991* be repealed to return the law to forfeiture of the vessel and other property only after a conviction and when an appropriate court so orders as part of the penalty.

The problem of dealing with large number of unlawful incursions into the AFZ in northern waters has resulted in a combination of policy, departmental practices and oppressive laws to have one unfortunate consequence that is quite unjust. This occurs when the Australian officers detain a fishing boat for alleged breaches of Australian fisheries laws. The officers then destroy the boats because most of the Indonesian fishing vessels do not meet Australian quarantine, health and seaworthy requirements. If the detention was not upheld in law then this draconian dealing with innocent peoples' property is not acceptable. As has been mentioned in the text, this happens from time to time but, at least so far, the damages or other reparations made by the Australian government do not match the injury done to innocent persons. The laws and practices in this regard should be altered to conform to the ordinary competent administration of law and the requirements of fair dealing and decency.

A heartening change of Australian governmental attitude to the large number of Indonesian small fishers has appeared in recent years in that the fisheries problem is being treated as much as an educational issue as a criminal one. Australian officers are now devoting time and resources to educate the Indonesian fishers about the need to conserve the fisheries resources and respect Australia's maritime boundaries.¹⁸⁹ It should, of course, have been more vigorously pursued some years ago as the resources would have best been expended in this endeavour rather than spending millions of dollars in constructing detention centres in which to incarcerate these fishers.

¹⁸⁹ S Morris, "Here's the Catch: It's a Shared Problem", *Australian Financial Review*, 19 February 2009, p 61.

AUSTRALIAN OFFSHORE LAWS

Another issue about fisheries laws is the overlap of jurisdiction between those of the States and those of the Commonwealth. The three mile limit dividing the jurisdiction of the two entities is not suitable, efficient or appropriate. This issue has not been addressed in this chapter, however, as suggested in Chapter 2, it should be reviewed. This point is taken up and developed in the concluding chapter to this book.

A final issue for mention is the overlap amongst the many agencies that are involved in the various aspects of enforcement of fisheries laws. Depending on the circumstances, all or any of the fisheries, immigration, customs, police and defence laws may be involved. Usually as well the Border Protection Command is involved but, as it has no statutory base, this does not involve another set of laws. It is suggested that these laws should be simplified and, whilst it is complicated, one way to do that is by consolidating the regulatory and enforcement laws and by establishing a coast guard, an issue which is discussed in the final chapter. It is to be hoped that the proposed Maritime Powers Bill that is mentioned in the front of this book will go some way to achieving this. Whether it does so, or whether it merely adds yet another law to an already complex situation, remains to be seen.

Chapter 8

Offshore Customs, Quarantine and Excise Laws

- 8.1 Introduction
 - 8.1.1 Constitutional Basis for Customs, Quarantine and Excise
- 8.2 Customs Act 1901
- 8.3 Resources and Sea Installations
 - 8.3.1 Control of Installations
 - 8.3.2 Prohibition of Direct Journeys
- 8.4 Goods
 - 8.4.1 Prohibited Imports
 - 8.4.2 Prohibited Exports
- 8.5 Narcotics
- 8.6 Incoming Vessels: Duties of Masters and Operators
- 8.7 Incoming Yachts: Duties
- 8.8 Customs Officers Powers
 - 8.8.1 Customs Vessels
 - 8.8.2 Powers
 - 8.8.2.1 Request to Board
 - 8.8.2.2 Hot Pursuit
 - 8.8.2.3 Use of Force by Armed Vessels
 - 8.8.2.4 Power to Board and Search
 - 8.8.2.5 Powers of Detention And Search
 - 8.8.2.6 Powers of Arrest
 - 8.8.3 Other Powers
 - 8.8.4 Trade Powers
 - 8.8.5 Interaction of the Customs Powers and UNCLOS
- 8.9 Forfeitures
- 8.10 Quarantine
 - 8.10.1 Quarantine Act 1908
 - 8.10.2 Quarantine Jurisdiction
 - 8.10.3 Application to Vessels and Installations
 - 8.10.4 Application to Persons and Goods
 - 8.10.5 Quarantine Powers
- 8.11 Australia's Excise Acts
- 8.12 Customs and Border Protection Command
- 8.13 Some Leading Cases
 - 8.13.1 When are Goods Imported
 - 8.13.2 Excise Duty on Diesel Fuel

- 8.13.3 Customs Forfeiture in Light of Prior Sale to Third Party
- 8.13.4 Offence at Sea of Importing a Prohibited Drug
- 8.14 Conclusions

8.1 Introduction

Every country needs to protect its citizens, livestock and agriculture from the ingress of unwelcome diseases, from unlawful substances coming into the country and to ensure that its tax and general revenues are not undermined by smuggling. In Australia the customs aspect is regulated primarily through the laws established in the *Customs Act 1901* (Cth), supported by a number of other pieces of legislation.¹ The chapter begins with the *Customs Act 1901* and then deals with the *Quarantine Act 1908* and finally with the Excise Acts. As Australia is an island, many aspects of this legislation must necessarily apply offshore into its surrounding seas and oceans and it is this aspect that this chapter addresses.

There is not space to deal with all aspects of this legislation, which is massive, although most of the main features will be mentioned. The object is to set out the main laws that arise relating to customs and the Customs and Border Protection Service and other related enforcement forces and mention when, where, to whom and to what they apply.

Before turning to the *Customs Act 1901* it is convenient to discuss the constitutional basis for the customs and related legislation.

8.1.1 Constitutional Basis for Customs, Quarantine and Excise

Before federation of the Australian colonies in 1901, each colony had the power to legislate with respect to taxation and included in this was the power to impose tax on customs and excise of goods. Australia's first governor, Governor Phillip, who arrived in New South Wales in 1788 to establish a penal colony, had a Royal Instruction that gave him power to impose taxation if the colony needed it. After 1824, when the government of New South Wales was granted a measure of self-government through

¹ Some of the supporting legislation is mentioned in the text of the chapter, but other Commonwealth Acts include *Customs Administration Act 1985*, *Customs and Excise Amendment (Diesel Fuel Rebate Scheme) Act 1999*, *Customs and Excise Legislation Amendment Act 1995*, *Customs Depot Licensing Charges Act 1997*, *Customs Legislation Amendment Act (No 1) 2002*, *Customs Amendment Act (No 1) 2003*, *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001*, *Customs Legislation Amendment (Application of International Trade Modernisation and Other Measures) Act 2004*, *Customs Legislation (Anti-dumping Amendments) Act 1998*, *Customs Securities (Penalties) Act 1981*, *Customs Tariff Act 1995*, *Customs Tariff Amendment Act (No 5) 2001*, *Customs Tariff Amendment Act (No 1) 2003*, *Customs Tariff (Anti-dumping) Act 1971*, *Customs (Tariff Concession System Validations) Act 1999* and *Customs Undertakings (Penalties) Act 1981*.

its own Parliament, it imposed customs and excise duties in order to raise extra revenue. After the other colonies gained self-government, the level of taxes imposed upon goods varied amongst them. At federation, they resigned their powers to legislate with respect to numerous issues, including customs and excise, to the Commonwealth Parliament.

The Constitution confers upon the Commonwealth Parliament the power to make laws with respect to taxation² and the power to impose duties of customs and excise and to grant bounties on the production or export of goods, which is exclusive.³ So from 1901, the States could no longer legislate with respect to customs and excise, and these Commonwealth duties of customs and excise were required to be uniform throughout the Commonwealth.⁴ Federal Parliament exercised this power and imposed uniform duties of customs in 1901.

Judicial decisions in this area have centred on the meaning of "duty of excise" and "duty of custom".⁵ A summary of these many decisions may be said to be that a duty of excise is a tax on goods, rather than on services, and applies on manufacture or distribution. Customs duties are also taxes on goods and they are imposed on imported goods at the point of import and similarly on export where there is such a duty. Thus customs duties apply to imports and exports, and excise duties to locally produced goods.

In addition to customs and excise, the Commonwealth Parliament has the power to make laws with respect to quarantine.⁶ Quarantine is essentially the restriction or prohibition of the movement of persons, animals or things.⁷ Before proclamation of the *Quarantine Act 1908* (Cth), the States had enacted uniform quarantine legislation, generally known

² Section 51: "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: ... (ii) taxation; but so as not to discriminate between States or parts of States".

³ Constitution s 90: "On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise, and to grant bounties on the production or export of goods, shall become exclusive. On the imposition of uniform duties of customs all laws of the several States imposing duties of customs or of excise, or offering bounties on the production or export of goods, shall cease to have effect, but any grant of or agreement for any such bounty lawfully made by or under the authority of the Government of any State shall be taken to be good if made before the thirtieth day of June, one thousand eight hundred and ninety-eight, and not otherwise".

⁴ Constitution s 88: "Uniform duties of customs shall be imposed within two years after the establishment of the Commonwealth".

⁵ See for example *Matthews v Chicory Marketing Board (Vic)* (1938) 60 CLR 263; *Parton v Milk Board (Vic)* (1949) 80 CLR 229; *Vacuum Oil Co Pty Ltd v Queensland* (1934) 51 CLR 108.

⁶ Constitution s 51: "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: ... (ix) quarantine".

⁷ *McCarter v Brodie* (1950) 80 CLR 432.

as the Federal Quarantine Acts. This new 1908 Commonwealth Act, which was given effect on 1 July 1909, tended to follow the principles embodied in the State legislation.⁸ The Commonwealth and the States enjoy concurrent powers of quarantine,⁹ which means that in any one State both Federal quarantine laws and the laws of that State may apply. It should also be noted that legislation or administrative action restricting freedom of movement for quarantine purposes does not contravene the constitutional guarantee that trade, commerce and intercourse between the States shall be absolutely free.¹⁰ As Australia is free of diseases that are to be found in many overseas countries these powers of quarantine are strictly exercised.

8.2 Customs Act 1901 (Cth)

The *Customs Act 1901* comprises four volumes, coming to almost 1000 pages when one includes the schedules and notes. Volume 1 Pt 1 deals with introductory definitions and such matters; Pt II with administration; Pt III with customs control, examination and securities; Pt IV with importing goods; Pt V relates to warehouses and special categories of goods; Pt VB is about persons departing Australia in ships and aircraft; Part VI deals with exporting goods and so on. In Volume 2 Pt XII sets out the powers of officers, including detention and search of suspects and suspected premises and Pt XIII deals with penal provisions such as forfeiture of goods, penalties for assaulting officers, etc and has provisions ancillary to these aspects. Volume 3 deals in the main with the economic aspects relating to the duties to be applied if there be “dumping” of goods. This refers to overseas goods being subsidised and then exported to Australia where they unfairly undercut Australian manufacturers. This is quite different, of course, and should not be confused with the marine environmental provisions of dumping wastes at sea. Finally, Volume 4 is mercifully brief and deals with notes and tables relating to the Act.

There are some aspects of the Act that can be noted at the outset. First, the Act includes a “severability” provision that requires courts to interpret the Act in a manner that severs any offending section and leaves valid the rest of the Act so that the offending provision does not cause the Commonwealth to exceed its power.¹¹ This is a common

8 See the Australian government’s website on *Australian Quarantine and Inspection Service*, available at <www.daff.gov.au/aqis>.

9 Constitution ss 51(ix), 107, 108; *Quarantine Act 1908* (Cth); *Health Act 1958* (Vic).

10 Constitution s 92: “On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free ...”. See *Ex parte Nelson (No 1)* (1928) 42 CLR 209; *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54.

11 Section 4AA.

provision so that if a court finds some part of the Act exceeds the power provided under the Constitution only the offending provision is struck down and the remainder of the Act remains valid.

Secondly, unlike many of the Acts drafted in more recent years which generally contain provisions specifying the geographical scope of the Act's application, the *Customs Act 1901* is confused and confusing about where and when it applies. Consequently, individual provisions of the Act must be carefully analysed to ascertain where the Act applies offshore and in what sea zones and to whom. The Act does not apply to the external territories which for many aspects are treated as an external place.¹² A "State" is defined to include the coastal waters adjacent to the State, as set out in Sch 1 to the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*.¹³ The Act applies to offshore petroleum platforms and offshore sea installations provided they are attached to the seabed, as to which see shortly.¹⁴ A substantial source of confusion relates to the number of phrases about areas to which the Act refers. It has definitions and provisions about an "Adjacent area", "Australia", "Australian sea bed", "Australian waters", "coastal area", "contiguous zone", "Coral Sea area", "Exclusive Economic Zone", "External place", "Joint Petroleum Development Area", "place outside Australia" and "territorial sea".¹⁵ In fact a perusal of the *Customs Act 1901* reveals an Act that is almost unworkable as a legislative instrument. It is fortunate indeed that Australia has the benefit in its public service of many pragmatic people who attempt to administer such an Act despite its confusion and thereby achieve some sort of workable outcome.

The *Customs Act 1901* imports large portions of the *Criminal Code* in relation to its penal provisions. In particular Ch 2 is imported in its entirety (which sets out the general principles of criminal responsibility),¹⁶ as well as s 72.13 and Div 307 (which provide for import and export offences, as well as offences relating to plastic explosives).¹⁷ Penalties are set out for the relevant offences.¹⁸

Administration of the Act is devolved on to the Chief Executive Officer,¹⁹ whose powers extend to designating which ports and airports are to be regulated for which purposes and to fixing the limits of those ports and airports.²⁰

¹² Section 6; although regulations may extend its provision to the Ashmore and Cartier Islands. See Chapter 10, Offshore Territories Laws. "External place" is defined in s 4.

¹³ Section 8(2)(b). See Chapter 3, Offshore Petroleum, Mining and Installation Laws.

¹⁴ Section 5C.

¹⁵ Section 4(1).

¹⁶ Section 5AA.

¹⁷ Section 4B.

¹⁸ Section 5.

¹⁹ Section 7.

²⁰ Section 15.

8.3 Resources and Sea Installations

As mentioned, The *Customs Act 1901* applies to resources installations and sea installations which installations are deemed to be part of Australia if they are attached to the Australian seabed.²¹ Naturally, the law relating to customs, immigration, quarantine and security has to apply to these offshore installations. A “resources installation” is a fixed or mobile unit that is used in operations relating to exploring or exploiting natural resources (ie petroleum platforms).²² A sea installation is any man-made structure fixed to the seabed that can be used for, amongst other uses, tourism, exploration or the carrying on of some other business (ie offshore installations other than petroleum platforms).²³ More detail on resources and sea installations is set out in Chapter 3.

Installations that are brought in from overseas are deemed to have been imported (along with any goods on those installations) when they become attached to the Australian seabed,²⁴ or when they are brought to a place in Australia for the purpose of becoming attached or installed within Australia.²⁵ The seabed is defined as the areas within Sch 1 to the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*.²⁶ Heavy penalties apply to those who cause an installation to become attached to the Australian seabed without permission.²⁷

An installation is deemed to have been exported when it is detached from the seabed and ceases to be part of Australia.²⁸ Goods taken overseas from an installation are also deemed to have been exported.²⁹

8.3.1 Control of Installations

A customs officer has the power to board and search any installation that is subject to the control of Customs,³⁰ or at which there is a ship or aircraft that has come to the installation from a place outside Australia,³¹ or on which an officer has reasonable grounds to believe there are goods that are subject to the control of Customs.³²

²¹ Section 5C. See Chapter 3 for further detail about these installations.

²² Section 4(5)-(8).

²³ *Sea Installations Act 1987* s 4(1).

²⁴ Section 49B(1).

²⁵ Sections 49B(2), 4(9)-(18).

²⁶ Section 4.

²⁷ Sections 5A, 5B.

²⁸ Section 126A.

²⁹ Section 126B.

³⁰ Section 187(1)(b)(i), (d)(i).

³¹ Section 187(1)(b)(ii), (d)(ii).

³² Section 187(1)(b)(iii), (d)(iii).

A customs officer may also board an installation for which permission to attach to the seabed has been granted.³³ A master of a resources installation, or owner of a sea installation, must facilitate the boarding of an installation by a person authorised to do so,³⁴ and failure to comply is an offence of strict liability.³⁵

8.3.2 Prohibition on Direct Journeys

In order to regulate people coming from or proceeding overseas, the Act prohibits direct journeys between installations and foreign countries, where the goods or persons brought from that foreign country have not been available for examination within Australia.³⁶ Although, as mentioned above, installations are generally deemed to be part of Australia,³⁷ they are specifically excluded from Australia for the drafting purposes of these provisions.

If these provisions are breached, the holder of the permit for the installation, the owner of the installation and the owner and person in charge of the ship or aircraft on which the goods or persons were transported are all guilty of an offence. These offences are all offences of strict liability,³⁸ with the result that the intention of the offender is irrelevant to the offence. It is, however, a defence if the relevant journey is necessary to secure the safety of life or the safety of a ship, aircraft or installation.³⁹

The Act also prohibits journeys between external places and resources installations in the Joint Petroleum Development Area (JPDA)⁴⁰ which is the area in the Timor Sea that is the subject of agreement between Australia and East Timor. Similar penalties and defences apply as to those outlined above.

8.4 Goods

The Customs and Border Protection Service is charged with control over goods imported into Australia.⁴¹ All goods on a ship or aircraft that has come from outside Australia and that is within the limits of a port or

33 Section 187(1)(c), (e). Permission may be granted to attach an installation to the seabed under ss 5A and 5B.

34 Section 61.

35 Section 61(2).

36 Section 58A, 58B.

37 Section 5C.

38 Section 58A(5A), with a note to s 6.1 of the *Criminal Code*.

39 Section 58A(6).

40 Section 58B. The Joint Petroleum Development Area (JPDA) is defined in the *Petroleum (Timor Sea Treaty) Act 2003*, and is discussed in Chapter 3.

41 Sections 30 and 68 provide for this.

airport within Australia are subject to the control of Customs.⁴² There is, however, an exception for traditional activities performed by traditional inhabitants in the Torres Strait⁴³ which area is mentioned further in Chapter 13. It is an offence to move, alter or interfere with goods that are subject to Customs control.⁴⁴

8.4.1 Prohibited Imports

The Governor-General may, by regulation, prohibit the importation of certain goods into Australia⁴⁵ which importation may be absolute,⁴⁶ or subject to certain limitations.⁴⁷ They may allow for the provision in licences that have the effect of legalising the importation of otherwise prohibited goods⁴⁸ and, of course, conditions may apply and penalties may be imposed if these conditions are violated.⁴⁹ These offences are absolute liability offences⁵⁰ with the result, as mentioned above, that intention on the part of the offender is not necessary for the offence to be committed. The list of prohibited imports is extensive and may be found in the schedules to the *Customs (Prohibited Imports) Regulations 1956*.

Narcotics will be addressed shortly but it is worth noting two points here. First, the Commonwealth's *Criminal Code*, particularly Div 307, largely governs the offences for importing and exporting illegal drugs. Secondly, under the *Criminal Code* the relevant minister may make emergency determinations that certain substances are "border controlled" drugs, plants or precursors.⁵¹ The *Customs Act 1901*, in turn, provides that these substances are taken to be prohibited imports as if they are listed in the *Customs (Prohibited Imports) Regulations 1956*.⁵² Finally on imports, a person who owns goods that are imported into Australia is required to categorise them for either home consumption or for warehousing.⁵³

8.4.2 Prohibited Exports

Similar provisions that apply to prohibited imports also apply to prohibited exports and they need not all be repeated. The power to prohibit

42 Section 31.

43 Section 30A.

44 Section 33.

45 Section 50.

46 Section 50(2)(a)

47 Section 50(2)(aa)-(c).

48 Section 50(3).

49 Section 50(4)-(7).

50 Section 50(6), (9).

51 *Criminal Code* ss 301.8, 301.9.

52 Section 51A.

53 Section 68(2).

certain exports is granted to the Governor-General,⁵⁴ who may also create licences to export prohibited exports, subject to conditions.⁵⁵ Absolute liability applies to persons who breach the terms of any licence so granted.⁵⁶ The complete list of prohibited exports may be found in the schedules to the regulations.⁵⁷

8.5 Narcotics

A key concern underpinning Australia's customs regime relates to the prohibition of illicit drug imports. There are a number of provisions of the *Customs Act* that specifically empower officers of customs (or, in some circumstances, officers of the police force or the Australian Defence Force) to take action where narcotic substances are suspected to have been illegally brought into the country. Other Acts, such as the Commonwealth's *Criminal Code*, make provision for other relevant offences.

Because of the importance that the regulation of harmful drugs plays in Australian society it is appropriate to set out some background on narcotics. Before the passing of the *Customs Act* in 1901 after federation, drugs were generally not regulated in the Australian colonies.⁵⁸ With the new Act, however, one of the first bans to be imposed was upon the importation of opium for non-medical purposes.⁵⁹ This proclamation was made under the then-existing provisions of the *Customs Act* allowing for certain substances to be proclaimed "prohibited imports". Almost immediately, drug smuggling of opium commenced and it has never since stopped. During the 1960s and 1970s, Australia experienced a dramatic increase in heroin use.⁶⁰ This can be attributed partly to the large number of United States servicemen then on leave from the Vietnam War and coming to Kings Cross, Sydney, as well as the increasingly seductive image associated with drug use. By the 1980s, organised crime had become attracted to the industry due to the large financial incentives involved.⁶¹

In June 1983, the Stewart Royal Commission found that this illegal activity had taken place with the benefit of significant criminal conduct

54 Section 112.

55 Section 112(2A).

56 Section 112(2BB), (2BE).

57 *Customs (Prohibited Exports) Regulations 1958*.

58 For a more comprehensive discussion on the history of drug policy, see J Rowe, "Pure Politics: A Historical Look at Australian Drug Policy" (2001) 26 *Alt LJ* 125.

59 See *Opium Proclamation 1905*.

60 J Rowe, "Pure Politics: A Historical Look at Australian Drug Policy" (2001) 26 *Alt LJ* 125.

61 Ibid citing AW McCoy, *Drug Traffic: Narcotics and Organised Crime in Australia* (Harper & Row, 1980), p 80.

on the part of police.⁶² In 1997, the Prime Minister launched the “*Tough on Drugs*” National Illicit Drug Strategy, a strategy that was essentially based upon a policy of “zero tolerance” towards drug use. Since the Australian Labor Party won office at the end of 2007, no new drugs policy has been announced,⁶³ however, a media release dated 14 April 2007 explains an approach to tackling the increasing prevalence of ICE within the Australian community.⁶⁴

Although the powers granted to officials will be addressed more widely shortly, it is worth noting here that an officer may seize, without warrant, any narcotic goods found on a ship or aircraft.⁶⁵ The definition of “officer” is quite broad and, apart from a customs officer, includes a member of the police force or a member of the Australian Defence Force.⁶⁶ The Act also gives certain wide powers to an “authorised person” to seize narcotic goods etc and this, again, is defined as an officer of customs, a member of the police force and a member of the Australian Defence Force.⁶⁷

The Act also grants a power of arrest to an officer of customs or police for offences relating to smuggling and the illegal importation of drugs.⁶⁸ These offences, however, are “imported” from the Commonwealth’s *Criminal Code* and are not expressly stated in the *Customs Act 1901*.⁶⁹

8.6 Incoming Vessels; Duties of Masters and Operators

Incoming vessels carrying crew and passengers need to be regulated as they often carry goods liable to duty or drugs that are prohibited. Also, the people on board need to be processed in relation to passports and visas; which is done in cooperation with the Department of Immigration and Citizenship.⁷⁰ The *Customs Act 1901* deals with this by placing a duty on the master and operators of incoming vessels as well as aircraft to land at a recognised port, where facilities are available to deal with them

62 J Rowe, “Pure Politics: A Historical Look at Australian Drug Policy” (2001) 26 *Alt LJ* 125.

63 The website of the Department of Health and Ageing states that content on the National Drugs Strategy is “under review” following the 2007 federal election. See <www.health.gov.au/internet/main/publishing.nsf/Content/temp> (accessed 30 July 2008).

64 See the Australian Labor Party website <www.alp.org.au/media/0407/msloo140.php> (accessed 30 July 2008).

65 Sections 185, 185A.

66 Section 185(5).

67 Sections 183UA, 203C.

68 Section 210.

69 For instance, s 210(1)(c), which imports Div 307 of the *Criminal Code*, prohibits the import or export of border controlled drugs.

70 See Chapter 6, Offshore Immigration Laws.

and to report their likely arrival in good time ahead, so the Customs can assess the risk the vessel or aircraft is likely to pose.

To this end the master of every ship from a place outside Australia must bring the ship to the designated boarding station appointed for that port⁷¹ as must the pilot of an aircraft to a designated airport.⁷² Once in the area, sometimes offshore and sometimes alongside, the vessels need to be boarded by customs officials and so marine pilots and masters of ships must take all reasonable means to facilitate boarding.⁷³ Also masters and pilots must not use their vessels to smuggle goods.⁷⁴ The penalties for breaching this section will depend on the type of goods smuggled.⁷⁵ Most of these offences are strict liability offences, meaning intention is not relevant to the commission of the offence.⁷⁶

An operator of a ship or aircraft is also responsible for filing an impending arrival report,⁷⁷ as well as an arrival report.⁷⁸ Various time frames are specified in the Act for the making of these reports and the details must include listing the passengers and crew.⁷⁹ This is, of course, to allow checks to be made before arrival.⁸⁰ The Customs Service shares this information with the Department of Immigration and Citizenship and also the police.

8.7 Incoming Yachts: Duties

Large vessels usually have commercial functions (cargo carriers, cruise liners, etc) and they will generally have experienced crew onboard and support staff ashore who are capable of ensuring that the ship's operations comply with local customs requirements. Also, because of their size, they are limited to entering Australia at only a few, well-established ports where the customs officers will be available.

The crew of yachts and other small craft, on the other hand, are not well-equipped to deal with the legislative requirements of customs. They seldom have onshore support staff, they may land at almost any part of the Australian coastline, and they are much more susceptible to difficult weather conditions that may require a change in arrival times or places. Further, their ability to communicate their details and changes may be limited.

71 Section 60(1).

72 Section 60(2).

73 Section 61(1).

74 Section 233A.

75 See ss 233AB-233BABAC.

76 Sections 60(1A), (2A), 61(2), 62(2).

77 Section 64.

78 Section 64AA.

79 Sections 64ACA, 64ACB.

80 See, for example, s 64ACD.

Impending arrival reports may be made in writing (a “documentary” report) or electronically.⁸¹ A documentary report must be in an approved form, and must be communicated to an officer at the port where the ship is expected to arrive.⁸² The approved form is available on the Customs website and is called the “Impending Arrival Report (Sea)”. Although it is relatively simple, it appears to be designed with larger ships in mind so is not appropriate for yachts.⁸³ The Customs CEO is empowered to settle on the detail for impending arrival reports and crew reports⁸⁴ and these are available in the extensive material available on the Customs’ website.⁸⁵

The present drafting of the *Customs Act 1901* is not well done as the reporting requirements, particularly s 64 (impending arrival report) and s 64ACB (crew reports), are designed to cover ships of all kinds – large, small, commercial, fishing, recreational, as well as aircraft.⁸⁶ The result may be a problem in enforcement cases, particularly because Customs must prove facts to the criminal standard of proof to obtain a conviction in some cases,⁸⁷ and because of the penal nature of the statute means it is likely to be narrowly construed. The requirement to report a ship’s impending arrival within a time limit depending on the length of the voyage is, however, fairly sensible. Regular review of this area of the Act to create more certainty for small craft users would be helpful to the maritime community.

8.8 Customs Officers’ Powers

To protect Australia’s border from illegal entry of people and goods, the Australian government has established a complex web of departments and responsibilities. From the legal point of view, the actual powers granted to officers are important and it is to this aspect that this section is directed. However, the “assets”, as they are referred to, that are provided to these officers are important. These include aircraft, shore facilities and, of course, some vessels. The coordination of the search and deployment of assets offshore is provided by the Australian Border Protection Command, which is a combination of the Customs and Border Protection

81 Section 64(3).

82 Section 64(9).

83 Section 4 defines an “operator” to include the “master”, but this would not be readily apparent to a master from the face of the Impending Arrival Report (Sea) form.

84 Sections 64(11) and 64ACB(7).

85 For Customs’ website, see <www.customs.gov.au>.

86 Generally see Customs’ website page “Information for yachts travelling to Australia – let us know you are coming”.

87 See, eg, *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161.

Service and the Department of Defence.⁸⁸ For the purposes of search, patrol, and boarding operations, the Border Protection Command cooperates with the other border protection departments including fisheries and immigration. The Border Protection Command is further mentioned later in this chapter.

The extensive powers granted to the officers or the Customs and Border Protection Service are complex. When one combines these with the fact that Customs officers are given powers in relation to other duties, such as fisheries and immigration, the situation becomes worse. The government has announced that it intends to introduce a Maritime Powers Bill, as set out in the Memorandum at the front of this book. If and when this Bill becomes an Act it is to be hoped that it simplifies the situation about enforcement powers offshore rather than the reverse.

Before addressing the powers granted to the Customs officers it is appropriate just to mention some of these Customs assets.

8.8.1 Customs Vessels

The Maritime Operations Support Branch of the Customs Marine Unit provides air and marine assets to enforcement operations and Border Protection Command.⁸⁹ In terms of ships, these assets include eight *Bay* class vessels. Australia's *Bay* class vessels are equipped with 6.4 metre tenders that can be lowered into the water and used for boarding, a 7.62 millimetre general-purpose machine gun, accommodation for 16 people and sufficient fuel for a range of approximately 1000 nautical miles. *Bay* class crew members also carry personal small arms. In 2009 the first steps were in hand by Customs to replace the *Bay* class vessels with a newly designed fleet.

Other vessels operated by Customs include the ACV (Australian Customs Vessel) *Triton* and the *Ocean Viking*. ACV *Triton* is a large, powered trimaran and to date has been used to patrol northern Australian waters. It is armed and has considerable accommodation facilities because its main function is to take persons detained at sea to port for processing thereby releasing the patrol vessels to continue operations at sea. These functions are, of course, mainly related to immigration and

88 Border Protection Command provides security for Australia's offshore maritime areas through the Australian Customs Service, the Department of Defence, the Australian Fisheries Management Authority, the Australian Quarantine and Inspection Service, and other Commonwealth, State and Territory agencies. Border Protection Command tries to provide a coordinated national approach with many other government agencies to Australia's offshore maritime security, which includes illegal exploitation of natural resources, illegal activity in protected areas, unauthorised maritime arrivals (boat people), prohibited imports and exports, maritime terrorism, piracy, compromise to bio-security and marine pollution. Details are available at <www.bpc.gov.au>.

89 These details are available at <www.customs.gov.au>.

fisheries regulation rather than customs regulation, a point that will be developed in the concluding chapter of this book. Another fairly significant vessel run by Customs is the *Ocean Viking*, which is contracted from P&O to conduct offshore patrols, including in the Southern Ocean mainly on fishery patrols.

As well as the offshore assets there is, of course, a major shore based department with access to all of the government resources. With this significant government machinery behind them it is important to understand what powers have been granted to customs officials under the *Customs Act* and, of course, the limits on them.

8.8.2 Powers

Division 1 of Pt XII of the *Customs Act 1901* provides for “powers of officers” and they are very wide ranging. The Chief Executive Officer is given the power to grant directions concerning the exercise of these powers⁹⁰ although these directions are deemed to be “disallowable instruments” and, when laid before the Parliament, may be disallowed by it in whole or in part.⁹¹

It is of some importance that the powers specified in this part of the Act are granted to different categories of “officers”. For instance, some powers may only be exercised by a customs officer, while others may be exercised by customs, police, or Australian Defence Force officers. For this particular section of this chapter the powers are given to the “commander of a Commonwealth ship”. This is stated to be a commissioned officer of the Australian Defence Force and the most senior customs officer on board the relevant ship.⁹² These provisions also relate to the commanders of aircraft.

It is noted that Australian Defence Force officers are given these powers in relation to customs regulation, which is really a civil and not a military function. The use of the defence forces in civil or police situations has a long constitutional history under British law, which has come down as the Australian law. Gibbs J discussed the constitutional basis upon which Defence Force personnel may assist the enforcement of a Commonwealth law in *Li Chia Hsing v Rankin*.⁹³ The status of the Governor-General as the commander-in-chief over the naval and military forces of the Commonwealth appears to place control of the Defence Force within the powers of the Executive branch of government.⁹⁴ Under

90 Section 183UC(1). The word “officer” is defined in s 5(1).

91 Section 183UC(2). “Disallowable instruments” are dealt with in *Acts Interpretation Act 1901* s 46B.

92 Section 184A(14). The word “officer” is defined in s 5(1).

93 (1978) 141 CLR 182 at 195.

94 Constitution s 68. See also Sir Ninian Stephen, “The Role of the Governor General as Commander-in-Chief of the Australian Defence Force” (1983) 43 *Defence Force Journal* 3.

the British constitutional tradition, the Defence Force must not be used to enforce the law against Australian citizens except in extraordinary circumstances.⁹⁵ This restriction does not apply, however, to foreigners, which is why the powers granted to the Australian Defence Force in relation to customs offences need to be carefully viewed. This issue of the government using the Australian Defence Force in civilian enforcement and regulatory roles is more fully discussed in Chapter 5.

8.8.2.1 Request to Board

A commander of a Commonwealth ship or aircraft may request the master of a ship to permit the commander or the commander's crew to board the master's ship.⁹⁶ Note that this does not amount to a power to actually board the other ship as this power is provided by other sections⁹⁷ although there is some absurdity in this legislative structure of "requesting" to board and then boarding anyway irrespective of the response,⁹⁸ as will be noted shortly.

A request may be made when a foreign ship is in Australian waters,⁹⁹ in the contiguous zone, within 500 metres of an Australian resources installation,¹⁰⁰ or where the ship is on the high seas provided it is or was supporting contraventions that occurred in "Australia".¹⁰¹ This latter power is designed to stop mother ships from supporting smaller vessels that commit illegal acts. Mother ship apprehension is codified by Art 111 of UNCLOS, which allows for a right of hot pursuit not only when a foreign mother ship has violated the laws of a coastal state, but also when one of its boats has.¹⁰² Article 111 requires that the vessel the mother ship is supporting be present within the internal, territorial or contiguous zones of the coastal state before the pursuit may commence. Similarly, it would appear that the powers under s 184A relating to mother ships would only apply where a vessel is in the relevant zone. It is important to know the difference between a mother ship and other support vessels which do not mother the smaller vessels – which is discussed in Chapter 7 in the *Chen Long* case.

95 C Moore, *ADF on the Beat: A legal analysis of offshore enforcement by the Australian Defence Force* (Ocean Publications, 2004), p 10.

96 Section 184A.

97 Sections 185 and 185A.

98 There is a similar legislative structure under the *Fisheries Management Act 1991*, as to which see Chapter 7.

99 Section 184A(2).

100 Section 184A(4).

101 Section 184A(5).

102 C Moore, *ADF on the Beat: A legal analysis of offshore enforcement by the Australian Defence Force* (Ocean Publications, 2004), p 72.

This position about taking action contemporaneously with the offence was also stated in the Border Protection Legislation Amendment Bill 1999 Explanatory Memorandum. There it stated, with reference to s 184A(1) and (5), that:

The request to board must be made as soon as practicable after the contravention by the other boat or craft occurs. *This is to ensure that, as far as practicable, any action taken against the mother ship is contemporaneous with the offence committed in the territorial sea* (emphasis added).¹⁰³

Requests may also be made of suspicious foreign ships in the EEZ and of ships on the high seas supporting contraventions in the EEZ.¹⁰⁴ A request may be made to an Australian ship regardless of where it is so long as it is outside the territorial sea of any other country.¹⁰⁵ Ships without nationality on the high seas are covered by a separate provision as there is an entitlement to board them at any place not within a foreign jurisdiction.¹⁰⁶

The absurdity mentioned above arises as the *Customs Act* then goes on to provide that a master must comply with a “request” made under any of these powers and refusing to comply is an offence (carrying a penalty of imprisonment for up to two years).¹⁰⁷ A defence of the master having a “reasonable excuse” for not complying is available.¹⁰⁸

8.8.2.2 Hot Pursuit

This is not the place to go into the international law of hot pursuit, nor even to discuss the relevant provisions of UNCLOS.¹⁰⁹ It should be noted, however, that the *Customs Act 1901* does not use the phrase “hot pursuit” but expresses the power in terms of the power to “chase”. A foreign ship whose master has not complied with a request to board made under the Act may be chased for the purpose of boarding that ship.¹¹⁰ The absurdity of the drafting is further developed as there does not have to be a “request” in the first place to have power to chase and board. The Act provides that its provisions still apply even if no request to board has been made provided such request *could* have made before the chase began.¹¹¹ It is a nice issue to consider that the Australian law provides that a master may be guilty of the offence of not agreeing to a “request”

103 Paragraphs 39 and 40, Sch 2.

104 Section 184A(6), (7).

105 Section 184A(3).

106 Section 184A(9).

107 Section 184A(12).

108 Section 184A(13).

109 UNCLOS Art 111 deals with the right of hot pursuit.

110 Section 184B.

111 Section 184B(3).

to board the vessel when the request was never made. The Act should be redrafted to reflect the actual offence, which is failing to obey a lawful order to stop.

One of the issues about the international law concerning hot pursuit is how the use of modern vessels, aircraft (fixed wing and rotary wing), technology and communications fit into the current law. In former days, when the basis for the international law on hot pursuit was being laid down, the chase had to be continuous and with the pursuing vessel keeping the offender in sight and the pursuit was usually by the only one chasing ship. This is no longer appropriate as there may well be a team of ships, aircraft, shore based radar, satellite surveillance, etc, all or any of which may play a part. The Act provides that a chase may continue even if the chasing ship loses sight and/or radar trace of the chased ship and it makes other similar provisions.¹¹² However, the chase may not continue if the chase has been "interrupted" within the meaning of Art 111 of UNCLOS at a place outside the outer edge of the contiguous zone.¹¹³ The doubtful lawfulness of the hot pursuit in the *Viarsa* fisheries litigation probably played a part in the jury acquitting the accused of certain charges, see Chapter 7, Fisheries Laws.

Under the Act Australian ships may also be chased in order to board¹¹⁴ and because the officers so authorised include the Australian Defence Force this again raises the appropriateness of using defence personnel against Australian citizens, as mentioned above.

8.8.2.3 Use of Force by Armed Vessels

A controversial issue in enforcing law at sea is what amounts to reasonable force to compel suspect vessels to stop to be boarded. If a vessel steams off in defiance of an order to stop and a hot pursuit ensues, should, for instance, firearms be used to force it to heave to? The issues are difficult as it may be that crew in the other vessel are killed or wounded when they are completely innocent of any wrongdoing. Perhaps only the master is complicit in wrong doing and the crew members are all innocent or perhaps the whole vessel is quite innocent of any wrong doing at all. Finally, is the enforcement of mere customs duties sufficiently serious for people to be killed or wounded, even if they are guilty of smuggling.

On this point the *Customs Act 1901* provides that any "reasonable means consistent with international law" and any "necessary and reasonable force" may be used in a chase situation.¹¹⁵ The Act further provides

112 Section 184B(4).

113 Section 184B(5).

114 Section 184C.

115 Section 184B(6).

for “firing at or into the chased ship to disable it to compel it to be brought to for boarding” where it is necessary and after firing a gun as a signal.¹¹⁶ This is consistent with international law in that a shot across the bows is an historic signal for a ship to heave to for boarding. This aspect is further developed organisationally as the relevant departments lay down the government policy for various situations about the use of force, which are often referred to as the “rules of engagement”.

Firing “at or into” the vessel is necessarily fraught with the risk of killing or injuring one or more of the crew. If the commander of the firing vessel has got it entirely wrong and there were no lawful grounds for doing this then that may well amount to a *prima facie* case of manslaughter or even murder. However, it is suffice for this book to note that this is a difficult issue and that there is not space to develop it here.

8.8.2.4 Power to Board and Search

The powers given under the *Customs Act 1901* are extremely wide and allow an officer to do almost anything if there is a “reasonable suspicion” of the commission of an offence or the likelihood of one being committed.¹¹⁷ As mentioned above, where a request to board has been given, or even if one is not given, that ship may be boarded pursuant to the powers in the Act.¹¹⁸ Australian ships outside the territorial sea of any other country can be boarded anywhere.¹¹⁹ Once boarded these wide powers then come into force and the section provides power to arrest without warrant, search and examine goods, copy or take extracts from a document¹²⁰ and to detain a ship and bring it to a port.¹²¹ These powers are further mentioned under.

The powers that relate to boarding and searching a vessel may be exercised directly by officers of the customs, police or the Australian Defence Force as the definition of “officer” in the relevant sections includes them all.¹²² The powers may also be exercised by the person in command or the crew of the ship requesting to board.¹²³ “Crew” is defined so as to include a person acting under the command of a com-

¹¹⁶ Section 184B(6)(b).

¹¹⁷ After the *Tampa* incident, the *Border Protection (Validation and Enforcement) Act 2001* further empowered Defence Force commissioned officers and persons under their command with the effect that these already wide powers were further extended: see C Moore, *ADF on the Beat: A legal analysis of offshore enforcement by the Australian Defence Force* (Ocean Publications, 2004), p 34.

¹¹⁸ Sections 185 and 185A.

¹¹⁹ Section 185(1).

¹²⁰ Section 185(2).

¹²¹ Section 185(3).

¹²² See s 185(5), discussed below. The general definition of “officer” is in s 5(1).

¹²³ Section 185(5)(a).

missioned officer.¹²⁴ The definition of “officer” under these provisions also means that, as long as a request has been properly made, a member of the Australian Defence Force may exercise the powers of a boarding officer even if they are not crew members of the requesting Commonwealth ship (or aircraft).¹²⁵ Similar provisions apply to ships with no nationality on the high seas, as long as they are outside the Australian contiguous zone and outside the territorial sea of any other country.¹²⁶

The force used in any exercise of these powers must be “reasonable”,¹²⁷ a point that has been discussed above. A power to board is granted to board all vessels, installations and goods that are subject to the control of Customs.¹²⁸

8.8.2.5 Powers of Detention and Search

There are wide powers in the *Customs Act 1901* to detain vessels, people and goods for the purpose of conducting an external search.¹²⁹ These powers are granted to customs officers and police officers. There are very wide powers given to officers to conduct searches of ships after they have boarded and found people on them.¹³⁰ Internal searches of people require either the consent of the person being searched¹³¹ or the order of a judge¹³² and such searches must be carried out by a medical practitioner,¹³³ as well as conforming to other requirements of the Act.¹³⁴

All officers exercising detention powers must show identification,¹³⁵ and must not use more force than is reasonable and necessary.¹³⁶ If the person is detained by an officer of customs, the detainee is regarded as being in the custody of the Chief Executive Officer.¹³⁷

Further detention powers are granted by Subdiv B of Pt XII, which allows a customs officer to detain a person reasonably suspected of having committed a “prescribed State or Territory offence”.¹³⁸

124 Section 184A(14).

125 See C Moore, *ADF on the Beat: A legal analysis of offshore enforcement by the Australian Defence Force* (Ocean Publications, 2004), p 35.

126 Section 185A.

127 Section 185(3B).

128 Section 187.

129 Section 219Q.

130 Generally see Pt XII, Div 1B.

131 Section 219V(1)(c).

132 See s 4(1) for the definition “Division 1B Judge”, and s 219RA(2) for the power of the minister to appoint a judge as a “Division 1B Judge”.

133 Section 219Z.

134 Which are specified in s 219ZF.

135 Section 219ZC(1).

136 Section 219ZC(2).

137 Section 219ZC(4)(a).

138 Section 219ZJB.

The Act also has provisions relating to consequences arising from boarding and detention. Where a ship is detained the deprivation of or restraint on the liberty of those on board is deemed lawful, no civil or criminal proceedings may be brought by them and, further, the jurisdiction of the courts relating thereto is deemed to be ousted.¹³⁹ However, the ouster of courts does not and cannot apply to matters under s 75 of the Constitution, which grants original jurisdiction to the High Court for certain matters, including where the Commonwealth or one of its officers is a party.¹⁴⁰ As a parliamentary Act cannot oust s 75 High Court jurisdiction it is a strange provision to include in the legislation and it would be better handled by inserting a note to the section. The privative clause attempting to oust the jurisdiction of the courts (other than the High Court) is not justified and should be removed.

The Act also provides that proceedings against any officer relating to these powers may not be commenced if the officer acted in "good faith and used no more force than was authorised".¹⁴¹ Naturally the Commonwealth officers need reasonable protection and this seems a reasonable provision. However, this legislative provision ousting courts (except the High Court) and giving protection merely on the grounds of "good faith" and acting within the forces that was "authorised" is a perilous incursion into personal liberties and should be kept under strict judicial review. As has been mentioned, there is no need to oust the jurisdiction of the courts and this provision should be removed.

8.8.2.6 Powers of Arrest

A customs or a police officer¹⁴² may arrest persons suspected of committing various offences.¹⁴³ The offences listed generally relate to smuggling goods and narcotics.¹⁴⁴ Many of the offences are "imported" from the Commonwealth's *Criminal Code*, and are not expressly stated in the *Customs Act*.¹⁴⁵

A customs officer may also arrest a person if the officer reasonably believes that the person has caused or threatened to cause harm against a

139 Section 185(3AAA).

140 Section 185(3AAB).

141 Section 185(3AB).

142 Quite rightly the Act does not give power of "arrest" to members of the Defence Force. The Defence Forces have a quite different role to play and, of course, they are not trained in arrest procedures and handling civilians who are accused of offences.

143 Section 210.

144 See, eg, ss 231, 233.

145 For instance, s 210(1)(c), which imports Div 307 of the *Criminal Code*, prohibiting the import or export of various matters including drugs. Section 72.13 of the Code is also imported, which relates to import or export of plastic explosives.

Commonwealth public official.¹⁴⁶ In general, there are very wide powers of arrest, all of which may be exercised on the spot and without an arrest warrant. Of course, it is not as though an officer from a vessel carrying out an arrest at sea has access to a magistrate to get a warrant so wide powers are needed.

8.8.3 Other Powers

Other powers available to officers include that they may move or destroy hazardous ships,¹⁴⁷ carry arms,¹⁴⁸ and question passengers.¹⁴⁹ Officers may also seize, without warrant, goods suspected to be narcotic goods.¹⁵⁰ A somewhat similar power is given to an “authorised person” where the goods are in a container.¹⁵¹

As mentioned above, a search of people, goods and the ship is authorised after a ship has been detained, by an officer of police, customs or the Australian Defence Force.¹⁵² A person of the same sex as the person being searched must conduct any search conducted under this section.¹⁵³ If an officer of the same sex is not available, any person of the same sex may be used to conduct the search, so long as that other person agrees.¹⁵⁴ The Act allows the Chief Executive Officer to declare a class of customs officers to be “detention officers”.¹⁵⁵ Detention officers may detain persons suspected of carrying prohibited goods on his or her body for the purpose of conducting a frisk search.¹⁵⁶ A “frisk search” is defined as a search of the person by quickly running the hands over a person’s outer garments.¹⁵⁷ The frisk search may be carried out by any officer of customs.¹⁵⁸ An officer may use reasonable force against a person who refuses to submit to a frisk search, or use reasonable force to take a thing found as a result of that search.¹⁵⁹

Goods that are seized must generally be secured,¹⁶⁰ and the Act also provides rules for the retention of things seized as evidential material.¹⁶¹

146 Sections 185(2)(d), 210(1A).

147 Section 185B.

148 Section 189A.

149 Section 195.

150 Section 185(2)(e).

151 Section 203C.

152 Section 185AA.

153 Section 185AA(5).

154 Section 185AA(5)(b).

155 Section 219ZA.

156 Section 219L.

157 Section 183UA(1).

158 Section 219M.

159 Section 219NA.

160 Section 204.

161 For example, s 203R.

8.8.4 Trade Powers

Part XII of the *Customs Act 1901* is concerned with “Officers” and its Div 1 is concerned with their powers. However, inserted into this division is Subdiv JA, which gives powers to monitor and audit the Australia–United States Free Trade Agreement. This wide, interesting and important subject is not, however, appropriate in this part of the Act even though the subdivision does relate to the power of officers under this Agreement. It being there is further justification for a total review of this Act. This provision is not included in the subject of this book and is not discussed.

8.8.5 Interaction of the Customs Powers and UNCLOS

In various parts of the *Customs Act 1901* mention is made of UNCLOS and the need to comply with international law. This is to the good but it is not very effective as the Full Federal Court in *Olbers’* case made it clear that a domestic court normally need not have recourse to international law but should concentrate on the precise provisions of the statute before it.¹⁶² Further, most cases come before an Australian domestic court and even if the Australian government is in breach of its international obligations these courts have no jurisdiction to pronounce on it. Any relief lies in international courts or tribunals and these actions are only available to governments and private litigants may not usually be heard.

Finally it should be mentioned, as has been done in Chapters 2 and 6, that the powers of the coastal state in the territorial sea and the contiguous zone have relevant restrictions. For instance, UNCLOS has a restriction that provides for innocent passage in the territorial sea in that a coastal state “shall not hamper the innocent passage of foreign ships through the territorial sea except in accordance with this Convention”.¹⁶³ This wide provision is constrained by Art 21 which allows for a coastal state to make laws applicable in the territorial sea only in respect of such activities as fisheries, customs, immigration and sanitary (quarantine) matters.

Similarly in the contiguous zone, there is only power for the coastal state to make laws to prevent infringement of its customs, fiscal, immigration, and sanitary laws.¹⁶⁴ In this zone, therefore, the request and board powers under the *Customs Act 1901* will not violate Australia’s obligations under UNCLOS so long as those powers are exercised for the purpose of enforcing customs, quarantine or immigration legislation.

¹⁶² *Olbers Co Ltd v Commonwealth* [2004] FCAFC 262. The various *Olbers’* cases arising out of the arrest of the FV *Volga* are discussed in Chapter 7.

¹⁶³ Article 24.

¹⁶⁴ Article 33.

8.8.6 Conclusions on Powers

This concludes this section on the powers given to officers under the *Customs Act 1901* and readers will see that they are very wide. Not every nuance, circumstance, restriction and provision has been included as the legislation is so extensive, but this outline gives a general picture of the contents of the Act. Also, and as has already been mentioned, these customs provisions also overlap with powers given under defence, immigration and fisheries powers: see Chapters 5, 6 and 7.

A further aspect of concern about these wide powers is the lack of adequate provision to uphold personal liberties. For instance, the *Crimes Act 1914* has a provision that after arresting someone on reasonable suspicion if, before the matter comes to trial, the officer no longer holds that suspicion then the officer must release the person.¹⁶⁵ In practice this should normally happen in relation to detentions of vessels and persons offshore, but it is better if the legislation makes it mandatory. After all, government officers have been shown to make errors from time to time that can lead to great injustices and the occasions on which these errors occur highlight the need to balance law enforcement with protection of personal liberties and private property.

8.9 Forfeitures

It has long been accepted that if certain goods are illicitly smuggled into or out of a country then part of the penalty may include the forfeiture of those goods. For instance, if drugs, liquor or such matters are illicitly smuggled then, on conviction, the court may order their forfeiture to the government (the Crown).

Under the *Customs Act 1901* in the “Penal Provisions”, the Act provides a long list of ships, boats, aircraft, and goods that “shall” be forfeited to the Crown.¹⁶⁶ The sections do not specifically state that this is so only on conviction but this is implied so this aspect is reasonable.¹⁶⁷ There are similar provisions in relation to goods in that certain goods,¹⁶⁸ and the proceeds of drug trafficking,¹⁶⁹ also “shall” be forfeited. Amongst the list of forfeited goods are all prohibited imports,¹⁷⁰ and goods for which a licence has been issued subject to conditions, and these conditions have not been complied with.¹⁷¹

165 *Crimes Act 1914* (Cth) s 3W(2).

166 Section 228.

167 The *Fisheries Management Act 1991* has forfeiture on a mere reasonable suspicion, as discussed in Chapter 7.

168 Section 229.

169 Section 229A.

170 Section 229(1)(b).

171 Section 229(1)(a).

There are some noteworthy points about these provisions that are concerning and could give rise to injustice. The first point is that the forfeiture provisions are mandatory and it would be preferable if forfeiture were left in the discretion of the court. The court normally balances the penalty with the seriousness of the offence and this discretion is denied by the Act as the forfeiture is automatic. This potential injustice is particularly pertinent in relation to property of high value. Under the provisions of the Act, for example, forfeiture automatically occurs of the whole ship if it is used in smuggling or knowingly used in unlawful importation, exportation or conveyance of any prohibited imports or exports or if the master has refused permission for his or her ship to be boarded and then fails to facilitate by reasonable means the boarding.¹⁷² A similar result is claimed by the Act if some person throws overboard, staves or destroys any goods to prevent their seizure by the Customs, and this applies no matter how insignificant a position, if any, that person holds in the management structure of the ship, or the ship is light or deficient in cargo after sailing from port.¹⁷³ Similar provisions apply to overseas resource installations, which are normally worth millions of dollars, as the Act states that they become automatically forfeited if they are installed or attached to the seabed in a prescribed sea area without the permission of the Chief Executive Officer.¹⁷⁴ There is not space here to develop the many injustices and absurdities that could arise from these provisions. There are similar provisions in the fisheries law and these have been addressed in Chapter 7.

The Act also provides for forfeiture if goods are thrown overboard, or destroyed to prevent seizure by customs, or if a ship is altered or fitted in any manner to conceal goods.¹⁷⁵ Take the instance of a large cargo or passenger ship with many crew or passengers and one of those people is an illicit smuggler of, say, liquor or drugs. If that person throws the illicit goods overboard to avoid seizure then the whole ship, worth millions of dollars, is purportedly automatically forfeited to the Crown. These provisions could give rise to injustice and they are another example of why the *Customs Act 1901* is in need of serious review.

8.10 Quarantine

Every country needs to protect itself from the importation of diseases and pests that are dangerous to people, animals, crops and the environment. Quarantine has long been accepted as a suitable means to control these things and Australia needs an effective system as much as, and more than some, other countries. Australia benefits from a natural

¹⁷² Section 228(1), (2)

¹⁷³ Section 228(4), (5).

¹⁷⁴ Sections 228A, 228B.

¹⁷⁵ Section 228(4), (6).

environment that, compared to other countries, is relatively free of many debilitating pests and diseases of humans, animals and plants and this must be protected. This section will look at the legislation that has been enacted to this end.

8.10.1 Quarantine Act 1908

Australian quarantine is regulated by the *Quarantine Act 1908* (Cth), which derives its authority from s 51(ix) of the Constitution.¹⁷⁶ Before the 1908 Act, the States had uniform quarantine Acts which were known as the "Federal Quarantine Acts".¹⁷⁷ Responsibility for managing the quarantine system moved from the Department of Trade and Customs to the Commonwealth Department of Health in 1921. Service delivery of animal and plant quarantine was then conducted by State departments but the human quarantine services were increasingly conducted by the Commonwealth. In 1984 the full responsibility was transferred to the Commonwealth Department of Primary Industry and in 1995 the Agriculture and Resource Management Council of Australia and New Zealand agreed to transfer service delivery functions from the States to direct Commonwealth control.¹⁷⁸ Currently, the Australian Quarantine and Inspection Service, which is charged with this responsibility, is part of the Australian Department of Agriculture, Fisheries and Forestry (DAFF).¹⁷⁹

The Quarantine Operations Division is divided into four departments, respectively dealing with animal quarantine, cargo management and shipping, plant quarantine and biological aspects and border issues.¹⁸⁰ The Australian Quarantine and Inspection Service administers the *Quarantine Act 1908*, *Export Control Act 1982*, *Imported Food Control Act 1992* and various other legislative instruments. From July 2009 many of these functions were amalgamated into the Biosecurity Services Group in order to put the services on a combined national footing.¹⁸¹

The structure of the *Quarantine Act 1908* appears sound. Part I is concerned with definitions and scope; Pt II with administration with a small added part relating to the environment; Pt III has general provisions relating to jurisdiction which include regulating for the arrival of vessels from overseas, the *Torres Strait Treaty* area and offshore resource and sea

¹⁷⁶ Constitution s 51 which provides that the Parliament has power to make laws with respect to "... (ix) Quarantine".

¹⁷⁷ M Nairn, *Australian Quarantine: A Shared Responsibility* (Department of Primary Industries and Energy, 1996) p 7.

¹⁷⁸ Ibid, p 7.

¹⁷⁹ See Australian Quarantine and Inspection Service on <www.daff.gov.au/aqis/about> (accessed 23 July 2008).

¹⁸⁰ Australian Quarantine and Inspection Service organisational chart, see <www.daff.gov.au/aqis/about/structure/org-chart> (accessed 27 November 2008).

¹⁸¹ See website <www.daff.gov.au/bsg/biosecurity_services_group> (accessed 1 September 2009).

installations. Part IV addresses details about quarantining of vessels, persons and goods and Pt V with animals and plants. Part VI deals with expenses relating to quarantine and enforcement and grants necessary powers in relation to quarantine and inquiries into equine influenza and Parts VIA and VIB with enforcement and inquiries into equine influenza. Finally, Pt VII deals extensively with details about legal matters such as liability for wrongful importation, seizure of infected animals and plants, treatment of vessels subject to quarantine, compensation and jurisdiction of courts. In all the Act takes up over 220 pages of legislation and there are, of course, extensive regulations.

It is now appropriate to mention some particular aspects of the Act that have offshore application.

8.10.2 Quarantine Offshore Jurisdiction

The jurisdiction of the Act includes measures designed to prevent the import, establishment or spread of disease, and the regulatory powers available include detention, exclusion, and regulation of vessels and installations.¹⁸²

The Act gives power to the Governor-General to supersede State quarantine measures in the event of an emergency and to make proclamations about epidemics.¹⁸³ Apart from quarantine officers, certain nominated persons and agencies, including the Defence Force, may be authorised under the Act to coordinate and to deal with the spread of disease.¹⁸⁴ However, the Defence Force may only be authorised as such an agency after consultation with the Defence Minister.¹⁸⁵

The *Quarantine Act 1908* needs to apply offshore of course and so its provisions are expressed to include Cocos Island and Christmas Island,¹⁸⁶ the Ashmore and Cartier Islands¹⁸⁷ and the Joint Petroleum Development Area in the Timor Sea.¹⁸⁸ Chapter 2 of the *Criminal Code* applies to all offences against the *Quarantine Act*.¹⁸⁹

The minister may, by notice in the *Gazette*, “declare that a place beyond or in Australia is infected with a quarantinable disease or quarantinable pest”.¹⁹⁰ If an epidemic is declared¹⁹¹ then extensive powers come

¹⁸² Section 4.

¹⁸³ Sections 2A, 2B.

¹⁸⁴ Section 3.

¹⁸⁵ Section 5(1AA).

¹⁸⁶ Section 6.

¹⁸⁷ Section 6AB. In a “belt and braces” provision, “Australia” is also defined to include the Territory of the Ashmore and Cartier Islands. For more detail on this see Chapter 10, Offshore Territories Laws.

¹⁸⁸ Section 6A. The JPDA is dealt with in Chapter 3.

¹⁸⁹ See s 86G.

¹⁹⁰ Section 12.

¹⁹¹ Section 2B.

into operation to deal with it, although in such epidemics it is usually only identified areas, known as "zones" in the Act, that are declared to have an epidemic.

The Governor-General is empowered to proclaim certain ports to be "first ports of entry",¹⁹² and it is an offence for a master of an overseas vessel to arrive in Australia without entering a port declared to be a first port of entry.¹⁹³ The maximum penalty for breaching this section is imprisonment for five years although a 10 year maximum penalty applies where the master knew that a quarantinable pest or disease existed on the vessel.¹⁹⁴

A quarantine officer may board any vessel in port or otherwise in Australia, the Cocos Islands or Christmas Island or the territorial sea. There is power to proclaim a further area for boarding which is up to nine miles, or such greater distance as the Governor-General declares, to seaward side of the territorial sea.¹⁹⁵

8.10.3 Application to Vessels and Installations

The master of any vessel leaving a place outside Australia to travel to a port in Australia is required to give notice and certain information to the Australian authorities about who and what may be on board.¹⁹⁶ If the incoming vessel is cleared, or having been quarantined is then cleared, it is granted "pratique", which means it has a licence, in effect, to enter the Australian jurisdiction and use the port.¹⁹⁷ Similar provisions apply to aircraft but with changes to suit their particular characteristics. As already mentioned, the master of a vessel must bring the vessel only to the declared first port of entry, and in the approach the vessel should display the quarantine signal before it comes within three nautical miles of any port or within 500 metres of an Australian installation.¹⁹⁸ Failure to comply is an offence punishable by up to 50 penalty units. A master must also facilitate the boarding of the vessel by a quarantine officer when so instructed.¹⁹⁹

192 Section 13.

193 Section 20.

194 Section 78.

195 Section 70. Of course, international law allows quarantine powers (sanitary laws) in the contiguous zone, which is up to 12 nautical miles to the seaward side of the territorial sea: UNCLOS Art 33.

196 Section 74AA.

197 Section 17(1). Any incoming resource installation or sea installation must also be cleared in a similar manner to an incoming vessel: s 17(2).

198 Section 21.

199 Section 25.

8.10.4 Application to Persons and Goods

As vessels, persons and goods onboard are all vetted at the same time, if a vessel is subject to quarantine so are all of the persons and goods aboard it.²⁰⁰ Unauthorised persons are prohibited from boarding or approaching vessels or installations subject to quarantine²⁰¹ and persons and goods must not leave a vessel or installation until cleared.²⁰²

If a person is not cleared then the person may be detained in certain circumstances. These include where the person has become infected with a quarantinable disease,²⁰³ or where the person has come into contact with or been exposed to infection from goods or persons subject to quarantine.²⁰⁴ Detention for the purposes of quarantine has been held to be non-punitive in character.²⁰⁵

8.10.5 Quarantine Powers

As mentioned above, a quarantine officer has power to board any ship up to nine miles out from the territorial sea²⁰⁶ and the officer may then examine any part of the vessel, or examine any animals or plants or other goods on board.²⁰⁷ A quarantine officer may give directions to a vessel if it is suspected that the vessel is carrying, or will carry, infected goods,²⁰⁸ and also has the power to search goods.²⁰⁹

The officer may require the master or the medical officer to answer questions about prescribed matters relevant to that vessel²¹⁰ and, of course, failure to answer these questions is an offence.²¹¹ Penalties are also imposed for providing false or misleading answers.²¹² An officer may also give a person subject to quarantine directions to go to, or remain in, a particular place.²¹³

200 Section 18(1), (2).

201 Section 24.

202 Section 29.

203 Section 18(1)(b).

204 Section 18(1)(c).

205 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 28 where Brennan, Deane and Dawson JJ held that “involuntary detention in cases of mental illness or infectious disease can also legitimately be seen as non-punitive in character and as not necessarily involving the exercise of judicial power”.

206 Section 70.

207 Section 70(1)(c), (d).

208 Section 74D.

209 Section 70A.

210 Section 28.

211 Section 28(4), (5).

212 Section 28(8).

213 Section 70D(1).

A police officer or an authorised person may apprehend, without warrant, a person who has quitted a vessel subject to quarantine.²¹⁴ The general powers that may be exercised by a quarantine officer include powers to search,²¹⁵ take samples,²¹⁶ and secure premises.²¹⁷

Where they have entered certain premises (with or without a warrant), quarantine officers may seize evidential material without warrant where doing so will prevent it from being lost or destroyed.²¹⁸ A similar power applies in relation to vessels and vehicles.²¹⁹ By and large, Pts V, VI and VII of the *Quarantine Act 1908* give extremely wide powers to quarantine and other officers. These are highly invasive of personal liberties but in the event of a serious epidemic in persons, animals or plants these have to be borne. The Commonwealth, State and Territory courts are given jurisdiction under this Act and also under the *Judiciary Act 1903*.²²⁰

8.11 Australia's Excise Acts

Excise is a government tax or duty on goods levied on their manufacture, sale or consumption. Before the rise of other taxes, especially income and company taxes, it was a very important source of revenue. One of the major issues in the debates leading up to the federation of the Australian colonies in 1901 was the excise taxes then imposed by the respective colonies and what to do about them. In the end the Constitution gave the Commonwealth Parliament jurisdiction over customs and excise exclusively.²²¹ It was not surprising then that the *Excise Act 1901* was passed in the very first year of the newly established Commonwealth Parliament.

The goods on which the excise falls are called excisable goods,²²² and the manufacturer or owner of excisable goods must pay excise duty on them.²²³ The goods to which an excise attaches, and the amount which is to be paid, are specified in the Schedule to the *Excise Tariff Act 1921* (Cth).

Excise duties mainly apply onshore in Australia in that certain goods manufactured in Australia and activities associated with them are taxed. However, in order to protect Australian industries from cheaper imports,

²¹⁴ Section 31.

²¹⁵ Section 66AA(1)(a).

²¹⁶ Section 66AA(1)(f).

²¹⁷ Section 66AA(1)(e).

²¹⁸ Section 66AD(2).

²¹⁹ Section 66AI.

²²⁰ *Quarantine Act 1908* s 86B.

²²¹ Constitution s 90 provides: "On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and excise, and to grant bounties on the production or export of goods, shall become exclusive".

²²² *Excise Act 1901* (Cth) s 4(1).

²²³ Section 54.

and to collect the revenue on imports, the Acts also applied to incoming goods. The main goods targeted are alcoholic liquors, tobacco and petroleum products. Both of these Acts, therefore, have limited offshore application.

Because petroleum products are included, the *Excise Act 1901* applies to offshore sea and resources installations, in much the same way as the *Customs Act 1901*.²²⁴ The *Excise Tariff Act 1921*, however, is concerned only with excise on petroleum so it applies only to resource installations or “platforms” (and not sea installations). This Act establishes “onshore fields” and “exempt offshore areas”. These areas may be prescribed by the Chief Executive Officer²²⁵ but may be subject to ministerial guidelines.²²⁶ An “onshore field” is defined as a field prescribed in a bylaw within a State or Territory or inside the outer limits of the Australian territorial sea,²²⁷ while an “exempt offshore area” must be outside the territorial sea.²²⁸ Oil producers falling within these categories are allowed to produce a “pre-threshold level” of oil, to compensate for the exploration and initial exploitation outlays, before the excise becomes payable.²²⁹

This concludes the survey of the Commonwealth legislation relating to customs and excise. The next section deals with an administrative aspect of offshore surveillance, then follows a section on some leading cases that should be mentioned and, finally, some conclusions are drawn on these topics.

8.12 Customs and Border Protection Command

Readers will have noted from this and the preceding chapters the complex matrix of laws and government departments and agencies that have responsibilities for regulation of offshore activities. The author makes recommendations in the concluding chapter of this book, one of which is that this indicates the requirement for an Australian Coast Guard. However, the Commonwealth government over the past decade has had a number of forays into administrative arrangements to deal with the need to coordinate all of these departments and agencies. In the main these did not involve legislation but were purely administrative structures and such is the case under the current model, the Border Protection Command.

²²⁴ *Excise Act 1901* s 4A.

²²⁵ Sections 165, 165A. Not surprisingly, as it relates to government revenue, the Chief Executive Officer in the *Excise Act 1901* is the Commissioner of Taxation: s 4.

²²⁶ *Excise Tariff Act 1921*, s 3A.

²²⁷ Section 3(1).

²²⁸ Section 3(1).

²²⁹ See the Schedule to the *Excise Tariff Act 1921*.

The Border Protection Command is charged with providing surveillance and information about Australia's offshore maritime areas through coordinating the Australian Customs and Border Protection Service, the Department of Defence, the Australian Fisheries Management Authority, the Australian Quarantine and Inspection Service, and other Commonwealth, State and Territory agencies. Its object is to provide a coordinated national approach for surveillance, detection and response to unlawful offshore activities such as illegal exploitation of natural resources, illegal activity in protected areas, unauthorised maritime arrivals, prohibited imports and exports, maritime terrorism, piracy, compromise to bio-security and marine pollution.²³⁰

It is, in essence, a coordinating office based in Canberra with people and equipment spread all around Australia in customs or defence offices, ships and aircraft. Deployment of the assets in the Australian northern waters is mainly controlled from combined headquarters in Darwin, in the Northern Territory. The main assets are aircraft for surveillance, known under the rubric of "Coastwatch", and the vessels run by navy and customs. The head of Border Protection Command is a naval officer. There is no separate legislation relating to it as it is mainly an administrative structure. Only a small space is devoted to the Border Protection Command here, but it is a very important organisation in the regulation of offshore surveillance, security, detection and response to illegal activity in the Australian offshore jurisdiction.

8.13 Some Leading Cases

There is a sprinkling of High Court cases dealing with customs, quarantine and excise of which several have been chosen for mention as an indication only of the decided cases in these areas.

8.13.1 When are Goods Imported

In the *Customs Act 1901* an important aspect is when goods are "imported" from overseas as in that case a chain of liability for duty and control of the goods is commenced. In *Wilson v Chambers & Co Pty Ltd*,²³¹ the High Court considered the meaning of "imported" under s 68 of the *Customs Act 1901*. The case concerned a quantity of paint, which was shipped from England to a consignee in Australia. The ship entered a New South Wales port and the paint was about to be discharged when an arrangement was made by the defendants, acting on behalf of the captain, for the paint to be bought to use to paint the ship and no duty was paid in respect of the paint. The Act contains no definition of "imported".

230 Details are on the Border Protection Command website <www.bpc.gov.au>.

231 (1926) 38 CLR 131.

The court held the paint was “imported” and that the consignee had failed to enter imported goods as required under s 68. Knox CJ held that goods are imported whenever they are brought into port for the purpose of being discharged there.²³² The character of goods as imported goods does not change if an agreement is subsequently made under which the goods are not actually landed at the port. This case had some difficulties about it as the paint was never landed and landing the imported goods is usually an essential element in the process of importation so it could easily be distinguished if a similar case came to trial.

8.13.2 Excise Duty on Ship’s Diesel Fuel

The issue in *BP Australia v Bissaker (Collector of Customs WA)*²³³ was whether or not the diesel fuel that had been supplied to three Japanese fishing vessels at Fremantle was “ship’s stores” and therefore exempt from excise duty under s 160A(1) of the *Excise Act 1901*. The Administrative Appeals Tribunal held the ships were making international voyages and were “overseas ships” for the purposes of the *Excise Act 1901* and the fuel was therefore “ship’s stores”.²³⁴ An appeal to the Full Court of the Federal Court was allowed.²³⁵ On further appeal by BP the High Court dismissed the appeal and upheld the decision of the Full Court of the Federal Court that excise duty was payable.

The vessels had all departed from Japan and were engaged in voyages that would last about two years for the purposes of catching tuna in the southern Indian Ocean and they called in from time to time at ports in Australia and South Africa to obtain fuel and provisions.

The High Court held that “international voyage” under s 130C of the *Customs Act 1901* meant a voyage beginning or ending at a place outside Australia. A fishing ground was, by virtue of the exclusion from the definition under the Act, not a “place outside Australia”. The voyage to the fishing grounds and back to Australia for more fuel was distinct from the international voyage departing from Japan and eventually returning there. It followed, so the court held, that none of the vessels was a ship on an international voyage when they loaded the diesel fuel so excise duty was payable.

8.13.3 Customs Forfeiture in Light of Prior Sale to Third Party

The case of *Burton v Honan* in 1952²³⁶ turned on whether the Constitution supported a law that allowed for automatic forfeiture of prohibited

232 Ibid at 136 per Knox CJ.

233 (1987) 163 CLR 106.

234 *Re BP Australia Ltd and Collector of Customs (WA)* (1985) 9 ALN N113.

235 (1986) 11 FCR 440.

236 *Burton v Honan* (1952) 86 CLR 169.

goods being imported into Australia. The construction of the forfeiture and seizure provisions (ss 229 and 203 of the *Customs Act*) and the operation of s 262 (which provided that where the committal of any offence causes a forfeiture of any goods the conviction of any person for such an offence shall have effect as a condemnation of the goods in respect of which the offence is committed). One Doyle imported a car into Australia but did not have the requisite licence under the *Customs (Import Licensing) Regulations*. He later obtained the licence by making false declarations for which he was convicted. He was also convicted for importing a prohibited import. In the meantime Doyle sold the car to Honan who further sold to Burton who were both innocent purchasers for value. The Commonwealth seized the car as being automatically forfeited once the facts were established by the conviction. Burton sued Honan for return of the price because of lack of good title and Honan defended by pleading the forfeiture provisions were beyond the Commonwealth powers. The matter was removed into the High Court under the *Judiciary Act* as it involved a question of the Constitution.

The court held that title to the goods vests in the Crown when the facts upon which the forfeiture takes place occur (which were established on conviction). This transfer of title to the Crown is unaffected if the goods are on-sold to a third party. The *Customs Act 1901* operates so as to empower customs officers to seize forfeited goods although they have passed into the hands of a bona fide purchaser for value.²³⁷ The relevant Commonwealth laws are supported by the trade and commerce, taxation and incidental powers.²³⁸

8.13.4 Offences at Sea of Importing a Prohibited Drug

In 1974 the Australian offshore criminal laws were in a most unsatisfactory state and this has been addressed in Chapter 4, Criminal Laws, and *R v Bull*²³⁹ was one of the cases that illustrated this. *Bull's* case was, however, based on customs laws and it will be mentioned here in that context.

In 1974 Mr Bull and others were convicted in the Supreme Court of the Northern Territory of assembling to import a prohibited import (cannabis) into Australia, possessing it, actually importing it and using a ship unlawfully for these purposes, under the *Customs Act 1901* (Cth). They

237 The issues of automatic forfeiture in this case are not unlike those involved in the *Fisheries Management Act 1991*, see (1952) 86 CLR 169 at 176 per Dixon CJ. This issue is discussed in the Chapter 7, Offshore Fisheries Laws, in the *Olbers'* cases but the fundamental difference between the cases is that in *Burton v Honan* there was a conviction and it was on that the automatic forfeiture effectiveness was based.

238 See the headnote; the powers are set out in Constitution s 51(i), (ii), (xxxix).

239 *R v Bull* (1974) 131 CLR 203.

took the *Mariana* from Darwin to Bali and on the return voyage the authorities boarded the *Mariana* before they reached the port of Darwin. The offences occurred offshore but within three miles of the Northern Territory coast, ie in the territorial sea. The offenders jettisoned the drugs overboard so they did not actually land them. They argued that the court had no jurisdiction because the events occurred offshore; alternatively it had none under the *Customs Act*; alternatively they did not import the drugs as they did not land them. The matter ended up as a case stated to the High Court.

The court held that cannabis was a prohibited import within the meaning of the Act even though it had not actually been imported as it was never landed. Consequently, offences under s 231(1)(c) (assembling to prevent the seizure of prohibited imports) and under s 233B(1)(a) (possessing prohibited imports on board a ship) could be committed within three nautical miles of the coast.

In order for goods to be imported within the meaning of the Act, it was necessary that they be landed or brought within the limits of a port with the intention of landing them. Thus the offence under s 233A of knowingly allowing a ship to be used in importing goods in contravention of the Act and under s 233B(1)(b) of importing prohibited imports could not be committed offshore even though within three miles of the coast (in the territorial sea). Consequently, the convictions for importing prohibited imports into Australia were bad.

The court also held that the Supreme Court of the Northern Territory had jurisdiction to try the charges and this jurisdiction was within the ordinary, not the Admiralty, jurisdiction of the court.

8.14 Conclusions

This chapter has concentrated on the offshore aspects of legislation relating to customs, quarantine and excise and readers will have seen that complex issues have emerged.

One of those is the geographical descriptions of the various areas offshore and how the *Customs Act 1901* deals with them. In s 8.2 over a dozen different phrases are identified as describing various areas offshore and the jurisdictions of the Act to which they relate. Further, a close perusal of the whole *Customs Act* reveals a massive complexity and confusing array of legislative powers that are calling out for simplification. The Act has just grown in a haphazard way since 1901, rather than being planned and structured.

The powers granted to various “officers” are extensive and complex but this complexity is further exacerbated by the provisions in the *Customs Act 1901* that grant these powers to different officers from different departments. These officers include those from the Customs and Border

Protection Service, from the Commonwealth and the State police forces and also from the Australian Defence Force. The drafting in relation to the powers that the various officers may exercise is far too complicated to be clear law and any moves to simplification would be an improvement. Further, the discussions on the *Quarantine Act* and the *Excise Act* show that the enforcement of all three Acts apply offshore but they all come under different departments. The *Customs Act* comes under the Customs and Border Protection Service, the *Quarantine Act* is administered by the Department of Agriculture, Fisheries and Forestry (DAFF) and the *Excise Act* by the Taxation Department (the Commissioner is the Chief Executive Officer). This adds its own further complexities.

Coordination of the personnel, equipment, aircraft and vessels of these various departments was well meaning but haphazard and the government recognising this formed the present Border Protection Command. This is a step in the right direction but it does not go far enough. The Border Protection Command has no legislative basis, but is only an administrative partnership by the Australian Defence Force and the Customs Service and so the heads report to different entities and the Border Protection Command itself relies on the goodwill of other departments, such those administering fisheries, petroleum, etc. Further, the customs and defence functions are essentially different and it is one of the comments in this book that appears regularly, and is repeated in the concluding chapter, that the Australian Defence Force should be used for defence in the main and not for regulatory enforcement of civil and criminal laws.

This chapter on customs, quarantine and excise forms the concluding chapter in the series of the offshore laws that have covered criminal matters in Chapter 4, defence forces laws in Chapter 5, immigration laws in Chapter 6 and fisheries laws in Chapter 7. It may be seen that the laws described in these five chapters interrelate, overlap and are administratively complex. This is inevitable to some extent, but not the extremities to which they now go. All of this, of course, is further complicated by adding the provisions of the Offshore Constitutional Settlement 1979, discussed in Chapter 3, whereby the jurisdiction of the first three nautical miles off their respective shores is granted to the States and the Northern Territory.

It suffices to state for present purposes that this situation calls for simplification. One way to do this would be to combine the many Commonwealth government offshore regulatory and enforcement laws into the one Act. This point will be developed in the concluding chapter of this book. As mentioned above, the government has announced its intention to introduce a Maritime Powers Bill and it is to be hoped that this simplifies the laws on offshore regulatory and enforcement powers. The outcome of this announcement remains to be seen.

AUSTRALIAN OFFSHORE LAWS

Even if the laws were simplified it would still leave the problem of the organisation of the government departments and the authoritative deployment of the regulatory and enforcement personnel and assets. One of the solutions to this is an Australian Coast Guard and, like the issue about simplification of offshore regulatory and enforcement laws, this will also be addressed in the concluding chapter.

Chapter 9

Antarctic and Southern Ocean Territories Laws

- 9.1 Introduction
- 9.2 Australian Antarctic Territory
 - 9.2.1 Antarctic Exploration
 - 9.2.2 Dash for Territory
 - 9.2.3 The Antarctic Treaty 1959
 - 9.2.4 Convention for the Conservation of Antarctic Seals 1972
 - 9.2.5 Convention for the Conservation of Antarctic Marine Living Resources 1980
 - 9.2.6 Protocol on Environmental Protection to the Antarctic Treaty 1991
 - 9.2.7 Australian Maritime Claims
- 9.3 Australian Antarctic Territory Laws
 - 9.3.1 Introduction
 - 9.3.2 Australian Antarctic Territory Act 1954 (Cth)
 - 9.3.3 Antarctic Treaty Act 1960 (Cth)
 - 9.3.4 Antarctic Treaty (Environment Protection) Act 1980 (Cth)
 - 9.3.5 Antarctic Marine Living Resources Conservation Act 1981 (Cth)
 - 9.3.6 Environment Protection and Biodiversity Conservation Act 1999 (Cth)
 - 9.3.7 Protection of the Sea (Prevention of Pollution from Ships) Act 1983 (Cth)
- 9.4 Macquarie Island
 - 9.4.1 Sovereign Status
 - 9.4.2 Applicable Legislation
- 9.5 Heard Island and McDonald Islands
 - 9.5.1 Territorial Claim
 - 9.5.2 Applicable Legislation
- 9.6 Australian Extended Continental Shelf
- 9.7 Whaling
- 9.8 Conclusions

9.1 Introduction

This chapter is directed to the Australian laws that apply in the Antarctic continent and the Southern Ocean. To set the background to this, it is

necessary to set out what lands and seas are covered, give a description of them, and describe the international conventions that apply in and around them. The Southern Ocean is a large and hostile sea area but, apart from Antarctica, it has other land areas in it and of these the relevant ones for this chapter are Macquarie Island and Heard Island and the Macdonald Islands. The chapter also touches on Australia's outer continental shelf area and, because it is currently controversial, whaling in the area. It should be mentioned that the laws of some other countries apply in the Southern Ocean and on some of the lands in that ocean but this chapter is only concerned with Australian offshore laws.¹

Antarctica dominates the Southern Ocean and the Australian laws there are an important part of this book so its characteristics are useful to set the background to them.²

Antarctica is Earth's southernmost continent, surrounding, as it does, the South Pole. It is almost entirely south of the Antarctic Circle, and is surrounded by the Southern Ocean. At 13.97 million square kilometres, it is the fifth-largest continent in area after Asia, Africa, North America, and South America. Approximately 98 per cent of Antarctica is covered by ice, which averages 1.88 kilometres thick.³

The term "Antarctic" implies "Opposite of the Arctic", and derives from times when the Arctic was defined by reference to astronomers' observations that the constellation Ursus Major, the constellation of the great she-bear (Arctos), appeared to rotate about the northern pole star.⁴ Although myths and speculation about a Terra Australis ("Southern Land") date back to antiquity, the first confirmed sighting of the Antarctic continent, as opposed to Australia, is commonly accepted to have occurred in 1820 by the Russian expedition of Mikhail Lazarev and Fabian Gottlieb von Bellingshausen.⁵ However, the continent remained

¹ When offshore laws are considered, it may be borne in mind that the *Acts Interpretation Act 1901* (Cth) has application to apply Acts to the coastal sea ie out to the limits of the territorial sea, unless otherwise expressed. Section 15B provides:

15B. Application of Acts in coastal sea (1) Except so far as the contrary intention appears:

- the provisions of every Act, whether passed before or after the commencement of this section, shall be taken to have effect in and in relation to the coastal sea of Australia as if the coastal sea of Australia were part of Australia; and
- any reference in an Act, whether passed before or after the commencement of this section, to Australia or to the Commonwealth shall be read as including a reference to the coastal sea of Australia.

² G Triggs and A Riddell (eds), *Antarctica: Legal and Environmental Challenges for the Future* (British Institute of International and Comparative Law, 2007), p 2.

³ B Stonehouse (ed), *Encyclopedia of Antarctica and the Southern Oceans* (John Wiley & Sons, 2002), p 12.

⁴ Ibid, p 7.

⁵ S Martin, *A History of Antarctica* (State Library of New South Wales, 1996), p 83.

largely neglected for the rest of the 19th century because of its hostile environment, lack of resources and isolation.⁶

An aspect of the Southern Ocean is the Antarctic Convergence, better known as the Antarctic Polar Frontal Zone (or “Polar Front” for short). It is a zone encircling Antarctica where cold, northward-flowing Antarctic waters meet and mix with the relatively warmer waters of the sub-Antarctic. These Antarctic waters predominantly sink beneath sub-Antarctic waters, while associated zones of mixing and upwelling create a zone of very high marine productivity, especially for Antarctic krill. The zone is up to 48 kilometres wide, varying somewhat in latitude seasonally and in different longitudes, extending across the Atlantic, Pacific, and Indian Oceans between the 45th and 60th parallels of south latitude. The precise location at any given place and time is made evident by the sudden drop in ocean temperature of about 3 degrees centigrade over three to four kilometres.⁷ Although this zone is mobile, it usually does not stray more than a half a degree of latitude from its mean position.⁸

This line, like the Arctic tree line, is a natural boundary separating distinctive marine life associations and different climates. The South Shetland Islands, South Orkney Islands, South Sandwich Islands, South Georgia, Bouvetoya Island, Heard Island and McDonald Islands all lie south of the Antarctic Convergence. The Kerguelen Islands lie approximately on the Convergence; the Falkland Islands, Prince Edward Islands, Crozet Islands, Île Amsterdam, Île Saint-Paul, Tierra del Fuego and Macquarie Island lie to its north.⁹

For those readers not familiar with this part of the world it may be worth mentioning that in the southern winter the ice, the cold, the high winds, the huge ocean swells that circle the globe uninterrupted by land, and persistent fogs all give rise to a hostile climate at sea and on the land. During the southern summer the conditions are better, and while occasionally they exhibit great beauty and calm, they can still be miserable and hostile, especially to the seafarer.

9.2 Australian Antarctic Territory

9.2.1 Antarctic Exploration

A short note on the history of Antarctic exploration is called for as this explanation is the genesis for the later territorial claims. A convenient

⁶ B Stonehouse (ed), *Encyclopedia of Antarctica and the Southern Oceans* (John Wiley & Sons, 2002), p 354.

⁷ Ibid, pp 9, 74.

⁸ United States Geographic Names Information System <http://geonames.usgs.gov/pls/gnispublic/f?p=105:3:1209346141094275::NO::P3_ANTAR_ID,P3_TITLE:488%2CAntarctic%20Convergence> (accessed 26 February 2009).

⁹ See Map 9.1, below.

chronology of this exploration was compiled and published by Robert Headland in 1989 and it is a good foundation for this explanation.¹⁰

He defined Antarctic exploration in six stages of which the first was "Terra Australis", which was from the first misty hints of the great southern land until 1780, when the great navigators identified its edges, ice covered shelves in many cases. The period consisted mainly of explorations and voyages penetrating to far southern regions and resulted in "the rapid reduction of the hypothetical 'Terra Australis' and continuous improvement of charts ... This period may be regarded as concluding with the voyages of Captains James Cook and Yves-Joseph de Kerguelen-Trémarec".¹¹

Next came the "Sealing Period" (1780 to 1892) when the sealers, who were nearly all from Britain, Cape Colony, France, New South Wales, New Zealand, Tasmania or the United States (New England States), made the first landings on the sub-Antarctic islands and in Antarctica (1821) and were the first to winter in Antarctic regions (including those who did so involuntarily).¹²

Headland then identified the period of "Continental Exploration" (1893 to 1918), including when the first "winterings" were made south of the Antarctic Circle (1898, aboard *Belgica*), and on Antarctica itself (1899, at Cape Adare). The last of the Antarctic islands was discovered (Scott Island in 1902) and the general limits of Antarctica became known during this period, although substantially mapped only in the places where landings had been achieved. The South Pole was reached twice in the 1911-1912 summer which also saw the start of the famous Australasian Antarctic Expedition under the leadership of Douglas Mawson.¹³

The "Whaling Period" (1919 to 1942) was a major source of activity in the Southern Ocean, including some discovery and charting by the whaling captains. Until World War II (1939-1945), the majority of vessels operating in the Southern Ocean belonged to the Norwegian whaling fleets and to scientific investigations associated with the industry (which began in 1904). Whalers were responsible for discovering many coastal regions of Antarctica, especially in the 1930-1931 season.¹⁴

1929 to 1931 saw the mounting of the British, Australian and New Zealand Antarctic Expedition, again under the leadership of Mawson, which resulted in the proclamation of and claim to those parts of Antarctica in 1936 that are now known as the Australian Antarctic Territory.

10 RK Headland, *Chronological List of Antarctic Expeditions and Related Historical Events* (Cambridge University Press, 1989), pp 26-27. The book contains an exhaustive list of expeditions launched by countries, their purposes and dates.

11 Ibid, p 26.

12 Ibid, p 26.

13 Ibid, p 27.

14 Ibid, p 26.

With increasing interest in the Antarctic there came the “Permanent Stations” (1943 to 1958), and the International Geophysical Year (1957-1958) was a major event in the development of these activities in which a cooperative concentrated research program was undertaken by the 12 countries which set up stations in Antarctic regions.¹⁵ Australia had made a good head start with the establishment of Mawson station in February 1954, the first permanent station south of the Antarctic Circle (and now the oldest continuously occupied Antarctic station).

Before moving to the laws it should be mentioned that these activities gave rise to competitive claims to the land itself and, finally, to the *Antarctic Treaty 1959*, with these claims underpinning the final laws.

9.2.2 Dash for Territory

Many of the expeditions by governments in the Antarctic were not for altruistic scientific purposes, and the concept of sharing for the “benefit of mankind”¹⁶ was subdued to the national interest of acquiring territory. After all, it was not then known, nor is it still, what economic and other benefits may flow from owning this frozen waste so there was quite an international dash to claim this territory and its possible future benefits.

It emerged that the claimants were Argentina, Australia, Chile, France, New Zealand, Norway and the United Kingdom; although there were other nations such as South Africa, also interested.¹⁷

Klaus Dodds gives a good description and he notes that “Argentina proved to be one of the most hawkish in terms of protecting her territorial claims to the Argentine Antarctic sector. Since the mid-1940s, a formidable amount of legislation, public speeches, acts of occupation and polar base construction has been mobilized for this purpose”.¹⁸ For its part the Chilean claims are based on a combination of historical, geographical and geological contexts. Title is claimed to flow from the 1493 Papal Inter Caetera, augmented in turn by the 1494 Treaty of Tordesillas between Spain and Portugal. Chile contends that it inherited legitimate claims to title to Antarctic lands when it gained independence from Spain in 1810.¹⁹

New Zealand and South Africa showed an active interest because of their geographical proximity to Antarctica. France was active even without that proximity. Australia, as we shall see shortly, supported its explorers and bases very vigorously and so it finished the dash for territory with two major sectors of it, partly founded on its British heritage, as

15 Ibid, p 27.

16 From UNLCOS Pt XI.

17 K Dodds, *Geopolitics in Antarctica* (John Wiley, 1997).

18 Ibid, p 47.

19 Ibid, p 109.

established by the legislation in its *Australian Antarctic Territory Acceptance Act 1933*.

The Australian claim relies on discovery, exploration and scientific research, thereby establishing the connection necessary for a legitimate international claim to new territory.²⁰ The leader of the primary efforts was the famous Australian explorer Sir Douglas Mawson²¹ and these expeditions supported the Crown's claim to much of Antarctica. Australia's legal basis for its present claim to its Australian Antarctic Territory has recently been well set out by others.²² The final step came in 1933 when Britain and Australia agreed on a transfer to Australia of some of the British interests so that the final Australian claim became the Australian Antarctic Territory. By the *Australian Antarctic Territory Acceptance Act 1933* (Cth) Australia accepted as a territory "that part of the territory in the Antarctic seas which comprises all the island and territories, other than Adelie Land (French claim), situated south of the 60th degree south latitude lying between 160th degree east longitude and the 45th degree east longitude".²³ The United Kingdom passed an Order in Council for its part and the effective date for transfer was 24 August 1936.²⁴

9.2.3 The Antarctic Treaty 1959

As mentioned above, the dash for territory led to dispute and by the 1950s there were seven claimants: namely, Australia, New Zealand, Chile, Argentina, the United Kingdom, Norway and France. Most of the claims had little recognition from other nations, some of the claimants

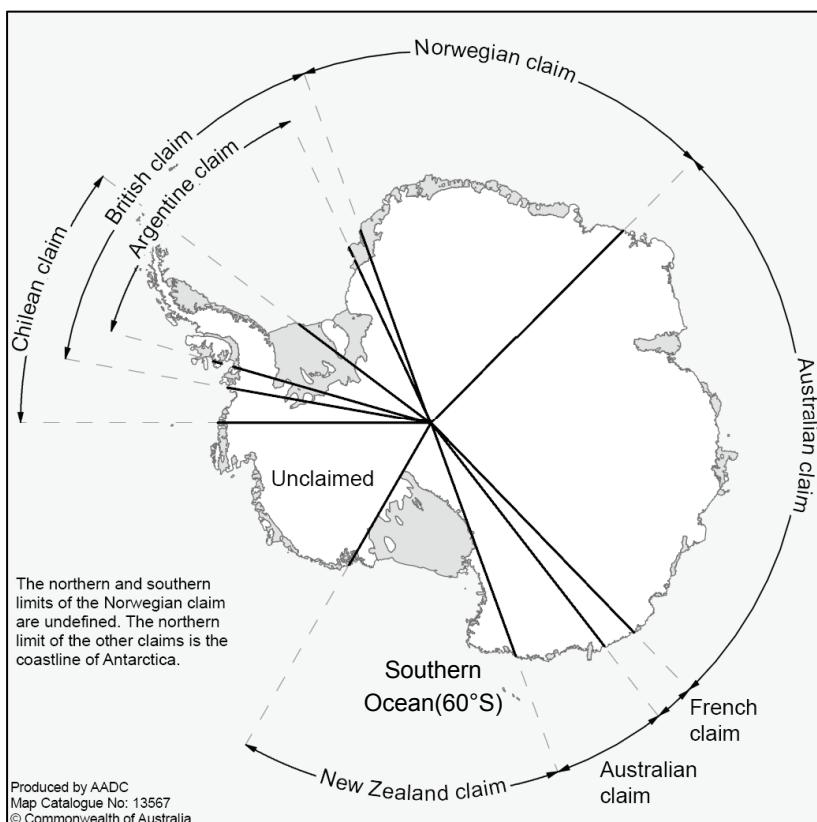
20 Antarctica was, of course, genuinely terra nullius (owned by no one), unlike the legal fiction that was established relating to the Australian continent and the Torres Strait Islands: see *Mabo v Queensland (No 2)* (1992) 175 CLR 1, which overturned this fiction.

21 FJ Jacka, "Mawson, Sir Douglas (1882–1958)" in *Australian Dictionary of Biography, Volume 10* (Melbourne University Press, Melbourne, 1986), pp 454–457; online at <www.adb.online.anu.edu.au> and follow prompts.

22 D Rothwell and S Scott, "Flexing Australian Sovereignty in Antarctica: Pushing Antarctic Treaty Limits in the National Interest" in L Kriwoken, J Jabour and AD Hemmings (eds), *Looking South: Australia's Antarctic Agenda* (Federation Press, Sydney, 2007), Ch 2; R Davis, "Commentaries: Enforcing Australian Law in Antarctica: The HIS Litigation" (2007) 8 MJIL 142; S Blau and K Bubna-Litic, "The Interplay of International Law and Domestic Law: The Case Of Australia's Efforts to Protect Whales" (2006) 23 EPLJ 465.

23 Section 2. Adelie Land was excepted from this provision because French Southern and Antarctic Lands include the French-claimed sector of Antarctica called Adelie Land. In the southern region the French territories include, as well, Ile Amsterdam, Ile Saint-Paul, Iles Crozet, Iles Kerguelen, and Iles Eparses in the southern Indian Ocean: E Sahurie, *The International Law of Antarctica* (New Haven Press, 1992), p 27. Iles Eparses, "the Scattered Islands", were added in 2007 by French law 2007-224, available at <www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000641099&dateTexte=&fastPos=1&fastReqId=180886854&oldAction=rechTexte> (accessed 19 June 2008) (in French).

24 Note 2 to the Act.



Map 9.1 Antarctica Showing Territorial Claims

Source: Australian Antarctic Data Centre

were in conflict with each other and other states reserved the right to make claims. The situation was stabilised by a major conference held in Washington, United States, which resulted in the *Antarctic Treaty* 1959. It was signed by the 12 states (the “original parties”) which had undertaken scientific endeavours in Antarctica during the International Geophysical Year of 1957-1958.²⁵ Currently, the treaty has 47 signatories.²⁶ Australia was an original party.

25 Secretariat of the Antarctic Treaty website <www.ats.aq/e/ats_treaty.htm>.

26 The full list is available at <www.ats.aq/devAS/ats_parties.aspx?lang=e> (accessed 1 September 2009). The Australian Antarctic Division website is also very informative, see <www.aad.gov.au>.

The reasons for the creation of the *Antarctic Treaty* 1959 included prevention of militarisation,²⁷ so one provision was that it could only be used for peaceful purposes, and there was also a provision that there be freedom of scientific research and information.²⁸ Another reason for the treaty was to prevent further territorial claims and to accommodate differences of view over the validity of existing claims.²⁹ Under Art IV of the treaty no party's claims were renounced or prejudiced and new claims were prohibited. Article IV also provided that no activities during the life of the treaty were to constitute a basis for asserting or denying sovereignty. This crucial provision did not prohibit sovereign acts in Antarctica but only prevented such acts having any subsequent effect in validating claims; in other words, Art IV "stopped the clock" on claims.³⁰

One of the difficult aspects for the treaty was which laws were to apply in Antarctica. The treaty provides for the national law of claimants to apply but that parties were free to send "observers" to any part of Antarctic to check on the activities of the others and such observers were subject only to the jurisdiction of the state whose nationals they were.³¹

An important aspect of the treaty was the geographical area to which it applied and this was provided as the area south of 60 degrees south latitude, including all ice shelves, but it is expressed not to prejudice the rights of states on the high seas.³² The choice of 60 degrees south latitude is sensible as it includes all of the land areas of Antarctica. Thanks to the treaty this part of the world is usually regarded as an area of peace and cooperation. Subsequent decisions have also given priority to environmental protection on a scale not seen anywhere else on Earth and the decision of the treaty makers to apply the treaty to the seas and lands south of the 60th parallel of latitude has been highly beneficial to that region.

It is noteworthy that the provisions of the treaty are expressed to be without prejudice to rights under international law to the "high seas". In 1959 the "high seas" were those areas beyond the territorial sea, which were then mainly only claimed to three nautical miles offshore. However, since UNCLOS 1982 came into force in 1994 this raises the question as to whether the coastal state claims in Antarctica can extend to an EEZ

27 *Antarctic Treaty* 1959 Art 1, preamble.

28 Articles 2, 3.

29 For an excellent book that discusses many law of the sea issues about Antarctica and the Arctic, see AO Elferink and D Rothwell (eds), *The Law of the Sea and Polar Maritime Delimitation and Jurisdiction* (Martinus Nijhoff Publishers, 2001). For very thorough, but earlier, books see also EJ Sahurie, *The International Law of Antarctica* (New Haven Press, 1991); Sir Arthur Watts, *International Law and the Antarctic Treaty System* (Grotius Publications, Cambridge, 1992); CC Joyner, *Antarctica and the Law of the Sea* (Martinus Nijhoff Publisher, 1992).

30 *Antarctic Treaty* 1959 Art IV(2).

31 Article VI.

32 Article VI.

offshore. If the EEZ is effectively claimed the relevant coastal state laws apply in them. If not, then they are high seas and coastal state laws do not apply. One example of the effect of the differences on these issues relates to the Japanese whaling fleets in the Southern Ocean including in the Australian Whale Sanctuary (ie, Australia's EEZ off Antarctica), as to which see Section 9.7, Whaling.

Article IX of the treaty provides for the contracting parties to meet regularly to discuss, consult, and formulate measures regarding, amongst other things, the facilitation of scientific research in Antarctica,³³ the use of Antarctica for peaceful purposes only,³⁴ and questions relating to the exercise of jurisdiction.³⁵ These meetings are titled "Antarctic Treaty Consultative Meetings" and are referred to in the remainder of this chapter as "consultative meetings". Article 9(1) limits the parties who can attend to those countries listed in the preamble to the *Antarctic Treaty 1959*; namely, Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, South Africa, the Soviet Union, the United Kingdom and the United States.³⁶ Other parties may attend by invitation,³⁷ or if they have acceded to the treaty. The consultative parties are those that can participate in decision making, which are the original signatories plus states which have demonstrated an interest in Antarctica by conducting substantial scientific research activity there, such as the establishment of a scientific station or the despatch of a scientific expedition.³⁸ Since 1998, a state must also sign the *Protocol on Environmental Protection to the Antarctic Treaty 1991* in order to obtain consultative status,³⁹ as to which protocol see shortly.

Parties that have been invited to attend consultative meetings, but which do not have consultative status, are the states that have acceded to the *Antarctic Treaty* but have not applied for consultative status.⁴⁰ These parties are granted "non-consultative" status and may contribute to discussions but not participate in decision making. Other participants in the consultative meetings are representatives of organisations such as the Commission for the Conservation of Antarctic Marine Living Resources, the Scientific Committee on Antarctic Research, and other international organisations that attend as observers or experts.⁴¹

33 Article IX(1)(b).

34 Article IX(1)(a).

35 Article IX(1)(e).

36 Preamble.

37 Sir Arthur Watts, *International Law and the Antarctic Treaty System* (Grotius Publications, Cambridge, 1992), p 13.

38 *Antarctic Treaty 1959* Art 9(2).

39 *Protocol on Environmental Protection to the Antarctic Treaty 1991* Art 22.4.

40 Sir Arthur Watts, *International Law and the Antarctic Treaty System* (Grotius Publications, Cambridge, 1992), pp 18-19.

41 Ibid, p 20.

As already mentioned, the purposes of the meetings include exchange of information, consultation on matters of common interest pertaining to Antarctica, and “formulating and considering, and recommending to their Governments, measures in furtherance of the principles and objectives of the Treaty”.⁴² This last purpose has allowed the consultative meetings to develop a quasi-legislative function.⁴³ Article 9(4) provides that measures agreed to at consultative meetings “become effective when approved by all the Contracting Parties whose representatives were entitled to participate in the meetings held to consider those measures”.⁴⁴ As Sir Arthur Watts indicates, the phrase “become effective” does not equate to “become legally binding”, although it does not exclude this meaning either. In Watts’ opinion, the “effectiveness” of an approved measure will depend on its drafting – hortatory measures will remain hortatory, while measures “drafted in language appropriate for … the creation of legal obligations will become ‘effective’ in that sense … and a legal obligation in the terms of the measure will thereupon arise”.⁴⁵ Since 1995 the outcomes of the consultative meetings have been measures (intended to be legally binding on the parties and thus requiring domestic legal implementation action); resolutions (hortatory) and decisions (procedural matters).

Before leaving the *Antarctic Treaty 1959* it is appropriate to mention that nearly all of the countries that are parties to it, including Australia, are supportive of preserving and protecting this pristine area, both land and sea.⁴⁶ This sentiment has given rise to the “agreed measures” of 1964⁴⁷ which include two conventions that relate to the area, and an environmental protocol.

9.2.4 Convention for the Conservation of Antarctic Seals 1972

The first of the two further conventions is the *Convention for the Conservation of Antarctic Seals 1972* which provided for the parties to have an orderly and controlled approach to the harvesting of the seals in the area south of 60 degrees south latitude ie the Antarctic treaty area, should the commercial industry be re-established. Under its provisions

42 *Antarctic Treaty 1959* Art 9(1).

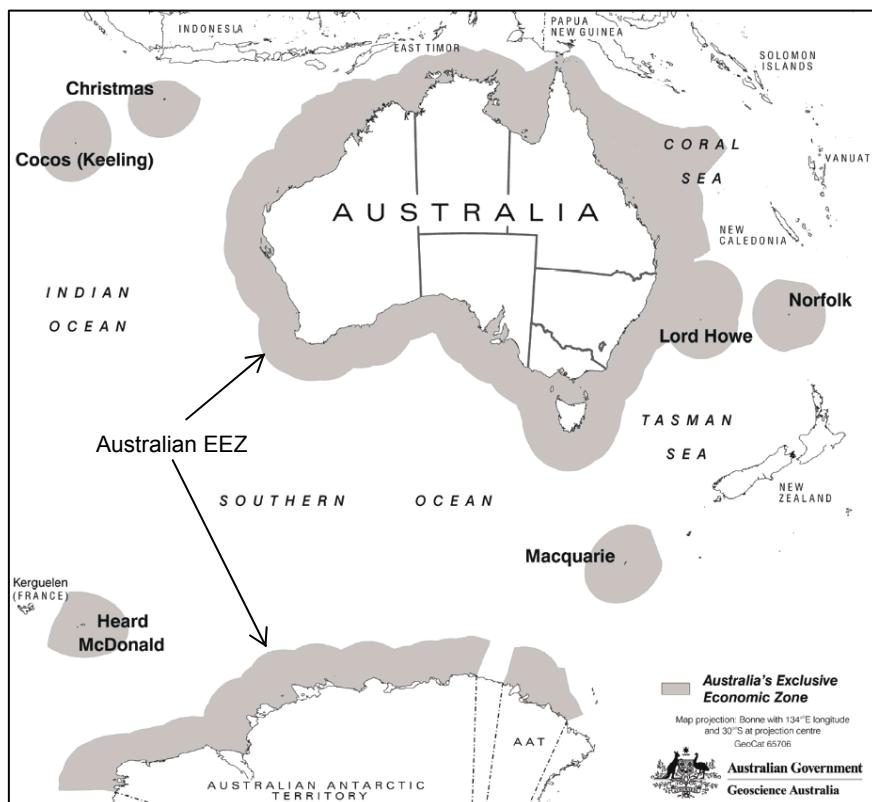
43 Sir Arthur Watts, *International Law and the Antarctic Treaty System* (Grotius Publications, Cambridge, 1992), p 24.

44 *Antarctic Treaty 1959* Art 9(4).

45 Sir Arthur Watts, *International Law and the Antarctic Treaty System* (Grotius Publications, Cambridge, 1992), p 25.

46 For full details, see M White, *Australasian Marine Pollution Laws* (Federation Press, Sydney, 2007).

47 Consultative Parties, *Agreed Measures for the Conservation of Antarctic Fauna and Flora 1964*, which are to protect endemic and native wildlife and plants. Entered into force 1 November 1982. See <www.aad.gov.au> and follow prompts.



Map 9.2: The Australian EEZ including the EEZ off the Australian Antarctic Territories

Source: Geoscience Australia (as amended)
Note: This is also shown as Map 7.1

the parties agreed that the Scientific Committee on Antarctic Research of the International Council of Scientific Unions be the scientific body that provides the advice upon which catch limits may be set.⁴⁸ Parties agreed to exchange information and scientific advice and to provide it to the committee. The United Kingdom is the depositary government.

9.2.5 Convention for the Conservation of Antarctic Marine Living Resources 1980

The second convention that arose from the consultative meetings related to the harvesting of the marine living resources including krill and the highly valued Patagonian toothfish. The Ninth Antarctic Treaty Consult-

⁴⁸ [1987] ATS 11, Arts 5, 6. The convention is in *Antarctic Treaty (Environment Protection) Act 1980* (Cth) Sch 1. The Annex, dealing with aspects of the permissible catch, seasons, zones etc was amended in 1988 and a copy is Sch 2 to the Act.

tative Meeting, in 1977 by Resolution IX-2, set out the framework for what became the *Convention for the Conservation of Antarctic Marine Living Resources 1980* (Marine Living Resources Convention).⁴⁹ The convention came into force in 1982 and has been a major influence in managing the resources of the region. Much of its force comes from the establishment of the Commission, which is given a legal entity, a budget, staff and is based in Hobart, Australia (which is the depositary for the convention). The Commission adopts conservation measures intended to become binding on the parties. It is comprehensive, well drafted and has as its main aim the "conservation of Antarctic marine living resources".⁵⁰

The Marine Living Resources Convention is open to any state, including those not party to the *Antarctic Treaty 1959*. The parties are bound to commit themselves to the various aspects of that convention that protect and preserve these marine resources. The boundary of the Marine Living Resources Convention area broadly reflects the position of the Antarctic Polar Front (also known as the "Antarctic Convergence") which has been described above, the coordinates of which are fully set out in the convention. The Marine Living Resources Convention area is wider than the *Antarctic Treaty* area as it extends north of 60 degrees south latitude. To provide consistency with the political accommodation of the treaty, parties to the Marine Living Resources Convention are not to use their activities as a basis for asserting, supporting or denying any claim to territorial sovereignty or make any new claim or enlargement under the *Antarctic Treaty 1980*.⁵¹ The Commission has power to set harvesting quotas and is assisted in this by its having established a scientific committee which provides advice to the Commission. States are bound to enforce these quotas. The dispute resolution provisions include mediation, arbitration, or, failing all else, the International Court of Justice or an arbitral panel (provision for which is annexed to the convention).⁵²

There is no doubt that the Marine Living Resources Convention has been successful, although it has been asserted that its two major weaknesses are lack of sufficient surveillance and lack of enforcement of its provisions, as they are left, ultimately, to the member states.⁵³ Concerted efforts have, however, been exerted since 1997 to put in place measures to reduce illegal, unregulated and unreported fishing in the Marine Living Resources Convention area.

49 [1982] ATS 9. For more detailed discussion, see G Lugten, "Net Gain or Net Loss? Australian and Southern Ocean Fishing" in L Kriwoken, J Jabour and AD Hemmings (eds), *Looking South: Australia's Antarctic Agenda* (Federation Press, 2007), Ch 8.

50 Article II(1).

51 Article IV.

52 Article XXV.

53 G Lugten, "Net Gain or Net Loss? Australian and Southern Ocean Fishing" in L Kriwoken, J Jabour and AD Hemmings (eds), *Looking South: Australia's Antarctic Agenda* (Federation Press, Sydney, 2007), p 104.

9.2.6 Protocol on Environmental Protection to the Antarctic Treaty 1991

The *Protocol on Environmental Protection to the Antarctic Treaty 1991* is another treaty-level agreement directed towards the protection of the treaty area and its dependent and associated ecosystems. It was negotiated by the consultative meeting and its main objective is for the *Antarctic Treaty* consultative parties to take steps for a “comprehensive protection of the Antarctic environment and dependent associated ecosystems” and to dedicate the area as a “natural reserve, devoted to peace and science”.⁵⁴ The protocol prohibits mining. The *Environmental Protocol* is comprehensive and has detailed provisions about how the consultative meetings should address its objectives, including establishing a Committee for Environmental Protection with the main function of providing advice and recommendations. The schedule to the protocol provides for dispute resolution by arbitration although, like CCAMLR, such provisions have never been used.

There is one schedule and there are six annexes to the *Environmental Protocol*. These apply to activities and matters arising in the “Antarctic area” which, as has been mentioned before, is comprised of the whole area south of 60 degrees south latitude. The schedule provides for dispute resolution and sets out provisions that include a provision that all parties to the *Environmental Protocol* nominate and list at least one arbitrator with the Permanent Court of Arbitration. In the event of dispute the claimant is to appoint an arbitrator, who may be a national of that party, the other party appoints its arbitrator and the parties agree on a third arbitrator or in default a person appointed by the President of the International Court of Justice. The schedule then goes on to make the usual provisions for the conduct of such a dispute before an international tribunal.

Annex I provides the procedures for the mandatory environmental impact assessments required by Art 8 of the protocol. Annex II is concerned with the conservation of the fauna and flora, applying to at sea as well on the land, and any taking or harmful interference, except in accordance with a permit, is prohibited.⁵⁵ Its appendices set out strong regulatory controls over what animals or plants may be introduced into the area. Annex II essentially updates and replaces the 1964 agreed measures.

Annex III regulates waste disposal and waste management and this applies to all activities and personnel in the Antarctic treaty area ie south of 60 degrees south latitude,⁵⁶ including the bases. Wastes that are pro-

⁵⁴ [1988] ATS 6, Art 2. A copy of the convention is in *Antarctic Treaty (Environment Protection) Act 1980* (Cth) Sch 3 .

⁵⁵ Annex II, Art 3.

⁵⁶ See the combined effect of *Environmental Protocol 1991* Art 1(b), Annex III, Art 1(1) and *Antarctic Treaty 1959* Art VI.

duced or are disposed of in the area must be reduced as far as practicable to minimise impact. Nominated harmful wastes are not to be discharged at all but they are to be removed from the area by the responsible country. Sewage and domestic liquid wastes may be discharged directly into the sea taking into account the assimilative capacity of the receiving marine environment. Where there are 30 individuals or more then this waste is first to be macerated. Also, where the sewage has been treated the byproduct may only be disposed into the sea if it is in accordance with the annex to that effect in the *Environmental Protocol*,⁵⁷ which is Annex VI.

Annex IV to the *Environmental Protocol* relates to the prevention of marine pollution and has detailed provisions about the regulation of discharge from ships flying the flag of a state that is party to it.⁵⁸ It has not, however, been implemented into Australian law by the *Antarctic Treaty (Environment Protection) Act 1980*, because the regulation of marine pollution from ships is covered in Australian law by the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983*. This latter Act applies MARPOL. Nonetheless, a summary of the provisions of Annex IV will be described here, as it contains important provisions for the ships to which they do apply, ie, other than Australian registered ships.

Annex IV follows, after a fashion, the annexes to MARPOL and is designed to apply these provisions in Antarctica to states which are not otherwise bound by the provisions of MARPOL. Article 3 in Annex IV regulates the discharge of oil, in that it prohibits its discharge unless discharged under conditions permitted by Annex I of MARPOL. It then goes on to provide that all sludge, dirty ballast, tank washing water etc not permitted to be discharged, may only be discharged to reception facilities outside of the treaty area. Article 4 deals with noxious liquid substances and prohibits their discharge absolutely. Article 5 deals with garbage and is a shortened version of MARPOL Annex V, in that garbage from plastics is prohibited, as is the disposal of other garbage. Food waste, however, may be discharged provided it has been comminuted or ground and at certain distances from land and ice shelves, or as permitted in MARPOL.

Article 6 of Annex IV of the *Environmental Protocol* then goes on to regulate sewage discharge and it, again, maintains its relationship with MARPOL.⁵⁹ Readers should note, however, that the *Protection of the Sea*

57 Annex III, Art 5.

58 For a discussion on the marine environmental protection issues in the Antarctic treaty area see R Davis and E Lee "Marine Environmental Protection and the Southern Ocean: The Maritime Jurisdiction Dimension of the Antarctic Treaty System" in AO Elferink and D Rothwell (eds), *The Law of the Sea and Polar Maritime Delimitation and Jurisdiction* (Martinus Nijhoff Publishers, 2001), Ch 11201-224.

59 Annex IV, Art 6.

(*Prevention of Pollution from Ships*) Act 1983 (Cth) applies MARPOL in the Antarctic area, but the provisions relating to sewage were further strengthened by certain sections.⁶⁰ Annex IV of the *Environmental Protocol* also regulates domestic waste, which may be discharged directly into the sea provided that it can be diluted and dispersed and, preferably, macerated, but it may only be discharged if it does not “adversely affect the local environment”.⁶¹ Annex IV then goes on to make other provisions, including for emergencies, sovereign immunity and expressly providing that nothing in its provisions derogate from the rights and obligations of ships that come under MARPOL.⁶² In short, Annex IV applies only to those ships not covered by MARPOL whether they be Australian or foreign registered.

Annex V to the protocol provides for area protection and management including the designation of “Antarctic Specially Protected Areas” and “Antarctic Specially Managed Areas” in which areas it requires that management plans are to be produced, applied and enforced.⁶³ These areas can include sites or monuments of historic value but if they are not so included they may be listed by any other party to the treaty and the lists attract special protection for them.⁶⁴

The final annex to the *Environmental Protocol* is Annex VI, and it should be noted that Annex VI is not in force yet, including for Australia. This annex was adopted in 2005 and begins the process of putting in place the liability rules envisaged in Art 16 of the protocol. The *Antarctic Treaty (Environment Protection) Act 1980* does not yet address Annex VI. The annex includes the requirement to have in place preventative measures, to have contingency plans and to take responsive action in the event of an environmental emergency. Further, Annex VI has provisions under which parties may be liable for the costs of response action to clean up pollution and sets limits of liability, which are measured in special drawing rights (SDRs) and are calculated by the tonnage of a ship where a ship is involved.⁶⁵ Each party to the *Environmental Protocol* is required to ensure its operators maintain adequate insurance or other financial security, a state is not responsible for the liabilities of its operators and the *Antarctic Treaty* secretariat is to establish a fund to which states may apply for recompense for costs of taking response action.⁶⁶ Again, these are similar to many of the provisions in the equivalent International

60 *Protection of the Sea Act 1983 ss 23BA-23BC.*

61 Annex IV, Art 5.

62 Article 14.

63 Protocol Annex V, Arts 2-7.

64 Protocol Annex V, Art 8.

65 Liability falls on an “operator that fails to take prompt and effective response action to environmental emergencies” (Art 6) but they may be exempt under Art 8. The limits to liability are set out in Art 9.

66 Protocol, Annex VI, Arts 10-12.

Maritime Organization conventions.⁶⁷ The so-called liability annex provides liability for the failure of an operator to respond to an environmental emergency but it does not include liability for the environmental damage itself. This may be provided for in future annexes.

Generally it may be seen from these numerous environmental provisions that the *Environmental Protocol* to the *Antarctic Treaty* 1959 goes a long way to regulating nearly every aspect of the environment and management of flora and fauna in the seas and on the land south of 60 degrees south latitude.

As the *Environmental Protocol* is so extensive the question arises as to its relationship with the other major conventions relating to the jurisdiction and laws of ships and the seas; namely, UNCLOS and MARPOL. This has been comprehensively discussed by Ivana Zovko elsewhere,⁶⁸ but there are several brief points that can be made here. The first is that, at about 47 parties, the number of parties to the *Environmental Protocol* is fairly small compared with some 157 parties to UNCLOS and about 148 parties to MARPOL. For many ships their flag state may not be a party to the *Environmental Protocol*. Secondly, where both, or even the three, conventions apply there are provisions in UNCLOS⁶⁹ that recognise that other conventions may apply in priority where there is a conflict. In relation to MARPOL, the *Environmental Protocol* has a provision that MARPOL should apply.⁷⁰ Finally, the general rules of construction and interpretation apply, including the provisions of the *Vienna Convention on the Law of Treaties* 1969,⁷¹ so there is some certainty about the result of interaction amongst these treaties.

As this chapter is concerned with Australian laws that apply offshore in the Southern Ocean and Antarctica, it is necessary to look at the basis for Australia's claims to sovereignty over the land that comprises its Antarctic territories before turning to the laws themselves.

⁶⁷ For a detailed description and discussion of these conventions, see M White, *Australasian Marine Pollution Laws* (Federation Press, Sydney, 2007).

⁶⁸ I Zovko, "Vessel-sourced Pollution in the Southern Ocean" in G Triggs and A Riddell (eds), *Antarctica: Legal and Environmental Challenges for the Future* (British Institute of International and Comparative Law, 2007), Ch 8.

⁶⁹ UNCLOS Art 311 addresses this point generally and is deferential to other treaties. Article 237 specifically addresses the issue in relation to marine environmental regulation. Article 237 provides that the provisions of UNCLOS are without prejudice to "special conventions and agreements" concluded on the marine environment and they should be carried out in a manner consistent with the UNCLOS "general principles and objectives". The *Vienna Convention* 1969 Art 30(2) asserts that such provisions be given effect when one treaty defers to the other ie that the other treaty prevails where they are incompatible.

⁷⁰ Protocol Annex IV, Art 14 provides:

Relationship with MARPOL 73/78: With respect to those Parties which are also Parties to MARPOL 73/78, nothing in this Annex shall derogate from the specific rights and obligations thereunder.

⁷¹ Done at Vienna on 23 May 1969; [1974] ATS 2.

9.2.7 Australian Maritime Claims

Claims to maritime jurisdiction over maritime areas are, of course, dependent upon a coastal state's territorial right to the land adjacent to those sea areas. As already mentioned, whether Australia and the other Antarctic claimants have a valid claim to Antarctic land territories is a contentious issue.⁷² However that contention being put to one side, the seas claims arising from the *Antarctic Treaty 1959* gives rise to separate and different contentions.

As noted above, there are seven states with territorial claims in Antarctica. None of these claims has universal recognition. The territorial extent of the claims by Australia, France, New Zealand and Norway are not disputed; it is just that the claims are not universally recognised. In relation to Argentina, Chile and the United Kingdom, however, the extent of their claims are disputed amongst themselves.⁷³ Map 9.1 above sets this out. Concentrating as we are on Australia, one notes that the Australian claim is only recognised by France, New Zealand, Norway and the United Kingdom, all of whom are fellow Antarctic claimants. For the present purpose of discussing Australian offshore laws, the contentious issue arises about the validity of the EEZ claims. When UNCLOS came into force internationally and for Australia in 1994, Australia proclaimed its EEZ off its mainland and territories, including off the Australian Antarctic Territory.⁷⁴ However under the *Antarctic Treaty 1959*, no new claims were permitted so there was and is a tension between the two treaties. As to this, however, see more later.

There are other contentious issues with Antarctic offshore zones based on UNCLOS. The first relates to the manner of fixing the baselines from which the width of the zones is measured. Antarctica has a large land continent, but much of the area where land meets the sea is covered in thick ice so accurately establishing the baselines is a problem in some areas. Further, as Australia has two sectors of the Antarctic land area, which are separated by a sector claimed by France, it has four abutting maritime boundaries to settle with its neighbours and these maritime boundary issues have not yet been settled.⁷⁵

Before turning to the Australian laws applicable offshore from the Australian Antarctic Territory, there are two further points to make. The

⁷² AO Elferink and D Rothwell (eds), *The Law of the Sea and Polar Maritime Delimitation and Jurisdiction* (Martinus Nijhoff Publishers, 2001), p 85.

⁷³ Ibid, p 86.

⁷⁴ UNCLOS Art 56, in Pt V, provides that in the EEZ the coastal state has "sovereign rights" over natural resources and the production of energy, and "jurisdiction" over installations, scientific research and protection and preservation of the marine environment.

⁷⁵ For some discussion of these issues see AO Elferink and D Rothwell (eds), *The Law of the Sea and Polar Maritime Delimitation and Jurisdiction* (Martinus Nijhoff Publishers, 2001), Chs 2, 5, 9.

uncertainties over the Australian Antarctic Territory do not apply, however, to sub-Antarctic islands; that is, those islands to the north of 60 degrees south latitude provided in the *Antarctic Treaty 1959*. The waters off those islands are clearly governed by the offshore zones permitted by UNCLOS. For Australia the islands are Macquarie Island on the one hand, and the Territory of Heard Island and McDonald Islands on the other, which will be dealt with in some detail shortly.

The final aspect of Australian Antarctic Territory offshore jurisdiction relates to the Australian entitlement to an extended outer continental shelf under Art 76 of UNCLOS.⁷⁶ The data to substantiate the Australian entitlement was submitted to the Commission on the Limits of the Continental Shelf on 15 November 2004 and, on 9 April 2008, the entitlement was endorsed by the Commission.⁷⁷ In its submission Australia requested the Commission not to take any action for the time being with regard to the continental shelf appurtenant to the Australian Antarctic Territory. This, then, averted international disagreements about Australia's claim to the outer continental shelf off the Australian Antarctic Territory but the issue has considerable scope for future disputes. The other issue having some controversy relates to whaling laws and this, too, is dealt with towards the end of the chapter. It is now convenient, however, to deal with the actual Australian laws that apply offshore from the Australian Antarctic Territory itself, and only those laws. Those relating to Macquarie Island the Territory of Heard Island and McDonald Islands will be discussed after that.

9.3 Australian Antarctic Territory Laws

9.3.1 Introduction

The Australian Antarctic Territory is that part of Antarctica claimed by Australia and it is the largest area of Antarctica claimed by any nation. It consists of all the islands and territory, including the ice shelves, south of 60 degrees south and between 45 degrees east and 160 degrees east, except for the French Adélie Land (136 degrees east to 142 degrees east).⁷⁸ The Australian Antarctic Territory is divided into the Western Sector (the larger portion) and Eastern Sector, with the French claim separating the two. It is bounded by Queen Maud Land in the west and by Ross

⁷⁶ UNCLOS Art 76 requires states to lodge their claims to the continental shelf beyond the EEZ. The rights associated with these extensions to the continental shelves only relate to the seabed and subsoil, not to the water column or air above it.

⁷⁷ Details of all of the submissions, including that by Australia, may be found on the United Nations Law for the Sea website at <www.un.org/Depts/los/clcs> and follow prompts to the Continental Shelf Commission.

⁷⁸ Adelie Land is French.

Dependency in the east. The area is estimated at 6,119,818 square kilometres and is inhabited only by the staff of research stations, including the staff of foreign stations, as well as temporary summer field parties. The Australian Antarctic Division administers the area, primarily by maintaining three year-round stations (Mawson, Davis and Casey), which support various research projects. Map 9.1, set out earlier in this chapter, gives the pictorial situation.

9.3.2 Australian Antarctic Territory Act 1954 (Cth)

By the *Australian Antarctic Territory Acceptance Act 1933* (Cth) the Commonwealth “declared to be accepted … as a Territory” the area mentioned above “by the name of the Australian Antarctic Territory”.⁷⁹ By United Kingdom Proclamation, 24 August 1936 was fixed as the date of transfer under the United Kingdom Order in Council to that effect.⁸⁰

The next step was the *Australian Antarctic Territory Act 1954* (Cth) which, with some exceptions, applied the laws of the Australian Capital Territory in the Australian Antarctic Territory.⁸¹ One of the exceptions was the criminal law, and the *Australian Antarctic Territory Act 1954* applied the criminal laws of the Territory of Jervis Bay.⁸² Of course, the Acts, Ordinances and regulations had to be expressed to apply in the Australian Antarctic Territory, and they were not to be inconsistent with an “Ordinance”, because the legislative and regulatory needs of the Australian Antarctic Territory were quite different from those of the Australian Capital Territory or Jervis Bay. For instance, the Australian Capital Territory is totally land-locked, so it has no need to consider what laws need to apply off its shores which is different from Jervis Bay and the Australian Antarctic Territory.

Some of the applicable legislative regime is established through Commonwealth Ordinances, the drafting of which lies in the power of the Governor-General ie, the Commonwealth Executive. The Ordinances, and regulations and bylaws, are to be tabled before both of the Commonwealth Houses of Parliament for possible review before coming into effect.⁸³ The Australian Capital Territory courts are given jurisdiction over matters arising from these laws being applied in the Australian

⁷⁹ Section 2.

⁸⁰ Published in *Commonwealth Gazette* 1936, p 1553 and also in the Statutory Rules 1901-1956, Vol V, p 5,505; see *Australian Antarctic Territory Acceptance Act 1933*, Note 2.

⁸¹ Section 6(1).

⁸² Section 6(2). Of course, the Australian Capital Territory criminal laws apply in the Jervis Bay Territory, see Chapter 4, so this provision is somewhat circular.

⁸³ Sections 11-12D. The criminal laws in force in the Jervis Bay Territory only apply in the Australian Antarctic Territory where they are applicable and “are not inconsistent with an Ordinance”: *Australian Antarctic Territory Act 1954* s 6(2).

Antarctic Territory.⁸⁴ The *Australian Antarctic Territory Act 1954* has since been amended from time to time, including when the Australian Capital Territory became self-governing by having its own Parliament,⁸⁵ but the *Australian Antarctic Territory Act 1954* is still in force and still applies relevant Australian Capital Territory laws and the Commonwealth Ordinances to the Australian Antarctic Territory.

9.3.3 Antarctic Treaty Act 1960 (Cth)

The *Antarctic Treaty Act 1960* (Cth) is a short and simple Act that gives effect to relevant provisions in the *Antarctic Treaty 1959*. The *Antarctic Treaty Act 1960* applies to two different areas; namely the “Territory” which is the Australian Antarctic Territory itself, and “Antarctica” which is the area south of 60 degrees south latitude which includes all of the ocean areas and all ice shelves. Essentially the Act has three main provisions.

First, the *Antarctic Treaty Act 1960* provides that the laws in force in the Australian Antarctic Territory do not apply to the foreign “observers” mentioned in the treaty,⁸⁶ which includes their staffs, while they are carrying out the function of an observer. This is because the treaty provides that their own national laws should apply to them. Australians and foreigners who are not observers are subject to the Australian laws mentioned in the section above. Secondly, the Australian Antarctic Territory laws apply to Australian “observers” in respect of any act or omission occurring anywhere in Antarctica as if the relevant act or omission occurred whilst that person was in the Australian Antarctic Territory.⁸⁷ The Australian Capital Territory courts are granted jurisdiction in relation to these matters.⁸⁸

Thirdly, nothing in the *Antarctic Treaty Act 1960* prejudices the exercise of rights of any country under international law with regards to the “high seas” within Antarctica.⁸⁹ This provision merely restates the international law but, as has been mentioned above, Australia’s claims to the EEZ off the Australian Antarctic Territory are not universally recognised, so the sea areas offshore from the Australian territory are regarded as

⁸⁴ Sections 8-12. The Act expressly gave jurisdiction to the *Australian Capital Territory Supreme Court Act 1933*: s 10. There were, of course, some qualifications and exceptions but they will not be addressed.

⁸⁵ Some changes were made by the *Australian Capital Territory Self-Government (Consequential Provisions) Act 1988* (Cth).

⁸⁶ Observers were specifically provided for in the *Antarctic Treaty 1959* to allow inspection by nationals of one claimant to the territories of the others to ensure compliance with the terms of the treaty: see above.

⁸⁷ Section 4.

⁸⁸ Section 4(3).

⁸⁹ Section 4(4).

"high seas" by many states. As the high seas are those parts of the sea not in the EEZ, territorial sea or internal waters,⁹⁰ and as the high seas are open to all states,⁹¹ then it remains unresolved as to what jurisdiction this Act, or any other Australian Act, has in those waters. As will be seen in Section 9.7, this issue arises in relation to fisheries laws jurisdiction and especially in regard to the contentious issue of Japanese whaling in these waters.

9.3.4 Antarctic Treaty (Environment Protection) Act 1980 (Cth)

The *Antarctic Treaty (Environment Protection) Act 1980* applies the *Convention for the Conservation of Antarctic Seals* and the *Protocol on Environmental Protection to the Antarctic Treaty 1991* described above. The geographical area of its application is the area south of 60 degrees south latitude, including all ice shelves in the area ("Antarctica"), for some provisions and the Australian Antarctic Territory ("the Territory") for other provisions.⁹² Except for the foreign "observers" mentioned in the convention, as discussed above, the Act applies in every Australian external territory⁹³ and expressly to the Australian Antarctic Territory and, outside of Australia, it applies to Australian citizens, expeditions, organisations, ships, aircraft and property.⁹⁴ Where the Act may conflict with the *Environmental Protection and Biodiversity Conservation Act 1999*, as to which see under, the *Environmental Protection and Biodiversity Conservation Act 1999* prevails, but if the regulations conflict then the Act prevails over those of the *Environmental Protection and Biodiversity Conservation Act 1999*.⁹⁵

The *Antarctic Treaty (Environment Protection) Act 1980* has extensive provisions that protect and regulate the Antarctic land and waters south of 60 degrees south latitude, which basically make certain harmful acts unlawful unless there is a valid permit allowing it. Environmental impact assessments are provided for, inspection systems with authorised inspectors are established, and a wide array of offences is created.⁹⁶ Mining is prohibited on land or under the sea in the *Antarctic Treaty* area, although this does not prevent scientific research such as collecting

90 UNCLOS Art 86.

91 UNCLOS Art 87.

92 Section 3. The two conventions, plus an amendment to the Annex to the *Convention for the Conservation of Antarctic Seals*, are schedules to the Act.

93 As the Act applies to all territories, this includes Heard Island and McDonald Islands, which will be discussed shortly.

94 Sections 4, 5.

95 Section 7.

96 Parts 4, 5, 6.

meteorites or rocks.⁹⁷ Acts done in an emergency that may otherwise give rise to an offence must be notified immediately to the authorities.⁹⁸ A review of many of the decisions made by the officials (“the minister” in the Act) is available in the Administrative Appeals Tribunal.⁹⁹ Overall it can be seen that this Act applies a strong environmental management regime to the Australian land territories in the Southern Ocean and to the seas surrounding them.

9.3.5 Antarctic Marine Living Resources Conservation Act 1981 (Cth)

The *Antarctic Marine Living Resources Conservation Act 1981* (Cth) gives effect to the *Convention on the Conservation of Antarctic Marine Living Resources 1980*, the provisions of which have been described above. The Act itself is directed to making it an offence to harvest any of the marine living resources unless it is done pursuant to a permit,¹⁰⁰ or falls under one of the exceptions, such as in an emergency. The Act is expressed to apply both within and outside Australia and to all Australian external territories. In waters in the Australian Fishing Zone (AFZ), which is the same area as the EEZ, the Act generally applies to all persons, both foreigners and Australians, while in waters beyond the AFZ it only applies to Australian nationals, vessels and their crews.¹⁰¹ In the Antarctic, however, the Act has made the Antarctic EEZ “excepted waters” and hence the Act applies only to Australians.

Enforcement and inspection powers are given to “inspectors” and those powers include arrest without warrant on reasonable suspicion and seizure of a vessel pending trial.¹⁰² Decisions made by the minister under the Act can be the subject of a review by the Administrative Appeals Tribunal.¹⁰³ A copy of the English text of the convention is a schedule to the Act.

9.3.6 Environment Protection and Biodiversity Conservation Act 1999 (Cth)

The *Environment Protection and Biodiversity Conservation Act 1999* is a major consolidation of a number of other Acts, including those former

97 Sections 19A, 19B.

98 Sections 21, 21AA, 21AB.

99 Section 28.

100 Sections 8-12.

101 Section 5.

102 Sections 15-17. See Chapter 7 for a fuller discussion of fisheries enforcement powers.

103 Section 23.

Acts that regulated Commonwealth law about town and land planning and the environmental aspects relating to such planning.¹⁰⁴ However this 1999 consolidating Act is more extensive and includes as a major objective the protection of the environment, promotion of ecologically sustainable development and conservation of biodiversity and, to achieve these ends, it establishes a major regulatory structure.¹⁰⁵ It was originally designed mainly to apply only to land but the Act has been extended to apply over the Australian seas areas. The discussion in this chapter will only deal those aspects of the Act that apply in the Southern Oceans and Antarctica.

The *Environment Protection and Biodiversity Conservation Act 1999* is expressed to apply to acts, omissions, matters and things in the whole Australian jurisdiction,¹⁰⁶ extends to each of the Australian external territories, and to the outer limits of the EEZ and covers all persons, aircraft, vessels and their crews, whether Australian citizens or not, in this area.¹⁰⁷ It also applies to Australian citizens and to those who are not citizens but who are domiciled in Australia, as well as to Australian corporations, agencies, aircraft, vessels and crews wherever in the world they may be ie inside or outside the EEZ or continental shelf borders. Further, the Act establishes power to draw up and impose fisheries management plans; which plans are then regulated under the main Act for fisheries – the *Fisheries Management Act 1991* (Cth).¹⁰⁸ There are some exceptions, which are set out in the Act, but there is not space here to go into them and they are not controversial.¹⁰⁹ Of particular relevance to the present chapter is that the Act has provisions about whales and other cetaceans (dolphins etc) and it creates the Australian Whale Sanctuary, but these provisions will be mentioned under Section 9.7, Whaling. In short, the Act is a vast piece of legislation which deals with major areas concerning the protection and preservation of the environment and biodiversity and it applies in the Antarctic area.

104 Most town and land planning comes within the jurisdiction of the States and the Australian Capital Territory and Northern Territory respectively as their laws regulate such conduct within their respective borders, but the Commonwealth laws in such matters have application in the wider field.

105 See s 3 for the objects of the Act.

106 “Australian jurisdiction” is defined to mean the land, waters, seabed and airspace in, under or above, Australia, its external territories, its EEZ and its continental shelf: s 5(5).

107 Section 5(1)-(4).

108 The area covered by the Australian Fisheries Zone (AFZ) is the same area as the area of the Australian EEZ: *Fisheries Management Act 1991* (Cth) s 4.

109 Sections 8-10.

9.3.7 Protection of the Sea (Prevention of Pollution from Ships) Act 1983 (Cth)

Readers will be aware that the major International Maritime Organization¹¹⁰ convention regulating pollution from ships is MARPOL.¹¹¹ MARPOL and the many other international conventions relating to marine pollution, and the Australian laws applying them, have been set out in another book by the author,¹¹² and the topic is mentioned in Chapter 11 in this book, so there is no need, nor is there the space, to develop the topic here. The Act that gives effect to MARPOL in Australian law is the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (Cth) and its provisions apply to foreign and Australian ships in Australian waters and to Australian ships wherever they may be.¹¹³ The Act generally applies both within and outside Australia and extends to every external territory and to the EEZ.¹¹⁴

The Act relating to sewage, however, has a special provision about discharge of sewage in the Southern Ocean south of 60 degrees south latitude ie the Antarctic area.¹¹⁵ The Antarctic area is a special area but not one recognised as such under the International Maritime Organization provisions so the *Prevention of Pollution from Ships Act 1983* makes particular provision concerning the discharge of untreated sewage,¹¹⁶ over and above the sewage provisions in Annex IV of MARPOL. The object is to give effect to Australia's obligations to protect the marine environment in the Antarctic area under Annex IV of the *Antarctic Protocol*¹¹⁷ which differ slightly from MARPOL.¹¹⁸ If there is an

¹¹⁰ International Maritime Organization, the United Nations organ concerned with the safety of shipping and the protection of the marine environment: see <www.imo.org>.

¹¹¹ *International Convention for the Prevention of Pollution by Ships 1973-1978*.

¹¹² M White, *Australasian Marine Pollution Laws* (Federation Press, Sydney, 2nd edn, 2007).

¹¹³ In MARPOL Annex I relates to oil; Annex II to chemicals; Annex III to noxious packaged substances; Annex IV to sewage; Annex V to garbage and Annex VI to air pollution (from ships' engines).

¹¹⁴ Section 6. As mentioned above in fn 1 of this chapter, under the *Acts Interpretation Act 1901* s 15B, Acts generally apply in the Australian coastal sea ie the territorial sea, as if the sea were part of the territory ie the land, itself.

¹¹⁵ Part IIIB, Div 1, s 26BA. For a thoughtful and well-researched chapter on marine pollution from ships in the Southern Ocean, see I Zovko, "Vessel-sourced Pollution in the Southern Ocean" in G Triggs and A Riddell (eds), *Antarctica: Legal and Environmental Challenges for the Future* (British Institute of International and Comparative Law, 2007), Ch 8.

¹¹⁶ *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (Cth) Pt IIIB, ss 26BA, 26BB, 26BC.

¹¹⁷ Section 26BB.

¹¹⁸ For sewage discharges in the sea other than in the Antarctic area, the other more general MARPOL provisions are applied: see *Protection of the Sea Act 1983* Pt IIIB, s 26C and following.

unauthorised discharge in the Antarctic area by an Australian ship then both the master and the owner are strictly liable. Also, if a person engages in conduct that causes a discharge into the Antarctic area and that person has been reckless or negligent in causing it then the person commits the offence.¹¹⁹ In general the provisions about this are:

- (a) if the discharge occurs in the territorial sea of the Australian Antarctic Territory, then the other provisions of the Act and MARPOL apply;
- (b) it is a defence if the discharge was made to secure the safety of the ship or persons onboard or to save lives at sea generally; or
- (c) if the discharge is done from holding tanks at a prescribed rate whilst underway at a prescribed speed in an area where the ship is not less than 12 miles from the nearest land or ice shelf; or
- (d) if the ship is small, defined as one certified to carry not more than 10 persons, then the provisions do not apply.¹²⁰

The penalty for these offences is 500 penalty units for the master or owner of the ship, but it is raised to 2000 penalty units if it is a person who has engaged in reckless or negligent conduct leading to the discharge.¹²¹ In this case, and similar provisions are applied in this Act more widely than in the Antarctic area, the concentration is on making the person who was negligent or reckless personally liable. This compares with the general liability of the master and owner under MARPOL when the prosecution does not have to prove any particular person caused the breach. Again, in contradistinction to the liability of the master and owner for discharge by the ship generally, a particular person who is accused is not “strictly liable”, which means, in effect, that whether the person had “intent” or not is relevant as a defence.¹²²

9.4 Macquarie Island

9.4.1 Sovereign Status

Macquarie Island is a sub-Antarctic island that lies in the Southern Ocean some 1500 kilometres to the south-east of Hobart, Tasmania, and 1300 kilometres north of the Antarctic continent, in approximately 54 degrees

¹¹⁹ Section 26BC(1).

¹²⁰ Section 26BC.

¹²¹ The penalty unit is currently set at A\$110 per unit: *Crimes Act 1914 (Cth)* s 4AA. If the master or owner is a corporation the maximum penalty for the offence is five times that for a natural person: *Crimes Act 1914* s 4B(3).

¹²² *Criminal Code* s 6.1 “strict liability” – if the law that creates the offence provides that it is an offence of strict liability then there are no fault elements. However, in these cases the defence of mistake of fact is still available: s 9.2.

south latitude.¹²³ Maps in Chapter 7, Map 7.1, and in Chapter 10, Map 10.1, show its position. It is 34 kilometres long and approximately 5 kilometres wide. Its highest point is Mount Hamilton.¹²⁴ The island is legally part of the State of Tasmania. It is administered as a Tasmanian State Reserve managed by the Tasmanian Parks and Wildlife Service. It lies just to the north of an oceanic boundary, the Antarctic Polar Front (or Antarctic Convergence), where cold polar water to the south meets the warmer sub-Antarctic water to the north.¹²⁵ While administratively part of Tasmania, the logistics and infrastructure on the island has historically been provided by the Commonwealth. Its only permanent inhabitants are at its northern end in the Australian research station run by the Australian Antarctic Division.

About 14 kilometres to the north of Macquarie lies Judge and Clerk Islands and some 26 kilometres to the south lies the Bishop and Clerk Islands. They are uninhabitable rocks projecting out of the sea, albeit with some tufts of grass on parts of them.

Discovery of Macquarie Island is attributed to Captain Frederick Hasselborough of the brig *Perseverance* who sighted it on 11 July 1810 during a sealing voyage out of Sydney, although he may have been preceded by Polynesians or other earlier visitors. Hasselborough named the place after the then Governor of New South Wales, Lachlan Macquarie.¹²⁶

Hasselborough's main interest was in the enormous numbers of seals on the island – especially fur seals. Commercial exploitation by sealers was vigorous and during the first 18 months of commercial operations at least 120,000 fur seals were killed for their skins and within 10 years the population was almost wiped out. The focus of commercial activity then turned to the elephant seals whose blubber contained oil that had widespread commercial use. By the mid-1840s the numbers of elephant seals had been reduced by 70 per cent.

Commercial exploitation then turned to the island's prolific penguin population and, whilst not as valuable as seal oil, penguin oil was relatively easy to obtain. At the peak of the industry in 1905, the plant there could process 2000 penguins at one time, with each penguin producing about half a litre of oil.

Australia acquired sovereignty over Macquarie Island in 1825 when Lieutenant-General Ralph Darling, the first Governor of Tasmania, was given a Commission over "our island of Van Dieman's Land ... and also Macquarie Island lying to the southward of the said island of Van

¹²³ The Australian Antarctic Division has an informative website on Macquarie Island; see <www.aad.gov.au> and follow prompts to "Stations" and "Macquarie Island".

¹²⁴ See <www.aad.gov.au> "Location".

¹²⁵ Ibid.

¹²⁶ Ibid.

Dieman's Land".¹²⁷ In 1889, however, the Premier of New Zealand, the Hon HA Atkinson, addressed the New Zealand Governor, Sir William Jervois, with a view to annexing the island for New Zealand.¹²⁸ The Colonial Office granted this request in May 1889, but was subsequently forced to cancel the authorisation after New Zealand's intentions were publicly gazetted and the Tasmanian government thereby learned of it and informed the Governor of New Zealand that Macquarie Island was included in Tasmania.¹²⁹ The Secretary of State for Colonies, Lord Knutsford, confirmed this fact and issued an apology to the Governor of Tasmania for the oversight,¹³⁰ demonstrating the timelessness of bureaucratic error.

From its first discovery, Macquarie Island was of interest to scientists. The Russian expedition led by Thaddeus von Bellinghausen collected flora and fauna on the island in 1820. Charles Wilkes' United States Exploring Expedition and two New Zealand scientists, JH Scott and A Hamilton, followed. Joseph Burton spent three and a half years from 1896 collecting specimens while working with oiling parties on the island. Scientists with Captain Robert Scott in 1901 and Sir Ernest Shackleton in 1909 also collected specimens there.

In 1911, Australia's Sir Douglas Mawson established the island's first actual scientific station. In addition to conducting geomagnetic observations and mapping the island, studies were made of the island's botany, zoology, meteorology and geology. The Macquarie Island expedition also established the first radio link between Australia and Antarctica by setting up a radio relay station on Wireless Hill whose transmissions could reach both areas.

From 1913 the meteorological observations begun by Mawson's group were continued by the Commonwealth Meteorological Service but discontinued in 1915 after the loss of the relief ship *Endeavour* in 1914 with all crew and passengers. The Ross Sea party of Shackleton's Trans-Antarctic Expedition on *Aurora* visited the island in 1915, and Mawson returned aboard the *Discovery* in 1930 with the British, Australian and New Zealand Research Expedition.

The island was declared a wildlife sanctuary in 1933 and, with the establishment of the Tasmanian National Parks and Wildlife Service in 1971, Macquarie Island became a conservation area. It was upgraded to a State reserve in 1972 and in 1978 was renamed the Macquarie Island Nature Reserve. In 1998 Macquarie Island was granted World Heritage status. The permanent station on the island was established by the

127 *Historical Records of Australia*, Series III, Volume V, 1.

128 JS Cumpston, *Macquarie Island* (Antarctic Division, Department of External Affairs, 1968), p 137.

129 *Ibid*, p 141.

130 Tasmanian Parliamentary Paper No 85 of 1890.

Australian Antarctic Division in 1948 and has been operating continuously ever since.¹³¹

As already noted, the early extensive hunting of animals for their oil and skins nearly wiped them out¹³² but they have since recovered and the island is now host to a huge variety of wild life. For over a century now scientific and related interests have been the predominant activities carried out on Macquarie Island.

9.4.2 Applicable Legislation

As already mentioned, Macquarie Island itself is subject to the laws of Tasmania and it is administered as part of Tasmania's Huon Municipality, the most southerly shire in Australia. As a result the waters surrounding Macquarie Island and its appurtenant islands come under the usual Australian maritime laws system. The first three nautical miles from the baselines are controlled by Tasmania,¹³³ and from there, subject to other laws, the Commonwealth laws prevail. The territorial sea extends to 12 nautical miles from the baselines, the contiguous zone covers out to the usual 24 nautical miles, and the EEZ out to 200 nautical miles.¹³⁴ Outwards from there is the Australian extended continental shelf, as to which see under. Fisheries in the three mile zone are regulated under Tasmanian law and, of course, beyond that in the EEZ it comes under the *Fisheries Management Act 1991* (Cth) and the regulations under that Act.¹³⁵

The scientific activities on Macquarie Island are under the control of the Australian Antarctic Division, a division of the Commonwealth Department of the Environment, Heritage and the Arts, which division operates a research station at the northern end of the island.¹³⁶ The island and the coastal waters are proclaimed a nature reserve under the Tasmanian *Nature Conservation Act 2002*. This reserve, as extended to seaward to the outer limit of the territorial sea (12 nautical miles), is listed as a World Heritage Area. The eastern boundary of the reserve is

131 <www.aad.gov.au> "Macquarie Island".

132 For a full description of the sealing trade and the various shipping expeditions to Macquarie Island from first discovery to 1933, see JS Cumpston, *Macquarie Island* (Antarctic Division, Department of External Affairs, 1968).

133 This is part of the Offshore Constitutional Settlement 1979 and the resulting legislation – *Coastal Waters (State Powers) Act 1980* and the *Coastal Waters (State Titles) Act 1980*. For more detail readers are referred to Chapter 2.

134 As noted frequently in this book but repeated here for the convenience of readers, the EEZ is declared under the *Seas and Submerged Lands Act 1973* (Cth).

135 In this case the *Fisheries Management (Macquarie Island Toothfish) Regulations 2006* and, for the toothfish, the Macquarie Island Toothfish Fishery Management Plan 2006. The Tasmanian State waters, out to three nautical miles, are closed to fishing as they are classified as a nature reserve under the Tasmanian Department of Primary Industries, Water and Environment.

136 <www.aad.gov.au> "Macquarie Island".

contiguous with the Commonwealth Macquarie Island Marine Park,¹³⁷ which is part of Australia's National Representative System of Marine Protected Areas.¹³⁸

Management of the reserve is under the Macquarie Island Nature Reserve and World Heritage Area Management Plan, which is established under the *National Parks and Reserves Management Act 2002* (Tas). As a World Heritage Area this extended area is also subject to Commonwealth legislation, in this case the *Environment Protection and Biodiversity Conservation Act 1999*. Research projects must comply with the *Nature Conservation Act 2002* (Tas) and the marine aspects of it with the *Living Marine Resources Management Act 1995* (Tas). Permits are controlled by the Tasmanian Parks and Wildlife Service.

In summary, it can be said that Tasmanian laws apply to Macquarie Island land area. In the offshore waters the same system applies to regulate activities as for the rest of Australia, in that Tasmanian jurisdiction applies in the coastal waters out to a limit of three nautical miles, and thereafter the Commonwealth laws apply.

9.5. Heard Island and McDonald Islands

9.5.1 Territorial Claim

Heard Island and the McDonald Islands comprise a sub-Antarctic group of islands consisting of three islands and a number of rocky outcrops lying at about 53 degrees south latitude. Being north of 60 degrees south latitude they are outside of the Antarctic area. Heard Island is the largest, at 42 kilometres long and with a peak elevation of 2745 metres above sea level (Mawson Peak), with the Macdonald Islands being relatively small. These islands are about 4100 kilometres south-west of Perth, Australia, and lie on the Kerguelen-Heard submarine plateau.¹³⁹ Maps in Chapter 7, Map 7.1, and in Chapter 10, Map 10.1, show their position.

Their early discovery began with the commercial expeditions seeking the seal oil and skins, which extended to penguins and whales. The early sealers were secretive about locations so as not to allow their competitors knowledge of the good areas so the detail of those ships that reported sighting these islands is subject to some controversy.¹⁴⁰ The first publicly

¹³⁷ Commonwealth Proclamation dated 20 October 1999 made under the *National Parks and Wildlife Act 1975* (Cth).

¹³⁸ <www.aad.gov.au> "Macquarie Island legislation".

¹³⁹ PL Keage, *The Conservation Status of Heard Island and the McDonald Islands* (University of Tasmania, Environmental Studies Paper 13, 1981), p 1.

¹⁴⁰ For a detailed description of the claims to discovery of and contact with Heard Island and the McDonald Islands, see M Downes and E Downes, "Sealing in Heard Island in the Nineteenth Century" in K Green and E Woehler (eds), *Heard Island: Southern Ocean Sentinel* (Surrey Beatty & Sons, 2006), Ch 11.

reported sighting is attributed to Peter Kemp in 1833 in the *Magnet* when on an exploratory and commercial voyage in the region financed by the London merchant Charles Enderby. Kemp mapped what he could but did not land and then moved on to mapping in Antarctica, but as a result of his endeavours the island was reported to and charted by the Admiralty Hydrographic Department. This is the basis for the British claim to sovereignty over the islands. However, the name for Heard Island came from the report by Captain John Heard, in the *Oriental*, on passage from Boston to Melbourne in 1853 and details of the island's precise location and its geography were then published.¹⁴¹

As for the smaller McDonald Islands, they comprise three rocky islets, with the name deriving from the voyage of Captain McDonald in January 1854, in the British sealing ship *Samarang*. He first saw Heard Island and then discovered the nearby small group of islets that came to be named after him after he published this discovery.¹⁴² McDonald's claim to being the first to discover these small islands was contested by Captain Heard, who happened to be in Melbourne at the time when McDonald arrived there and publicly proclaimed his discovery.¹⁴³ There were many and varied other captains and ships that came on the islands in the 1800s but this is sufficient to show the origins of the names and the bases for British sovereignty ie Kemp discovering and mapping Heard Island in 1833 and McDonald discovering the small islands named after him in 1854.

The British government did little to exercise its sovereignty over these islands as they were on the other side of the globe, in a cold and hostile environment and of little commercial or strategic value. So the matter of sovereignty rested there until 1908, when the British government received an inquiry from the Norwegian Legation in London on behalf of Peter Bogen regarding its sovereignty claim and seeking permission to establish a floating whale factory near Heard Island. Britain allowed Bogen an exclusive lease for three years at £100 per year, occupying the island on behalf of Britain and, as evidence of the British sovereignty, required that he raise a British flag there. The Norwegian Foreign Office refused its support for Bogen so there it ended. It was not until 1910 that a British subject on board a Norwegian whaling vessel again annexed Heard Island and the McDonald Islands for Britain,¹⁴⁴ which really settled the matter in Britain's favour.

141 Ibid, "Introduction", p 1.

142 M Downes and E Downes, "Sealing in Heard Island in the Nineteenth Century" in K Green and E Woehler (eds), *Heard Island: Southern Ocean Sentinel* (Surrey Beatty & Sons, 2006), p 186.

143 PL Keage, *The Conservation Status of Heard Island and the McDonald Islands* (University of Tasmania, Environmental Studies Paper 13, 1981), p 9.

144 K Green, "Sovereignty, Science and Twentieth Century Sealing" in K Green and E Woehler (eds), *Heard Island: Southern Ocean Sentinel* (Surrey Beatty & Sons, 2006), p 198.

In 1947, the day the Atlas Cove research station opened on Heard Island, sovereignty over Heard Island and the McDonald Islands was transferred from Britain to Australia. This was confirmed by an exchange of notes between Great Britain and Australia in 1950. The Australian Note, dated 19 December 1950, stated that, as result of an earlier letter from the United Kingdom government, "effective government, administration and control" of the islands passed to the Commonwealth government on 26 December 1947.¹⁴⁵ This is the basis for the present Australian sovereignty over the area.

9.5.2 Applicable Legislation

Australian legislative provision was made for the control of the islands by the *Heard Island and the McDonald Islands Act 1953* (Cth) which has been supplemented from time to time by Ordinances. Basically the Act provides that the islands are declared a Commonwealth Territory, that, subject to some exceptions, the Australian Capital Territory laws apply, provided they are so expressed to apply, as if the islands were part of the Australian Capital Territory. However in relation to criminal laws, it is those of the Jervis Bay Territory that are applicable, again subject to some exceptions and to their being so expressed to apply.¹⁴⁶ An unusual provision, from the lawyer's point of view, is that the Governor-General is given power to make Ordinances (as well as the usual regulations) for the "peace, order and good government" and these Ordinances may amend or repeal the Act or any other law in force in the islands.¹⁴⁷ The Australian Capital Territory Supreme Court has jurisdiction in and in relation to the islands.¹⁴⁸

The need for legislation and Ordinances was not great as the human activity on these islands is limited to occasional expeditions with the main focus on scientific research.¹⁴⁹ The present position is that the lands are Australian territories so naturally these islands generate the usual maritime zones around them. Australian claims include the claim to a territorial sea (12 nautical miles), contiguous zone, EEZ and the extended continental shelf.

¹⁴⁵ This understanding was confirmed in the British Note of the same date. Both notes are contained in Australian Treaty Series, 1951, No 3.

¹⁴⁶ As mentioned above, the Australian Capital Territory criminal laws apply in Jervis Bay.

¹⁴⁷ Sections 8, 10. The Ordinances have to be laid before both Houses of Parliament and are subject to disallowance by them: ss 11-11C.

¹⁴⁸ Section 9.

¹⁴⁹ The details of these expeditions are set out by GD Munro "Waiting on the Weather – the ANARE years 1947-1955" and K Green "Heard Island – the later ANARE Years 1963-2004" in K Green and E Woehler (eds), *Heard Island: Southern Ocean Sentinel* (Surrey Beatty & Sons, 2006), Chs 13, 14. "ANARE" is the Australian National Antarctic Research Expedition.

Some of the waters surrounding them are declared as the Heard Island and McDonald Islands Marine Reserve¹⁵⁰ and a management plan under the *Environmental Protection and Biodiversity Conservation Act 1999* has been put in place for the environmental protection of the area.¹⁵¹ This Territory is a listed world Heritage Area.

The fisheries in these seas are regulated and under the *Fisheries Management Act 1991* (Cth). The Australian Fisheries Management Authority has the responsibility for fisheries management plans and has produced fisheries plans for this area from time to time.¹⁵² These seas have generated considerable interest for lawful and unlawful fishing, especially in relation to the Patagonian toothfish. Some details of the fisheries enforcement are set out in Chapter 7. The western maritime boundary of these islands abuts the French maritime boundary based on the Kerguelen Islands.¹⁵³ With unlawful fisheries having been a major issue for some years the Australian and French governments agreed, in a treaty of 24 November 2003, to cooperate with each other over fisheries enforcement in the Southern Ocean.¹⁵⁴ The treaty provides for cooperative surveillance, assistance with hot pursuit, permission for hot pursuit to continue in the territorial sea of the other party, exchange of information on location, movements, registration, etc of fishing vessels in the relevant area and a shared fishing vessel register of vessels each government has licensed to fish there.¹⁵⁵

In summary of this section, the laws applicable to Heard Island and the McDonald Islands are those contained in the relevant Commonwealth Acts and Ordinances. There is very little human activity, except

¹⁵⁰ *Commonwealth of Australia Gazette* No GN 41, 16 October 2002 (Government Notices). The gazette included the waters in the area down to 1000 metres and also assigned it as a strict nature reserve under the World Conservation Union. It was so declared under *Environment Protection and Biodiversity Act 1999* s 344, not the *Heard Island and the McDonald Island Act 1953*.

¹⁵¹ For details see Heard Island and McDonald Islands Marine Reserve Management Plan, described and set out in the publication of that name by the Australian Antarctic Division on behalf of the Director of National Parks, 2005, <www.comlaw.gov.au> and follow prompts. The 2002 Gazette is reproduced in pp 140-142.

¹⁵² *Fisheries Management Act 1991* (Cth) ss 17, 18, and see the *Fisheries Management (Heard Island and McDonald Islands Fishery) Regulations 2002* (Cth).

¹⁵³ The Kerguelen Archipelago is a French possession in the Southern Indian Ocean. Administratively it is a part of the French Southern and Antarctic Lands (Terres Australes et Antarctiques Françaises), and it consists of the island of Kerguelen (also known as Desolation Island) and nearly 300 islets, which together cover about 6200 square kilometres: *Encyclopaedia Britannica Online* <www.brittanica.com> and follow prompts.

¹⁵⁴ Treaty between the Government of Australia and the Government of the French Republic on Cooperation in the Maritime Areas Adjacent to the French Southern and Antarctic Territories, Heard Island and the McDonald Islands [2005] ATS 6, done at Canberra on 24 November 2003 and entered into force 1 February 2005.

¹⁵⁵ Articles 3-5.

for research expeditions from time to time, due to the remoteness and hostile weather for most of the year. The offshore fisheries and other maritime activities are regulated by the usual Commonwealth laws for those activities.

9.6 Australian Extended Continental Shelf

On 15 November 2004 Australia made a submission to the Secretary-General of the Commission on the Limits of the Continental Shelf pursuant to Art 76(8) of UNCLOS.¹⁵⁶ The submission contained the information on the proposed outer limits of the continental shelf of Australia beyond 200 nautical miles from the baselines ie beyond the EEZ.¹⁵⁷ In relation to Antarctica, under the *Antarctic Treaty* 1959 no party was to make any new claim to “territorial sovereignty”.¹⁵⁸

In making its submission Australia requested that the Commission not take any action for the time being with regard to any claim appurtenant to Antarctica.¹⁵⁹ This was to maintain harmony within the Antarctic treaty system. However, in order to preserve its right to make a future claim the Australian government maintains that this is not a new claim that is contrary to Art IV of the Treaty. This is because it is an extended continental shelf, and it is not a territory as an area where rights might be exercised appurtenant to having a territorial claim in land. The problem that Australia was seeking to avoid was a situation where an international body not constrained by the political accommodations of the Antarctic treaty system could be seen to be giving de facto recognition to the legitimacy of the Australian Antarctic Territory in international law. This recognition could arise because the recommendations of the Commission on the Limits of the Continental Shelf become final and binding on other states. Also included with the Australian submission were comments that Australia made the submission without prejudice to eventual agreement with its neighbouring maritime states in Antarctica.

The Australian submission was for 10 discrete marine regions, and for present purposes the relevant one relates to the area east of

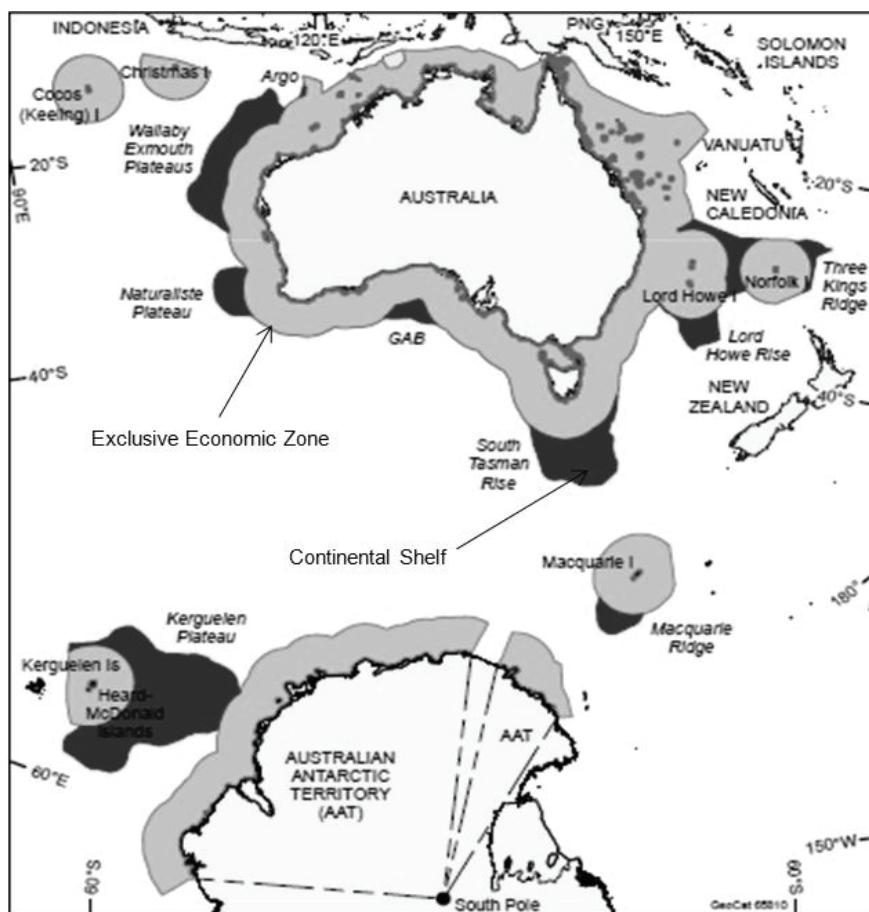
¹⁵⁶ Article 76(8) provides, in effect, that information on the continental shelf beyond 200 nautical miles from the baselines is to be submitted to the Commission on the Limits of the Continental Shelf on the basis of “equitable geographical representation”. The Commission shall then make recommendations on them. The limits so established are “final and binding”.

¹⁵⁷ The Australian submission is on the United Nations Law of the Sea website at <www.un.org/Depts/los/clcs> and then follow prompts to the continental shelf submissions.

¹⁵⁸ Article IV(2).

¹⁵⁹ For discussion of Australian possible claims, see S Kaye, “The Outer Continental Shelf in the Antarctic” in AO Elferink and D Rothwell (eds), *The Law of the Sea and Polar Maritime Delimitation and Jurisdiction* (Martinus Nijhoff Publishers, 2001), Ch 7, pp 125-138.

AUSTRALIAN OFFSHORE LAWS



Map 9.3. Australia's Continental Shelf and EEZ

Source: Geoscience Australia

Macquarie Island, where it borders with the New Zealand maritime boundary. The second claim was to the west of Heard Island and the McDonald Islands EEZ, where the maritime boundary borders with the French Kerguelen Islands maritime boundary, and to the south where it abuts the shelf generated by the Australian Antarctic Territory. The whole Australian claim may be seen on Map 9.3 above.

A number of notes verbale were lodged with the United Nations concerning Australia's submission. They all merely preserved the rights of the countries concerned relating to settlement of their maritime boundaries with Australia and most of them merely reiterated the fact that under the *Antarctic Treaty 1959* no further territorial claims were to be made. These notes welcomed Australia's request that its Antarctic data

not be considered for the time being. The Commission on the Limits of the Continental Shelf considered Australia's submission at its 21st session in New York over 17 March–18 April 2008 and accepted the submission on 9 April 2008.¹⁶⁰

The benefits of the outer continental shelf relate to the exclusive rights granted to the coastal state to explore and exploit the natural resources on and under the sea bed and subsoil.¹⁶¹ In commercial terms these mainly relate to exploitation of any oil and gas as well as to minerals and sedentary species that may be found there.

To some extent, these rights may also overlap with the *Convention for the Conservation of Antarctic Marine Living Resources 1980* regime, which has been discussed above. This extended continental shelf area gives Australia a vast area of sea floor jurisdiction, including in the Marine Living Resources Convention area, and the *Antarctic Treaty* area for a large part of the shelf extending south of Heard Island. The Australian government can be expected, in relation to the area south of 60 degrees south latitude, to abide by the provisions of the treaty's environmental protocol that prohibits mining.

9.7 Whaling

Whaling in the Southern Ocean has become a prominent public issue in Australia and elsewhere. The main issue concerns Japanese whaling ships taking whales in the Southern Ocean, including in the Australian Whale Sanctuary. This sanctuary has been proclaimed by legislation in the Australian Fishing Zone, which is the same area as the EEZ, including the area off the Australian Antarctic Territory.¹⁶² Opposition to whaling has a high Australian national profile for a number of reasons, including that whale watching is a major tourist activity for the seasons when the whales migrate up and down the Australian coast between the Antarctic waters and the warmer northern waters for calving.¹⁶³ As a result there is high feeling for their preservation, even though many of the most vocal objectors like to forget that Australia was until 1975 an active whaling nation. For all of that the annual whaling expedition conducted by Japan into the Southern Ocean has generated much public controversy, in Australia, New Zealand, and in many other countries.

160 Its deliberations on the Australian submission are reported, in a statement by the Commission on the Limits of the Continental Shelf chairman of 21 April 2008 and in its Recommendation; see website <www.un.org/Depts/los> and follow prompts.

161 UNCLOS Art 77.

162 For full details see M White, "Whaling in Australian Waters by the Japanese Fleet: Legal Issues" (2008) 14 *JIML* 41.

163 Also see S Blay and K Buba-Litic, "The Interplay of International Law and Domestic Law: The Case of Australia's Efforts to Protect Whales" (2006) 23 *EPLJ* 465.

The relevant Japanese whaling is conducted by Kyodo Sepaku Kaisha Ltd, a company incorporated in Japan and which owns and operates the whaling ships. These whaling activities are allowed and supported by the Japanese government pursuant to the Japanese Whaling Research Program under a special permit for the Antarctic (JARPA and JARPA II), issued under Art VIII of the *International Convention for the Regulation of Whaling 1946*.¹⁶⁴ The Japanese government operates through a research agency called the Institute of Cetacean Research.¹⁶⁵ The Japanese whaling fleet for the 2007-2008 season comprised five vessels made up of one “sighting and survey” vessel, three “catcher” vessels and the base ship for processing the slaughtered whales, the MV *Yashin Maru No 2*. The 2008-2009 whaling fleet had a similar composition. The Australian government opposes these whaling activities. There are a number of international and national legal issues that are thrown up by this whaling dispute.

Australian law proscribes whaling under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) under which an Australian Whale Sanctuary is created in the EEZ.¹⁶⁶ In the Australian Whale Sanctuary it is an offence to kill, injure, take or be in possession of whales¹⁶⁷ and these laws apply to all persons and vessels in the sanctuary waters. There is an exception under the *Antarctic Treaty (Environment Protection) Act 1980* (Cth)¹⁶⁸ if the actions of a country or entity are authorised by the Australian minister but such is not the case here. Under Australian law, therefore, that part of the annual Japanese whaling expedition that takes whales in the Australian EEZ is unlawful. However, most countries do not recognise the Australian claim to an EEZ off Antarctica and so Japan denies that Australian law in this area where it takes whales is valid.

The second legal issue relates to the Southern Ocean Whale Sanctuary. The International Whaling Commission, as to which see more under, adopted the Southern Ocean Whale Sanctuary in 1994, which provided protection for all whales from commercial whaling.¹⁶⁹ The sanctuary is designed to allow the natural restoration of the whale ecosystem that had been damaged by many years of commercial whaling, with some whale populations becoming endangered. A sanctuary had been established in the Antarctic in 1938, although it was later lifted, and

¹⁶⁴ 1948 Australian Treaty Series 18; opened for signature 2 December 1946 and entered into force 10 November 1948. The facts in this paragraph are taken from the judgment of Allsop J in *Humane Society International Inc v Kyodo Sepaku Kaisha Ltd* [2008] FCA 3 as to which see more under Section 7.7.4 in Chapter 7.

¹⁶⁵ See <www.icrwhale.org>. The Institute is very informative, especially in setting out the Japanese press releases and other material concerning the events surrounding the whaling fleet and the activists.

¹⁶⁶ Sections 5, 225.

¹⁶⁷ Sections 229, 230.

¹⁶⁸ Section 7(1).

¹⁶⁹ See International Whaling Commission <www.iwcoffice.org>.

the International Whaling Commission established the Indian Ocean Sanctuary in 1979. Commercial whaling was generally prohibited by the International Whaling Commission in 1982. Proposals for sanctuaries in the South Atlantic and the South Pacific have been submitted to the Commission but they have not been able to achieve the required two-thirds majority vote.¹⁷⁰ This Japanese “scientific” whaling is carried out in the Southern Ocean Sanctuary, which prohibits commercial whaling only.

The *Whaling Convention*¹⁷¹ established the International Whaling Commission and granted to it powers to set the allowable whaling catch. However, under Art 8 of the *Whaling Convention* the contracting states may grant to its nationals a special permit to kill whales “for the purposes of scientific research” and this shall be “exempt from the operation of this Convention”.¹⁷² Article 8 provides no limits on the take of whales for research purposes; hence the characterisation of this provision as a loophole. Whales taken for research shall be “processed” as far as practicable.¹⁷³ Japan asserts its scientific whaling take is lawful because it is for scientific research. Australia disputes this and asserts it is commercial whaling and that it is misleading to claim it is scientific research. Evidence of this is that they kill the whales and this is not necessary for research; that the Japanese take is much higher than is required for any research with a 2007-2008 season target of nearly 1000 whales (although it was not achieved), and all or nearly all of the whale meat is sold in the commercial market. Japan argues that commercial sale of this whale meat is allowable under the Convention after the scientific research has been completed and so this is not evidence against the genuineness of its scientific program. The International Whaling Commission and its scientific committee has regularly asserted that non-lethal research of whales is perfectly adequate to achieve the required research.¹⁷⁴ It may be seen, therefore, why the Japanese claim to kill whales for scientific research is regarded by many as a deceit.

If Australia, or New Zealand, or any other interested party, were to seek international legal sanction against the Japanese government then the main avenues for this are the International Court of Justice, which is available under the United Nations Charter and the International Court

170 See IWC website at <www.iwcoffice.org> and search “Whale Sanctuaries”.

171 *International Convention for the Regulation of Whaling* done at Washington on 2 December 1946 and entered into force generally on 10 November 1948. It has since been the subject of much amendment, but the main issues remain the same. Article III establishes the International Whaling Commission.

172 Article VIII(1).

173 Article VIII(2).

174 One example is International Whaling Commission Resolution 2005-1 which includes that the Commission “strongly urges the Government of Japan to withdraw its JARPA II [whaling] proposal or to revise it so that any information needed to meet the stated objectives of the proposal is obtained using non-lethal means”: see <www.iwcoffice.org> Resolutions 2005.

of Justice Rules,¹⁷⁵ or the International Tribunal for the Law of the Sea (ITLOS), which is available under UNCLOS.¹⁷⁶ It may be that any case commenced by Australia in ITLOS would end up for final decision before an arbitration panel as provided for in UNCLOS, as was the case in the *Southern Bluefin Tuna Case*.¹⁷⁷ It is also open to the Japanese government to take the initiative to have the matter determined by the same international bodies but it has not made any statement that it is contemplating it. The Australian and Japanese governments are generally on good terms and both have expressed their hope that a diplomatic solution may be found. The future decisions of the International Whaling Commission itself will also have a major influence on events and the parties to the Commission are trying to arrive at a suitable solution to the dispute.

9.8 Conclusions

It may be seen from what has been set out above that the Antarctic and Southern Ocean region is almost unique in the world in its geophysical qualities on land and sea and in its governance of both. The governance of both land and sea is the subject of so many disparate claims that most of the world's nations have combined to manage them and their resources in a cooperative and integrated manner. The basis for governance of the Antarctic is the *Antarctic Treaty* 1959 and the other treaties flow on from it, as has been set out above in this chapter. The *Antarctic Treaty* has provided the framework for a wide ranging governance arrangement for the region in what is now well established as the Antarctic treaty system. From the agreed principles based on this treaty most of the activity is related to scientific discovery and the only exploitation, at least so far, relates to fisheries and some very controversial whaling. The treaties and the Australian laws that are based on them seem to work well.

The other two Australian land areas in the Southern Ocean are Macquarie Island, which is part of Tasmania, and the Commonwealth Territory of Heard Island and the McDonald Islands. That Macquarie Island should be part of Tasmania is a product of history as it was Tasmania that provided the best base for its governance during the colonial period. However, now that the Commonwealth manages Australia's offshore islands as territories there is much to be said for its governance to be transferred. The only activity on Macquarie Island comes from the Commonwealth research station and having this island, some

¹⁷⁵ Charter of the United Nations Art 7(1) <www.un.org>.

¹⁷⁶ UNCLOS Pt XV and Annexes V-VIII <www.icj-cij.org>.

¹⁷⁷ *Australia v Japan; New Zealand v Japan*, ITLOS Provisional Order dated 27 August 1999 see <www.itlos.org>; and Arbitral Award dated 4 August 2000 see <www.worldbank.org>.

1500 kilometres away, as part of the Tasmanian Huon Municipality for its local government is anomalous. If Macquarie Island became a Commonwealth external territory its governance would likely be improved as the issues arising from it are now, and will remain in the future, national and not Tasmanian State issues.

The laws relating to the Territory of Heard Island and the McDonald Islands are Commonwealth laws, although the applied laws include some laws from the Australian Capital Territory and Jervis Bay. As there is no permanent habitation on those islands and as fisheries is the only commercial activity in the area, the Commonwealth laws apply. Much of this region is well managed with the fisheries management plans and strong fisheries enforcement in place. Being a Commonwealth external territory simplifies the governance of the area, over both land and sea, as no Commonwealth-State issues arise.

The governance of the Southern Ocean areas as seas seems to have a suitable set of conventions and laws, at least from the Australian point of view. A live issue arises from whether Australia and the other countries with firm territorial claims to Antarctica can claim an EEZ off their coastlines and, beyond that, an extended continental shelf. All parties are being restrained about it, but the only countries that recognise such claims are those that are self-interested in the benefits. This is part of the reason for a controversy between Australia, and New Zealand and some other countries, and Japan. The latter does not recognize the EEZ claims offshore from Antarctica and so, aggressively, continues to hunt whales in these sea regions. This is an issue that will probably be resolved in the International Whaling Commission, although the issues arising from the various claims to the land and offshore seas of Antarctica are likely to continue long after the whaling issue is resolved.

Chapter 10

Offshore Territories Laws

- 10.1 Introduction and Constitutional Base
- 10.2 Coral Sea Islands Territory
 - 10.2.1 Relevant Legislation and Applicable Law
 - 10.2.2 Offshore Laws
- 10.3 Norfolk Island Territory
 - 10.3.1 History
 - 10.3.2 Administration and Governance
 - 10.3.3 Judiciary
 - 10.3.4 Offshore Laws
- 10.4 Lord Howe Island
 - 10.4.1 History
 - 10.4.2 Laws
- 10.5 Macquarie Island
- 10.6 Heard Island and McDonald Islands Territory
- 10.7 Indian Ocean Territories – Cocos (Keeling) Islands and Christmas Island
 - 10.7.1 Geographical Location
 - 10.7.2 History
 - 10.7.2.1 Cocos (Keeling) Islands
 - 10.7.2.2 Christmas Island
 - 10.7.3 Relevant Legislation and Applicable Law
 - 10.7.4 Administration and Governance
 - 10.7.5 Judiciary
 - 10.7.6 Offshore Laws
- 10.8 Ashmore and Cartier Islands Territory
 - 10.8.1 Relevant Legislation and Applicable Law
 - 10.8.2 Offshore Laws
 - 10.8.3 Fisheries Agreement with Indonesia
- 10.9 Conclusion

10.1 Introduction and Constitutional Base

Australia's offshore territories are an important aspect of Australia's offshore laws. This chapter, therefore, looks at the various offshore islands and sets out the basic facts as to their background and present laws. Although the chapter is entitled as being about the offshore "territories", two of the islands offshore are in fact parts of the mainland States out from which they lie. This is due to historical development and is not

necessarily conducive to orderly offshore administration, a point which is made in the concluding section. The order in which these disparate offlying territories will be addressed is to start in the north-east with the Coral Islands Territory and then work south and clockwise around Australia, ending with the Ashmore and Cartier Islands Territory in the north-west. Some conclusions will then be drawn about the effectiveness and orderliness of the laws relating to these offshore island territories and their adjacent seas.

The Constitution provides for the creation and governance of territories within Australia's federal system as follows:

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, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.¹

It may be seen from this that the Commonwealth may acquire a territory in one of three ways: accept a territory surrendered to it by a State; accept a territory placed under its authority by the Queen, or it may otherwise acquire a territory. The onshore territories (the Australian Capital Territory, Jervis Bay and the Northern Territory) were created by State surrender of land to the Commonwealth,² as to which see shortly. However, the various offshore territories were created by different means. The Territories of Papua and Norfolk Island were each placed under the authority of the Commonwealth by the Queen.³ Other offshore territories were "otherwise acquired", to use the words of the Constitution. These were the Cocos (Keeling) Islands,⁴ Christmas Island,⁵ Heard Island and

¹ Constitution s 122.

² For the creation of the Australian Capital Territory, see: *Seat of Government Acceptance Act 1909* (Cth); *Seat of Government Surrender Act 1909* (NSW); *Jervis Bay Territory Acceptance Act 1915* (Cth); *Seat of Government Surrender Act 1915* (NSW). For the creation of the Northern Territory, see: *Northern Territory Acceptance Act 1910* (Cth); *Northern Territory Surrender Act 1907* (SA). For a discussion on the extent of the territories power (s 122), see *Kruger v Commonwealth* (1997) 190 CLR 1.

³ For the recitation of the laws concerning the colonial governance of Papua, then called British New Guinea, see *Strachan v Commonwealth* (1906) 4 CLR 455. Norfolk Island is dealt with in some detail under but for its legal basis and history see *Newbery v R* (1965) 7 FLR 34; *Berwick Ltd v Gray* (1976) 133 CLR 603 at 608-609 per Mason J. The *Norfolk Island Act 1913* (Cth) was repealed and replaced by the 1957 Act which in turn was repealed and replaced by the current 1979 Act. The recitation to the 1979 Act has a full description of the various legal instruments for and governance of Norfolk Island from its first British governance as part of New South Wales after 1788, through administration by Van Dieman's Land (Tasmania) then back to the colony of New South Wales up until it became a Commonwealth territory; see under for details.

⁴ *Cocos (Keeling) Islands Act 1955* (Cth).

⁵ *Christmas Island Act 1958* (Cth).

McDonald Islands,⁶ the Coral Sea Islands,⁷ Ashmore and Cartier Islands,⁸ the Australian Antarctic Territory⁹ and the Trust Territories of Nauru¹⁰ and New Guinea.¹¹

It is appropriate to further mention the three onshore territories before moving on to the offshore ones. The Australian Capital Territory was acquired by the Commonwealth for the site of Australia's new capital after the colonies federated in 1901. It took over 20 years to do so, but the Australian Capital Territory is now well established in that role and, furthermore, it is self-governing with its own Parliament and government structure. At the time of federation it was intended that the new Commonwealth capital, being inland, should also have a port and the southern part of Jervis Bay, being the closest convenient port to the Australian Capital Territory, was acquired to this end. The new Royal Australian Naval College for the training of naval officers was established there in 1915 and it is still there to this day, known as HMAS Creswell. The other two aspects of the Jervis Bay Territory are a small village nearby and the Wreck Bay Aboriginal Community in the southern part of this territory.¹² The third onshore territory is that of the Northern Territory, which started as part of South Australia, then became a Commonwealth territory and then moved to self-government with its own Parliament. There is no requirement to mention these three territories further as they are not offshore ones. (Jervis Bay has part of a large bay in its boundaries but these are internal waters, not offshore ones). Australia has had a busy history in territories of which some have since become independent. The independent countries of Papua New Guinea and Nauru were previously held as Australian territories. Papua was annexed as a British possession in 1884 and was administered by a Lieutenant-Governor under the general governance of the Colony of Queensland. After federation the Commonwealth took control of the territory under the *Papua Act 1905*.¹³ New Guinea was a Germany colonial territory captured from it during World War I (1914-1918) and after the peace mandated to the Trusteeship of Australia by the League of Nations. After World War II (1939-1945) a new system came into place as the new Charter of the United Nations established an international trustee system for the administration and

6 Heard Island and McDonald Islands Act 1953 (Cth).

7 Coral Sea Islands Act 1969 (Cth).

8 Ashmore and Cartier Islands Acceptance Act 1933 (Cth).

9 Australian Antarctic Territory Acceptance Act 1933 (Cth).

10 Nauru Island Agreement Act 1919 (Cth) (repealed on its becoming independent, see under).

11 Papua New Guinea Act 1949 (Cth) (repealed on its becoming independent, see under).

12 Informative details about all of the Commonwealth territories is available on the Attorney-General's website <www.ag.gov.au> and follow prompts.

13 See *Strachan v Commonwealth* (1906) 4 CLR 455, mentioned above fn 3.

TERRITORIES LAWS



Map 10.1: Australian Current Offshore Territories

Source: Geoscience Australia (as amended).

Note: outer continental shelf claims not shown here but can be seen in Chapter 9, Map 9.3

supervision of certain territories.¹⁴ A trusteeship agreement was created for New Guinea in 1946, under which Australia was to exercise sole responsibility for the territory's administration.¹⁵ Australia administered Papua as a territory jointly with the Trust Territory of New Guinea under the one administration until they both came to independence as one country in 1975 as Papua New Guinea.¹⁶

As to the island of Nauru, the United Nations approved a trusteeship agreement in 1947 for its administration, naming Australia, New Zealand

14 *Charter of the United Nations Ch XII.*

15 No 122 Trusteeship Agreement for the Territory of New Guinea, approved by the General Assembly of the United Nations on 13 December 1946 Art 2.

16 *Papua New Guinea Independence Act 1975 (Cth).*

and the United Kingdom as the “Administering Authorities”.¹⁷ Under this trusteeship, Australia, on behalf of New Zealand and the United Kingdom, exercised full powers of legislation, administration and jurisdiction in and over the territory.¹⁸ The economic importance of the Territory of Nauru lay in its phosphate deposits which were heavily mined and marketed for fertiliser. Nauru was granted independence from Australia in 1967.¹⁹

What laws apply to which of the offshore territories is, of course, important but the legislation in this regard is disparate. Under the *Acts Interpretation Act 1901*, unless the contrary intention appears, then “Australia or the Commonwealth”, when used in a geographical sense, includes the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands but does not include any other external territory.²⁰ What laws apply to them has to be found in the relevant Acts applying to them and one has, therefore, to study a huge range of legislation to establish what laws apply to the various Australian offlying territories and other islands. When one adds to this the complexities of federation and the governance under the Offshore Constitutional Settlement 1979 and then combine the many and various offshore activities, the resulting matrix of laws is truly impressive and not a little confusing.

This has given some background to the Australian territories and the rest of this chapter will focus upon the Coral Sea Territory, the Territory of Norfolk Island, the New South Wales Lord Howe Island, the Indian Ocean Territories, comprising the Territories of the Cocos (Keeling) Islands and Christmas Island, and it will conclude with the Ashmore and Cartier Islands. Although for completeness headings are included for Macquarie Island, the Australian Antarctic Territory and the Territory of Heard Island and McDonald Islands, readers will need to refer to Chapter 9 where the laws applying to these Southern Ocean lands are dealt with.

10.2 Coral Sea Islands Territory

The Coral Sea Islands Territory is a single territory encompassing all the islands, cays and reefs in the Coral Sea.²¹ The territory covers approximately 780,000 square kilometres, extending east and south from the

¹⁷ No 138 Trusteeship Agreement for the Territory of Nauru, approved by the General Assembly of the United Nations on 1 November 1947 Art 2.

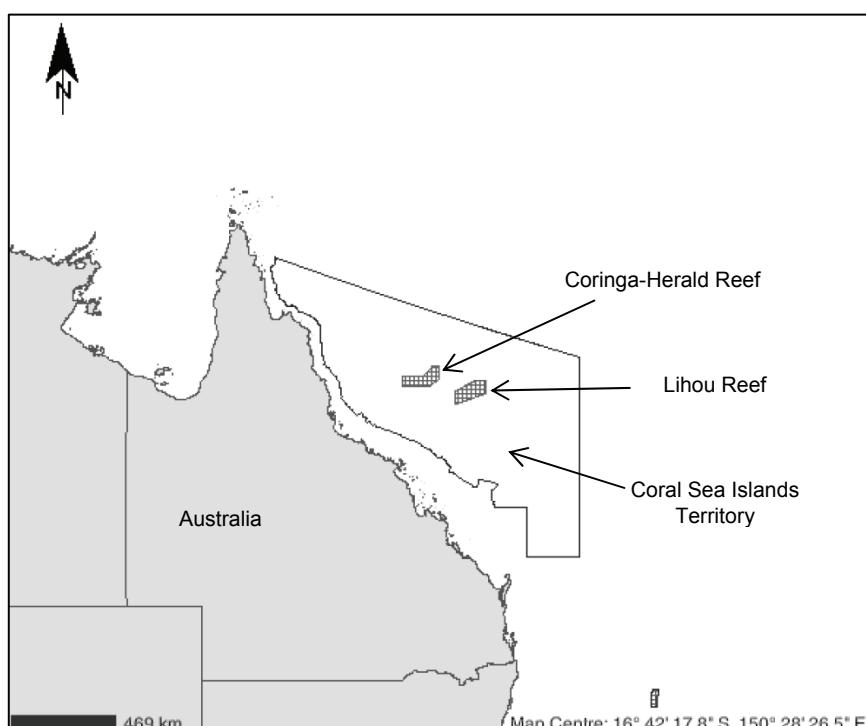
¹⁸ Article 4.

¹⁹ *Nauru Independence Act 1967* (Cth) which repealed the *Nauru Act 1965* under which it had previously been administered.

²⁰ *Acts Interpretation Act 1901* (Cth) s 17(a). By *Criminal Code* s 3A, the Code applies to all external territories, but as the relevant sections of this book show, so do other criminal laws.

²¹ See *Coral Sea Islands Act 1969* (Cth) preamble.

outer edge of the Great Barrier Reef between latitudes 12 degrees south and 24 degrees south out to longitude 156 degrees east, see Map 10.2 below.²² It became a Commonwealth territory in 1969 under the *Coral Sea Islands Act 1969* (Cth) before which it was part of the State of Queensland. The territory was enlarged in 1997 to include the Elizabeth and Middleton Reefs, which are well to the south being located at approximately 29 degrees south latitude.²³ There are weather stations and navigational structures on many of these reefs and islets but the only one with permanent habitation is Willis Island, which has a small staff for its weather station. The many islands, cays and reefs make it a dangerous navigational area with the result that there have been numerous shipwrecks.



Map 10.2: Coral Sea Islands Territory

Source: Geoscience Australia (as amended)
Note: see also Map 10.3

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- 22 Australian Government Geoscience Australia, *Coral Sea Islands* (2006) <www.ga.gov.au/education/facts/dimensions/externalterr/coral.htm> (accessed 14 January 2009).
 - 23 See *Environment, Sport and Territories Legislation Amendment Act 1997* (Cth) Schedule.

10.2.1 Relevant Legislation and Applicable Law

The relevant Commonwealth Act pertaining to this territory is the *Coral Sea Islands Act 1969* (Cth). The laws in force in the Coral Sea Islands Territory²⁴ are only those expressed to apply there and the Governor-General, in reality the Commonwealth government, may make Ordinances for its peace, order and good government²⁵ but the Ordinances must be laid before the Parliament where they may be disallowed by motion carried by either House.²⁶ A 1973 Ordinance set out the detail about the relevant laws in force from time to time in the Australian Capital Territory that are to apply in the Coral Sea Islands Territory.²⁷ It also repealed all laws otherwise applicable in the Coral Sea Islands that were inconsistent with Australian Capital Territory laws.²⁸

As mentioned, relevant laws must state that they apply and Commonwealth legislation is not in force in the territory except where the Act expressly so extends it.²⁹ For example, the *Criminal Code* expressly extends to all offshore territories.³⁰

The 1969 Act confers jurisdiction on the Norfolk Island court in relation to the Coral Sea Islands Territory, except with respect to matters pertaining to the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*.³¹ The court is not obliged to sit in the Coral Islands, however, as the small islands have no suitable facilities and are somewhat damp, so the Act provides that it may sit in Norfolk Island or in Australia as it chooses.

10.2.2 Offshore Laws

Map 10.3 indicates that the western boundary of the Coral Sea Islands Territory roughly approximates the outer Great Barrier Reef and so runs, to some extent, parallel to the Queensland coastline (except the Elizabeth and Middleton Reefs, which are located further south). For the purposes of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), the offshore area of Queensland includes the Coral Sea area³² so this Queensland law applies in this territory. Similarly, under the *Offshore Minerals Act 1994* (Cth), the Coral Sea area is part of the Commonwealth-Queensland offshore area³³ so this Queensland law also applies there. Some of the Coral Sea Islands Territory has been declared a marine reserve and,

24 The boundaries of the Coral Sea Islands Territory are set out in the preamble to the 1969 Act.

25 Section 5.

26 Section 6(2).

27 *Application of Laws Ordinance 1973* (CSI) s 3(1), (2).

28 Section 7.

29 *Coral Sea Islands Act 1969* (Cth) s 6(1).

30 *Criminal Code* s 3A.

31 Section 8.

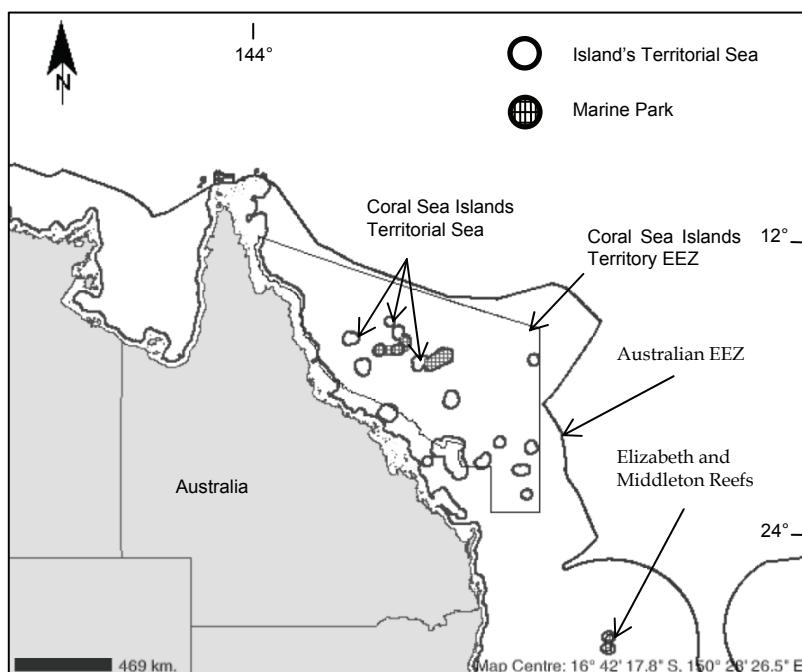
32 *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) s 8(1).

33 *Offshore Minerals Act 1994* (Cth) s 14(2).

for instance, both Elizabeth Reef and Middleton Reef have been so declared as Marine National Nature Reserves.

The Coral Sea Islands areas do not have a three nautical miles coastal zone around them because they are Commonwealth and not State lands, but each has a 12 nautical miles territorial sea. The relevant laws of the Australian Capital Territory and the Commonwealth that apply in the Coral Sea Islands Territory also apply within those territorial seas. Beyond the territorial sea, the Commonwealth has jurisdiction within its further 12 nautical mile contiguous zone to enforce the Commonwealth fiscal, sanitary, migration and fiscal laws.³⁴ As shown in Map 10.3 below, the Commonwealth's EEZ extends beyond the eastern boundary of the territory in some cases although this eastern boundary is limited where it abuts an agreed maritime boundary with a neighbouring country.

It may be seen from this that the laws applicable in the Coral Sea Islands Territory are complex. Some Commonwealth laws apply, some Australian Capital Territory laws apply and some Queensland laws apply. The court with jurisdiction has no direct connection with any of these as it is the Norfolk Island court, which is derived from the Federal Court as will be seen shortly.



Map 10.3: The Territorial Sea and EEZ of the Coral Sea Islands

Source: Geoscience Australia (as amended)

Note: see also Map 10.2

34 UNCLOS Art 33.

10.3 Norfolk Island Territory

Norfolk Island lies in the south-west Pacific Ocean at 28 degrees south latitude and 167 degree east longitude.³⁵ In 1856 persons who had previously inhabited Pitcairn Island, who were the descendants of the mutineers of the *Bounty* and their Tahitian followers, were resettled on to Norfolk Island.³⁶ The island currently has a population of approximately 1800, about half of whom are of Pitcairn descent. The territory comprises the main island, with other small islands and rocks nearby.³⁷

As mentioned above, unless the contrary intention appears in any particular Act, “Australia”, when used in a geographical sense, includes the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands but does not include any other external territory.³⁸ Norfolk Island is, consequently, not considered part of “Australia” under this provision for geographical purposes, which is consistent with its present structure of being self-governing, having its own citizenship and having its own separate court system.

10.3.1 History

Captain Cook discovered Norfolk Island in 1770 on his second voyage and was much taken with its timber and hemp for use in ships, which commodities were then in short supply for the British fleet. Norfolk Island was settled promptly as a penal settlement after the Botany Bay penal colony (Sydney) was established in 1788. It was a dependent settlement of New South Wales but the island was abandoned in 1814 and was then reoccupied in 1825, beginning the period in which the island was used as a penal settlement for second offenders. The penal settlement was transferred to Van Diemen’s Land in 1855.

In 1856, pursuant to the *Australian Waste Lands Act 1855* (Imp), Norfolk Island was declared a distinct and separate settlement, to be administered by a governor, and the Governor from time to time of New South Wales was appointed to this office. Some governance changes were later made including in 1901 to accommodate federation of the Australian colonies in 1901. Finally, in 1914 by United Kingdom Order in Council, Norfolk Island was offered to the Commonwealth of Australia which accepted it by virtue of the *Norfolk Island Act 1913*³⁹ as a Commonwealth territory.

35 *Norfolk Island Act 1979* (Cth) s 4(1), Sch 1.

36 See *Norfolk Island Act 1979* (Cth) preamble.

37 Schedule 1.

38 *Acts Interpretation Act 1901* (Cth) s 17(a).

39 See *Norfolk Island Act 1979* (Cth) preamble. See also *Berwick Ltd v Gray* (1976) 133 CLR 603 at 608-609 per Mason J; *Newbery v R* (1965) 7 FLR 34 per Eggleston J.

10.3.2 Administration and Governance

The current Commonwealth legislation for Norfolk Island is the *Norfolk Island Act 1979* (Cth). Prior to this enactment governance was under the 1963 and the 1957 Acts and prior to that under the 1913 Act, as mentioned above. The current position is that Commonwealth legislation does not apply in Norfolk Island unless the statute so states,⁴⁰ which is so whether the statute was passed before or after the commencement of the 1979 Act.⁴¹

The head of government of Norfolk Island is the Administrator, who is responsible for administering the government of the territory⁴² and is appointed by the Governor-General.⁴³ The Administrator is thus the Commonwealth's representative on the island. Norfolk Island is governed by an Executive Council that advises the Administrator on all matters relating to the government of the territory.⁴⁴

It is one of only three territories granted a measure of self-government, together with the Australian Capital Territory⁴⁵ and the Northern Territory⁴⁶ Norfolk Island has a unicameral Legislative Assembly⁴⁷ (nine members) with broad powers to make laws for the "peace, order and good government" of the territory.⁴⁸ The Administrator has power to assent to legislation, disallow it or suggest amendments, or to reserve it for the consideration of the Governor-General. The Governor-General has a considerable array of powers as well, as to which see shortly. Schedules 2 and 3 to the *Norfolk Island Act 1979* sets out areas over which the Legislative Assembly may pass legislation and there is a complex set of areas in which the Assembly, the Administrator, the Governor-General and the Minister have some powers. The Act establishes an Executive Council, over which the Administrator presides, and whose assent is necessary for legislation to be completed.

The Legislative Assembly does not have the power to make laws that authorise the acquisition of property otherwise than on just terms; the raising or maintaining of any naval, military or air force; the coining of money; or that permit euthanasia.⁴⁹

Under the *Norfolk Island Act 1979*, the Commonwealth has retained powers with respect to legislation passed in the territory. The Governor-General has a special power to disallow a territory law within six months

⁴⁰ Section 18.

⁴¹ Section 18(1).

⁴² Section 5(1).

⁴³ Section 6.

⁴⁴ Section 11.

⁴⁵ *Australian Capital Territory (Self-Government) Act 1988* (Cth).

⁴⁶ *Northern Territory (Self-Government) Act 1978* (Cth).

⁴⁷ *Norfolk Island Act 1979* (Cth) s 31(1).

⁴⁸ Section 19(1).

⁴⁹ Section 19(2).

of its enactment.⁵⁰ The Governor-General also has the power to introduce a proposed law into the Legislative Assembly.⁵¹ Not only this, the Governor-General also has legislative powers with respect to the territory by way of Ordinances that are expressed to apply there.⁵² Where an enactment of the Legislative Assembly is inconsistent with an Ordinance made by the Governor-General, the latter prevails to the extent of any inconsistency.⁵³

10.3.3 Judiciary

Norfolk Island has a Supreme Court, which was established by the *Norfolk Island Act 1957* (Cth) and preserved by the *Norfolk Island Act 1979* (Cth).⁵⁴ The Governor-General may appoint judges of Federal Courts to preside over the Supreme Court.⁵⁵ Norfolk Island's Supreme Court is consequently composed of nominated Federal Court judges, who sit there as the business of the court requires. Appeals from the Norfolk Island Supreme Court go to the High Court of Australia although special leave is required for them as for other appeals to that court.⁵⁶

10.3.4 Offshore Laws

Norfolk Island has the usual Australian territorial sea of 12 nautical miles, a contiguous zone of 24 nautical miles and an EEZ of 200 nautical miles. Being a territory of the Commonwealth rather than a State, it does not have a three nautical miles coastal zone where State jurisdiction applies. For discussion as to the nature of these different zones, see Chapter 2.

Whilst discussing this Australian offshore area around Norfolk Island it is appropriate to mention the maritime boundaries that have been agreed by treaty with New Zealand and also with France in relation to New Caledonia. On 25 July 2004 Australia and New Zealand signed the Treaty between the Government of Australia and the Government of New Zealand establishing certain Exclusive Economic Zone and Continental Shelf Boundaries.⁵⁷ The treaty describes the boundary lines

50 Section 23.

51 Section 26.

52 Section 27.

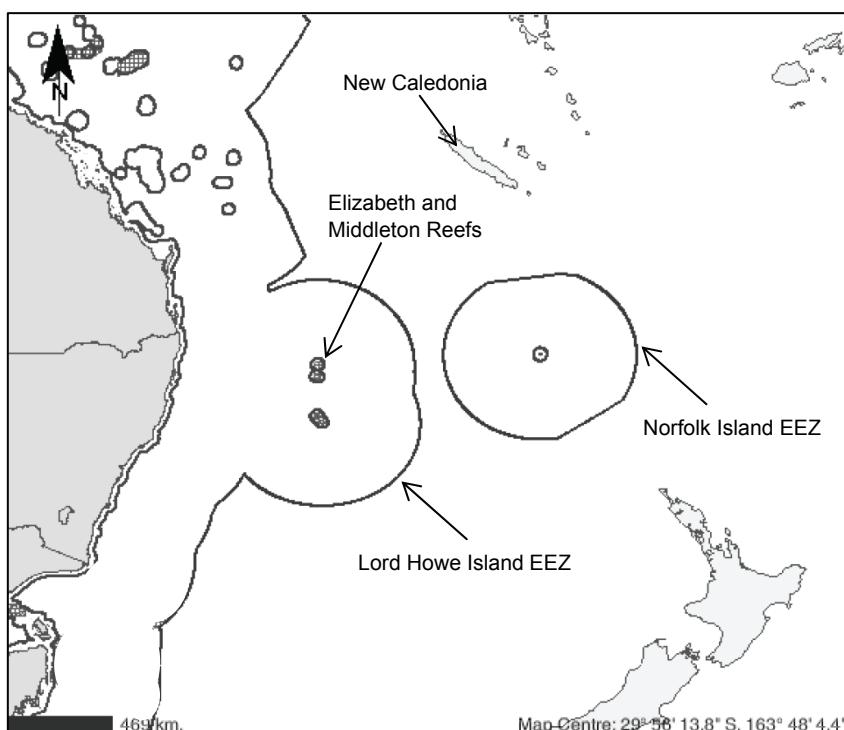
53 Section 29.

54 Section 52(1).

55 Section 53(1). Part VII of the Act deals with the judicial system. In December 2008 Justice Peter Jacobson was appointed Chief Justice and Justice Bruce Lander a judge of the court, with both judges retaining their appointments as Federal Court judges; see joint media release by Hon R McClelland, Attorney-General, and Hon B Debus, Minister for Home Affairs, dated 12 December 2008; website <www.attorneygeneral.gov.au> for Media Releases.

56 *Judiciary Act 1903* (Cth) s 35AA (Appeals from the Supreme Court of a Territory).

57 [2006] ATS 4. The Australian Treaty Series is available on the Commonwealth DFAT website <www.dfat.gov.au> and follow prompts.



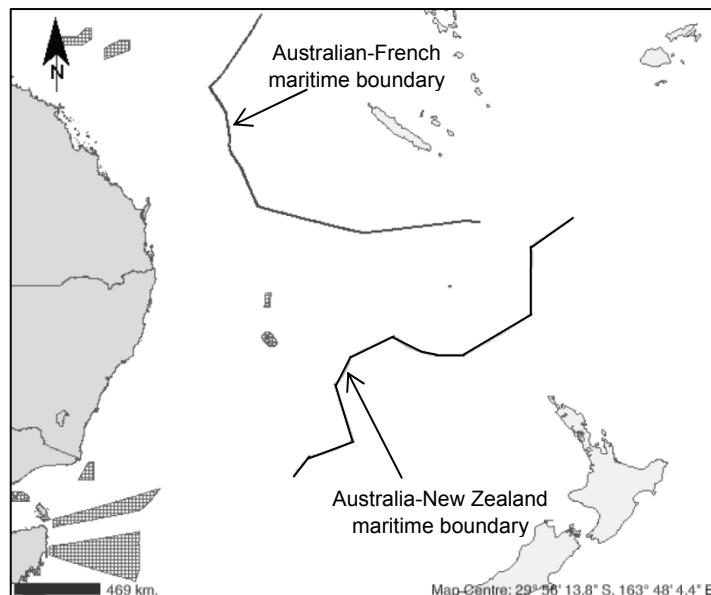
Map 10.4: The Territorial Sea and EEZ of Lord Howe Island and Norfolk Island

Source: Geoscience Australia (as amended)
 Note: for NZ boundary see Chapter 7, Map 7.5.
 Note: for Coral Sea boundary see Map 10.2.

between Australia's and New Zealand's EEZs and continental shelves. The boundary has two discrete parts, one in the north and one in the south. In the north, the zones generated by Norfolk Island and the New Zealand Three Kings Island overlapped to a small extent so this boundary line was agreed between the two governments. In the south the boundary relates to Macquarie Island, as to which see under.

Australia's eastern maritime boundary is also governed by the Agreement on Maritime Delimitation between the Government of Australia and the Government of the French Republic 1983. This agreement defined the boundary between Australian islands in the Coral Sea, Norfolk Island and other Australian islands on one the hand, and New Caledonia, the Chesterfield Islands and other French islands on the

AUSTRALIAN OFFSHORE LAWS



Map 10.5: Australian and the French (New Caledonia) and New Zealand Maritime Boundaries

Source: Geoscience Australia (as amended)
Note: also reproduced in Chapter 7, Map 7.5

other.⁵⁸ Naturally, Australia's offshore laws do not apply beyond its maritime boundaries (except by special separate agreement).

In summary on Norfolk Island it may be seen that the laws that apply are a disparate mixture of local laws and ordinances and Commonwealth laws and ordinances. These laws seem to have some balance and utility and it is a Commonwealth offshore territory which is quite unlike its Australian island neighbour Lord Howe Island.

10.4 Lord Howe Island

Lord Howe Island is situated approximately 600 kilometres east of the Australian mainland, off the coast of New South Wales, at approximately 31° south latitude and 159° east longitude. It comprises Lord Howe Island itself and numerous nearby small islands and rocky islets nearby of which one is known as Ball's Pyramid, after the discoverer, with the total area

58 Agreement on Maritime Delimitation between the Government of Australia and the Government of the French Republic[1983] ATS 3 (entered into force 10 January 1983). Article 1 deals with the Australian-New Caledonian boundary. Article 2 deals with the Heard-McDonald Islands and Kerguelen Island boundary, as mentioned in Chapter 9.

amounting to about 56 square kilometres. The whole of these lands is known as "Lord Howe Island" and Map 10.5 above shows their position.

10.4.1 History

Lord Howe Island was first discovered by Lieutenant HL Ball RN, commander of the *Supply*, in 1788 when sailing from the new British penal settlement in Botany Bay (Sydney) to Norfolk Island to found a second colony. Lord Howe Island was then uninhabited and the first settlement was established in 1833 by three enterprising men and their families who lived by selling provisions to passing ships and collecting feathers for marketing. In 1841 Captain Owen Pool RN Ret'd, bought the rights to the island and employed people to continue this industry.⁵⁹

From there the island had a mixed and various settlement history. The island was, of course, under the British Crown but in 1855 it came under the administration as part of the Colony of New South Wales. In 1878 the New South Wales government sent Captain RR Armstrong RN to be its resident Administrator which brought some orderly administration to the island. Various people came and went after that and its present permanent population is now about 350 people and it is still part of New South Wales.

10.4.2 Laws

Because its origins and growth of settlement were somewhat haphazard the administration grew up in a disorderly way, including the legal position of land tenures. After much agitation concerning the position, the New South Wales government passed the *Lord Howe Island Act* 1953 the purpose of which was to "make provision for the care, control and management of Lord Howe Island" and other matters, including land tenure. The Act established the Lord Howe Island Board, responsible for the administration of the island⁶⁰ and for providing necessary services and facilities.⁶¹ The Board comprises seven persons of whom four are islanders and the other three are selected and appointed by the minister, of whom two are to represent business and tourism and conservation. The third is an officer of the New South Wales Department of Environment and Conservation. Although the islanders are appointed by the minister, their names are derived from an election of the adult islanders on the electoral roll.⁶² The conservation of the island features highly in

59 The facts are taken from *Lord Howe Island 1788-1988: Early Settlers (1883-1880)* (Bicentennial Publication, National Library of Australia, ISBN 0 7316 3090 4).

60 *Lord Howe Island Act* 1953 (NSW) s 4.

61 Section 5(1)(a). See also Pt 3.

62 Part 2, Divs 1 and 3. The formal administrative structure is that Lord Howe Island is part of the New South Wales electoral district of Port Macquarie.

the responsibilities of the Board under the Act and in 1982 it was listed on the World Heritage Register.⁶³ As a result and to the end of administering conservation and heritage laws, certain nominated parts of the New South Wales planning, environment and parks legislation apply.⁶⁴

In relation to the contentious issue of clarifying land tenure and management, the *Lord Howe Island Act 1953* declared that all land was New South Wales Crown land and then went on to make provision for leases, parks, etc, including leases in perpetuity to the islanders themselves.

The offshore laws situation is that Lord Howe Island has a three nautical miles coastal sea, in which the law of New South Wales applies, and beyond this area the laws of the Commonwealth apply in the usual way. It is anomalous that an offlying island such as Lord Howe Island should be part of a State, and in this regard it is like Macquarie Island which is part of Tasmania. It would probably be preferable that it be a Commonwealth offshore territory, like its island neighbour Norfolk Island. However, unlike Macquarie Island, Lord Howe island is inhabited and the inhabitants should have a major say on whether this be so or not.

10.5 Macquarie Island

Macquarie Island lies to the south of Tasmania and is therefore in the Southern Ocean. Because of this it is dealt with in Chapter 9 and readers are referred to that chapter for details about its laws. It should be noted that Macquarie Island is part of Tasmania and is not a territory. The Chapter 9 maps show its geographical position as they do for Heard Island and McDonald Islands.

10.6 Heard Island and McDonald Islands Territory

The Territory of Heard Island and McDonald Islands is a Commonwealth territory located in the Southern Ocean south of Australia and well to the west towards South Africa. They are remote and uninhabited but are important Australian islands because they confer upon the Commonwealth an extensive additional EEZ in the Southern Ocean. As they are in the Southern Ocean, for further details on these territories see Chapter 9.

⁶³ The Register is established under the UNESCO Convention *Concerning the Protection of the World Cultural and Natural Heritage* 1972, which establishes the World Heritage List.

⁶⁴ Sections 15A and 15B apply the *Environmental Planning and Assessment Act 1979* (NSW) and the *National Parks and Wildlife Act 1974* (NSW).

10.7 Indian Ocean Territories – Cocos (Keeling) Islands and Christmas Island

The Cocos (Keeling) Islands and Christmas Island are administered by the Commonwealth as one, known as the Indian Ocean Territories. As the histories and legal regimes of the Cocos (Keeling) Islands Territory and the Christmas Island Territory are closely linked and as together they form this one administrative territory it is appropriate to discuss these Commonwealth territories together.

10.7.1 Geographical Location

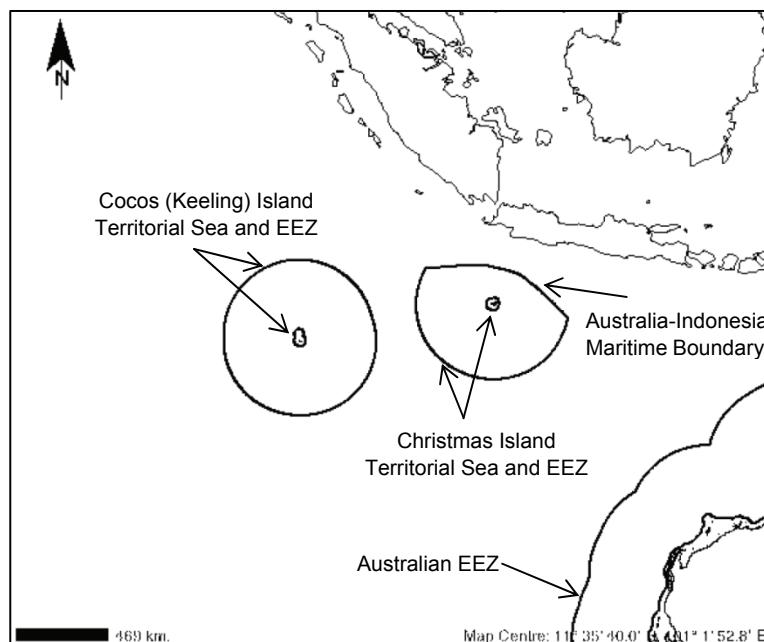
The territories are located in some proximity to each other in the Indian Ocean. The Cocos (Keeling) Islands are about 2770 kilometres north-west of Perth being composed of a series of 27 coral islands and two larger atolls. North Keeling Island is the northern atoll and South Keeling Islands make up the remainder, with only Home Island and West Island being inhabited.⁶⁵ The Cocos (Keeling) Islands lie at approximately 12 degrees south latitude and approximately 97° east longitude, with a total land area of 14 square kilometres. A population of approximately 600 people, consisting mainly of Moslem ethnic Malays, live on the two islands.⁶⁶

For its part Christmas Island is about 2600 kilometres north-north-west of Perth and lies to the north-east of the Cocos (Keeling) Islands so it is much nearer Indonesia, at about 10° south latitude and 106° east longitude, with its northern EEZ boundary truncated by the Australian and Indonesian agreed boundary.⁶⁷ Christmas Island is just the one island and it has a population of approximately 1500 consisting mainly of ethnic Chinese.

⁶⁵ *Cocos (Keeling) Islands Act 1955* (Cth) s 4. The Commonwealth Attorney-General's Department has an informative website on Australia's territories; see <www.ag.gov.au> and follow prompts to "Territories of Australia".

⁶⁶ Australian Government Geoscience Australia, *Cocos (Keeling) Islands* (2003) <www.ga.gov.au/education/facts/dimensions/externalterr/cocos.htm> (accessed 4 October 2008).

⁶⁷ Also relevant to the maritime boundaries of these territories are the maritime agreements between Australia and Indonesia. On 14 March 1997, Australia and Indonesia concluded the Treaty between the Government of Australia and the Government of the Republic of Indonesia establishing an Exclusive Economic Zone Boundary and Certain Seabed Boundaries although it has not entered into force. Among other things, this treaty altered the boundary between the seabed and EEZ of Australia and those of Indonesia in the area between Christmas Island and Java Island, see Art 3. For a discussion on Australia's maritime agreements with Indonesia, see Chapter 7.



Map 10.6: The Territorial Sea and EEZ of the Cocos (Keeling) Islands Territory and Christmas Island Territory

Source: Geoscience Australia (as amended)
Note: Australia-Indonesia boundary also shown at Chapter 7, Map 7.2.

10.7.2 History

10.7.2.1 Cocos (Keeling) Islands

Captain William Keeling discovered the Cocos (Keeling) Islands in 1609. They became known as both the Cocos Islands, after the numerous coconut trees on them, and the Keeling Islands, after the discoverer who first charted their existence. The islands were annexed to Britain in 1857 with John Clunies-Ross named Governor under the Crown until, in 1878 by letters patent, the Governor of Ceylon was appointed to that office. In 1886, by further letters patent, the responsibility for their administration was transferred to the Governor of the Straits Settlements (Penang, Malacca and Singapore) and its governor became the governor of these islands. That same year, Queen Victoria granted all of the islands to George Clunies-Ross in perpetuity to the Clunies-Ross family, who had been in possession since the 1820s and owned the islands under the British Crown, on which they had established copra and other industries

with workers imported from other regions. In 1903, the Cocos Islands (and Christmas Island) became part of the administration of the British Straits Settlements (then based in Malaya).⁶⁸

After World War II ended in 1945 the British government reorganised its administration and, under the *Straits Settlements (Repeal) Act 1946* (UK), the Straits Settlements ceased to be a colony and in 1946 the Cocos Islands (and Christmas Island) became part of the British Colony of Singapore.⁶⁹ By agreement between Australia and the United Kingdom and as part of the United Kingdom decolonisation, in 1955 the islands were transferred from the United Kingdom to Australia, the legislative authority for the Australian Commonwealth being under the *Cocos (Keeling) Islands (Request and Consent) Act 1954* (Cth) and for the United Kingdom under the *Cocos Islands Act 1955* (UK). The islands are currently administered under the *Cocos (Keeling) Islands Act 1955* (Cth), as to which see under, with the Act settling the naming issue by declaring their name to be "Cocos (Keeling) Islands".⁷⁰

Due to unrest with their governance and the land ownership by the Clunies-Ross family the Commonwealth put pressure on and then purchased the islands from the Clunies-Ross family in 1978, except for the family home and some surrounding land. In 1984, in a referendum supervised by the United Nations, residents of the Cocos (Keeling) Islands (and also Christmas Island) voted in favour of being integrated into Australia.⁷¹

10.7.2.2 Christmas Island

Christmas Island derives its name from Captain William Mynors, of the East India ship the *Royal Mary*, who so named it when passing it on Christmas Day in 1643. The British buccaneer, Captain William Dampier, sent crew members ashore for water there in 1688 but it was not really explored and surveyed until 1857 and then more extensively in 1887. George Clunies-Ross, already established on the Cocos (Keeling) Islands, together with Dr John Murray, who had come ashore there from the *Challenger* expedition, wished to exploit the extensive guano deposits and, as a result of their efforts, the British government formally took possession in 1888. Mining was thereafter conducted in various forms for this valuable guano (accumulated bird deposits, used for fertiliser). As

68 For a history of the Cocos (Keeling) Islands, see, for example, M Mowbray, "The Cocos (Keeling) Islands: A Study in Political and Social Change" (1997) 51 AJIA 383.

69 Straits Settlements (Repeal) Order in Council, 1946 (No 462); Singapore Colony Order in Council, 1946 (No 464).

70 Section 5.

71 See Resolution 39/30, Question of the Cocos (Keeling) Islands, General Assembly of the United Nations, 5 December 1984.

the island was then uninhabited, the workforce for the mining was imported from elsewhere and the current population of about 1500 people is composed of Chinese, Malays and European cultures. The guano mining is presently only a very small industry. Much of Christmas Island is now a national park. The Australian government has constructed a major detention facility on the island at which the boat people who arrive without prior authorisation from overseas by boat are processed. (Chapter 6 has some mention of the laws about this issue.)

The Japanese occupied the island during World War II from 1942 to 1945⁷² and after the war, as with the Cocos (Keeling) Islands, Christmas Island was administered by the British Crown Colony of Singapore.⁷³ In 1957, by agreement between the British and Australian governments, the Commonwealth paid £2.9 million for the phosphate-rich Christmas Island to the colony of Singapore for lost revenue and then in 1958 Christmas Island was transferred from the United Kingdom to Australia to become a Commonwealth territory. The legislative basis for this change was by virtue of the *Christmas Island (Request and Consent) Act 1957* (Cth) and the *Christmas Island Act 1958* (UK). Christmas Island is currently administered under the *Christmas Island Act 1958* (Cth), as to which see shortly. As mentioned above, a 1984 referendum supervised by the United Nations resulted in the residents of Christmas Island (and the Cocos (Keeling) Islands) voting in favour of being integrated into Australia⁷⁴ which has since occurred.

10.7.3 Relevant Legislation and Applicable Law

The system of laws applicable in the Cocos Islands and Christmas Island territories was and is marked with some complexity.⁷⁵ As first enacted, the *Cocos (Keeling) Islands Act 1955* and the *Christmas Island Act 1958* provided that "all laws in force immediately before the proclaimed date in the Islands shall continue in force in the Territory by virtue of this Act and not otherwise".⁷⁶ This resulted in the Ordinances of Singapore remaining in force in both territories and Singapore laws applying. In 1979, the Commonwealth government proclaimed the *Singapore Ordinances Application Ordinance*,⁷⁷ which repealed the Ordinances of Singapore

⁷² See the helpful informative website by the Department of Environment, Water, Heritage and Arts; <www.environment.gov.au> and follow prompts to Parks and Christmas Island.

⁷³ Attorney-General Department website <www.ag.gov.au> and follow prompts to Territories.

⁷⁴ See Resolution 39/30, Question of the Cocos (Keeling) Islands, General Assembly of the United Nations, 5 December 1984.

⁷⁵ *Re Clunies-Ross; Ex parte Totterdell* (1989) 82 ALR 475 per French J.

⁷⁶ Section 8.

⁷⁷ As allowed for under *Cocos (Keeling) Islands Act 1955* (Cth) s 12.

in force in the territories, except for certain Ordinances specified in Sch 2, and applied Australian laws in the main.⁷⁸

Then in 1992 the *Territories Law Reform Act 1992* (Cth) substantially amended the legal regime of the Cocos (Keeling) Islands and Christmas Island. The Act repealed all laws in force in the territories immediately before 1 July 1992, except for those laws specified in the schedule.⁷⁹ Western Australian law then was applied to both territories.⁸⁰ The two applicable Acts for the Cocos (Keeling) Islands and Christmas Island have many identical or similar provisions, so that the applicable laws are much the same. As a result, and in the main, Western Australian laws apply in the Indian Ocean Territories⁸¹ and many particular Western Australia statutes are applied,⁸² which in their combination are known as “the applied Western Australian law”. The Commonwealth Parliament has, however, the power to terminate the operation of a Western Australian Act in the territories⁸³ if it should wish to do so and the Commonwealth laws can also have force as the Commonwealth government is empowered to pass Ordinances which may incorporate, amend, repeal or suspend any law,⁸⁴ as both Acts provide that the Governor-General may make Ordinances for the peace, order and good government of each territory.⁸⁵ Unless otherwise provided, all relevant Commonwealth statutes may also apply in the territories.⁸⁶

10.7.4 Administration and Governance

The Cocos (Keeling) Islands Territory and the Christmas Island Territory have some measure of self-government despite their small populations. The *Local Government Act 1995* (WA) applies to the administration and governance of both Indian Ocean Territories and each territory is governed directly by a Commonwealth-appointed Administrator.⁸⁷ Respon-

78 By the *Singapore Ordinances Application (Amendment) Ordinance 1981*, subordinate legislation and orders continued in effect by the 1979 Ordinance were in turn deemed to have had effect from its commencement, that is, from 20 December 1979.

79 *Territories Law Reform Act 1992* (Cth) s 16. See also *Cocos (Keeling) Islands Act 1955* (Cth) s 8.

80 *Cocos (Keeling) Islands Act 1955* (Cth) s 8A(1); *Christmas Island Act 1958* (Cth) s 8A(1).

81 *Cocos (Keeling) Islands Act 1955* (Cth) ss 7A, 8A; *Christmas Island Act 1958* (Cth) ss 7, 8A.

82 *Cocos (Keeling) Islands Act 1955* (Cth) s 8B; *Christmas Island Act 1958* (Cth) s 8B.

83 *Cocos (Keeling) Islands Act 1955* (Cth) s 8C; *Christmas Island Act 1958* (Cth) s 8C.

84 *Cocos (Keeling) Islands Act 1955* (Cth) s 8A(2), (3); *Christmas Island Act 1958* (Cth) s 8A(2), (3).

85 *Cocos (Keeling) Islands Act 1955* (Cth) s 12; *Christmas Island Act 1958* (Cth) s 9.

86 *Cocos (Keeling) Islands Act 1955* (Cth) s 8E; *Christmas Island Act 1958* (Cth) s 8E.

87 See *Administration Ordinance 1975* (for the Territory of Cocos (Keeling) Islands); *Administration Ordinance 1958* (for the Territory of Christmas Island).

sibility for local government matters is vested in an elected Shire Council of seven members for each respective area.

In relation to the provision of public services for both areas, the Commonwealth is empowered under these two Acts to enter into arrangements with Western Australia for the application and administration of law in the territories.⁸⁸ This has been done through service delivery agreements with the Western Australian government which apply to the public services such as policing, education, ports and airports, with the Commonwealth Attorney-General's Department playing a major role.⁸⁹ It would not be a misdescription to describe this aspect as truly cooperative federalism between the Commonwealth and the Western Australian governments.

10.7.5 Judiciary

Western Australian courts deal with all matters arising in the Indian Ocean Territories and although each territory used to have a Supreme Court these have been abolished⁹⁰ and all jurisdiction is now vested in Western Australian courts, which include the Family Court of Western Australia,⁹¹ the District Court of Western Australia,⁹² the Children's Court of Western Australia⁹³ and the Supreme Court of Western Australia.⁹⁴

In short, Western Australian courts and court officers now have jurisdiction (including appellate jurisdiction) in and in relation to the territory as if the territory were part of Western Australia⁹⁵ and any court or court officer may sit in the territory or in Western Australia at its discretion⁹⁶ and, of course, Western Australian practices and procedures apply.⁹⁷

88 Cocos (Keeling) Islands Act 1955 (Cth) s 8H(1); Christmas Island Act 1958 (Cth) s 8H(1).

89 See Attorney-General Department website; <www.ag.gov.au> and follow prompts to Indian Ocean Territories.

90 See Territories Law Reform Act 1992 (Cth) ss 10, 18. See also Cocos (Keeling) Islands Act 1955 (Cth) s 15AAG; Christmas Island Act 1958 (Cth) s 14G.

91 Cocos (Keeling) Islands Act 1955 (Cth) s 15AAC(2)(b)(i); Christmas Island Act 1958 (Cth) s 14C(2)(b)(i).

92 Cocos (Keeling) Islands Act 1955 (Cth) s 15AAC(2)(b)(ii); Christmas Island Act 1958 (Cth) s 14C(2)(b)(ii).

93 Cocos (Keeling) Islands Act 1955 (Cth) s 15AAC(2)(b)(iii).

94 Cocos (Keeling) Islands Act 1955 (Cth) s 15AAC(2)(b)(iv); Christmas Island Act 1958 (Cth) s 14C(2)(b)(iii).

95 Cocos (Keeling) Islands Act 1955 (Cth) s 15AAB(1); Christmas Island Act 1958 (Cth) s 14B(1).

96 Cocos (Keeling) Islands Act 1955 (Cth) s 15AAB(2); Christmas Island Act 1958 (Cth) s 14B(2).

97 Cocos (Keeling) Islands Act 1955 (Cth) s 15AAB(3); Christmas Island Act 1958 (Cth) s 14B(3).

10.7.6 Offshore Laws

Map 10.6, shown above, shows the limits of the territorial sea and the EEZ surrounding the Cocos (Keeling) Islands and Christmas Island. Although the territories have a strong connection with Western Australia, they remain Commonwealth territories and for this reason there is no three nautical miles state coastal zone and within the whole of the 12 nautical miles territorial sea Commonwealth law applies. It should be noted that amendments to the *Migration Act 1958* (Cth) in 2001 excised both these territories from Australia's migration zone for the purposes of visa applications. This is because Christmas Island was at the centre of the controversy surrounding the *Tampa* incident in 2001 when that ship rescued some 450 persons from a sinking vessel bringing refugees and others to Australia. For a brief discussion of these issues, see generally Chapter 6. The Commonwealth detention centre on Christmas Island and its many staff and detainees make a major impact on life in this island.

In summary, it may be said that the laws in force in and offshore from the Indian Ocean Territories of Cocos (Keeling) Islands and Christmas Island are a mixture of the applied laws of Western Australia and, where they have been made applicable, the laws of the Commonwealth. This matrix is complex but in view of the small populations of these islands, that Western Australia is the nearest State and that some sensible provision has to be made for its governance it is hard to say that this is not a suitable solution to the need to bring the rule of law to them.

10.8 Ashmore and Cartier Islands Territory

The last of the Australian offshore territories with which this chapter is concerned is that of the Territory of the Ashmore and Cartier Islands, comprising the islands and reefs bearing these names. As may be seen from Map 10.7 (see over), they are located in the Indian Ocean off the north-west coast of Australia and are uninhabited and, for the most part, uninhabitable. The land areas needed, however, to have some legal structure and declaring them as a territory was a sensible structure by which this could be done. The territory is located about 320 kilometres off Australia's north-west coast and only 144 kilometres south of the Indonesian island of Roti.⁹⁸ (See Chapter 3, Offshore Petroleum, Mining and Installations Laws for the relevant petroleum laws.)

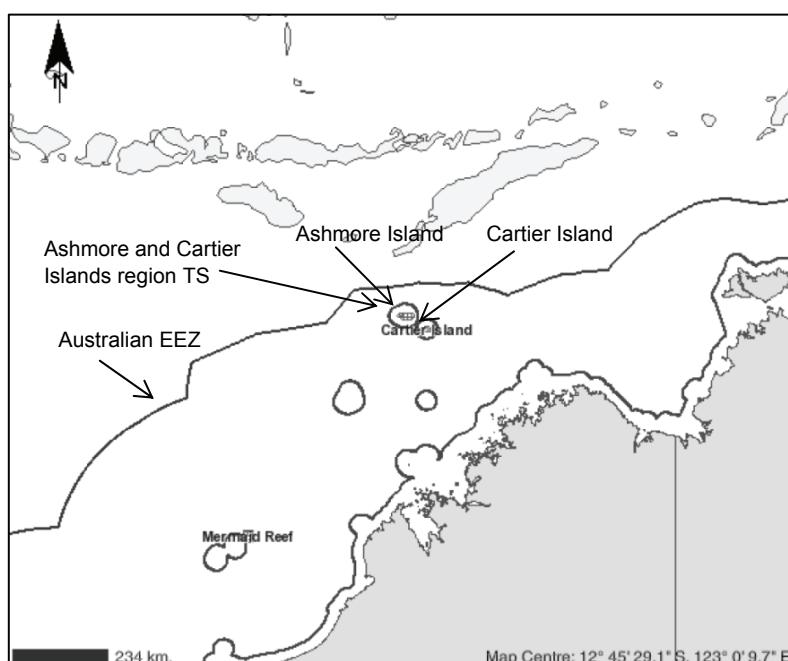
Ashmore Reef was named after Captain Samuel Ashmore, commander of the *Hibernia*, who noted the reef in 1811, with the nearby Hibernia

98 See <www.ag.gov.au> and follow prompts to the Ashmore and Cartier Islands.

AUSTRALIAN OFFSHORE LAWS

Reef being named after the ship.⁹⁹ This area was frequently visited by, and a major fisheries area for, traditional Indonesian fishers for some time before European settlement in Australia, as to which fishers see more shortly. Ashmore Reef comprises the islets known by their geography: namely as West, Middle and East islets, and their mean coordinates are approximately 12° south latitude and 123° east longitude.

For its part Cartier Island, an uninhabited and unvegetated sand quay, is located some 70 kilometres south-east of Ashmore Reef. It was named after the ship *Cartier* when first charted in 1800. It was a bombing range during World War II and has a wrecked ship and a wreck of a WWII bomber on it.



Map 10.7. The EEZ and Ashmore and Cartier Islands Region

Geoscience Australia (as amended)

⁹⁹ Commonwealth Department of Environment, Water, Heritage and Arts website; <www.environment.gov.au> and follow prompts to Ashmore Reef. See also the Commonwealth Attorney-General's website, <www.ag.gov.au>, although it is not particularly informative on this territory. Hibernia Reef is only a drying reef so does not generate an EEZ and it is located outside and is not part of this territory.

In 1909 these islands were annexed by the United Kingdom but by agreement between it and Australia in 1931 they were placed under the authority of the Commonwealth of Australia by virtue of a United Kingdom Order in Council dated 23 July 1931. The Commonwealth accepted the islands as a territory under the *Ashmore and Cartier Islands Acceptance Act 1933* (Cth).¹⁰⁰ The islands remained part of the Northern Territory administration from 1933 to 1978, at which date the Northern Territory was granted self-government after which they then became a territory administered by the Commonwealth government. The Ashmore and Cartier Islands are significant to Australia due to the Jabiru and Challis oil fields lying adjacent to them and to the importance of the marine ecosystems in the area. They both have substantial parks associated with them and are important for traditional Indonesian fishers, as to which see shortly.

10.8.1 Relevant Legislation and Applicable Law

The main legislation applicable to the Ashmore and Cartier Islands Territory is the *Ashmore and Cartier Islands Acceptance Act 1933* (Cth), which has been much amended since its first enactment. The present laws that apply in this territory are those of the Northern Territory as in force from time to time,¹⁰¹ which is appropriate due to the geographical proximity to the Northern Territory, and relevant Commonwealth statutes also apply.¹⁰² Under this Act the Governor-General (ie the Commonwealth government) may make Ordinances for the peace, order and good government of the territory¹⁰³ and these may repeal or amend the applicable Northern Territory laws.¹⁰⁴

The Act also empowers the Commonwealth minister to make arrangements with Northern Territory ministers for the exercise of powers and the performance of functions in the offshore territory¹⁰⁵ and this has been done. The Northern Territory courts have jurisdiction in and in relation to this territory¹⁰⁶ for such cases as may arise and the Act empowers them to sit in the Northern Territory or in the Ashmore and Cartier Islands Territory. A sitting held in the islands may be a little wet and windy as there are no buildings or facilities on land and what is there is barely above sea level, but it would be possible to hold a court in a ship in the territory should that be desirable.

100 Section 5.

101 Section 6(1), (2).

102 Section 8(1).

103 Section 9(1).

104 Section 7.

105 Section 11A.

106 Section 12(1).

10.8.2 Offshore Laws

As the Ashmore and Cartier Islands is Commonwealth territory they do not have a three nautical mile coastal sea so the Commonwealth jurisdiction runs from the baselines but the islands themselves generate a 12-mile territorial sea (but not mere drying reefs).

10.8.3 Fisheries Agreement with Indonesia

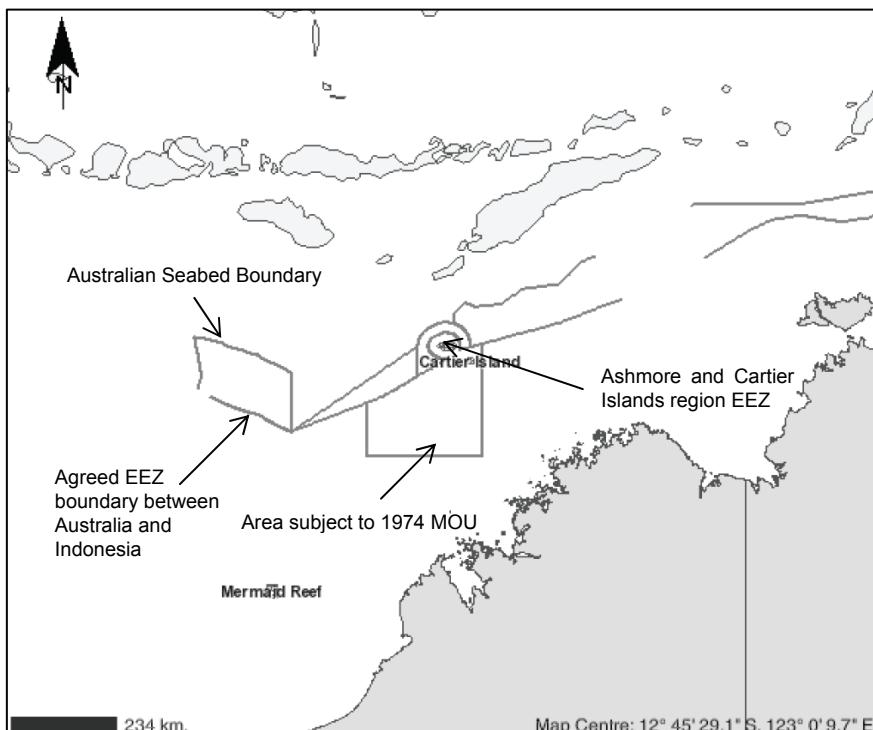
Indonesian fishers traditionally visited and fished this region long before European settlement in Australia. Their wish to continue to do so was something of an issue when the maritime boundary between Australia and Indonesia was being negotiated as the boundary eventually agreed placed this region in the Australian EEZ. As a result, the two countries entered into a memorandum of understanding about their rights in this region and an "MOU box" area was agreed in which these Indonesian traditional rights could be exercised and a general agreement about fisheries was also settled.¹⁰⁷ Map 10.8 below shows the relationship between the Indonesia treaty and Australia's EEZ and the box where traditional Indonesian fishers have certain agreed fisheries rights. Basically, in 1974, as part of negotiations to delineate seabed boundaries, Australia and Indonesia entered into this memorandum of understanding which recognised the rights of access for traditional Indonesian fishers in shared waters to the north of Australia. This access was granted in recognition of the long history of traditional Indonesian fishers that have fished the area. In 1989, new guidelines under the memorandum of understanding were agreed in order to clarify access boundaries for traditional fishers and take into account the declaration of the 200 nautical miles fishing zones and periodic meetings are held between the government officers of both countries to manage the area and keep fish stocks at sustainable levels.¹⁰⁸ Then in 1992 the two governments agreed on further cooperation in fisheries research, regulation and enforcement.¹⁰⁹

For a discussion of fisheries laws and the Commonwealth maritime boundary agreements with Indonesia, see generally Chapter 7. As Ashmore Reef is the closest point of Australian territory to Indonesia it has been and still is a popular place at which boat people being smuggled from Indonesia make their landfall. The Howard government became

¹⁰⁷ Memorandum of Understanding between the Government of Australia and the Government of the Republic of Indonesia regarding the Operations of Indonesian Traditional Fishermen in Areas of the Australian Exclusive Fishing Zone and Continental Shelf 1974. For a general fisheries agreement relating to managing fisheries between the two countries, see Agreement between the Government of Australia and the Government of the Republic of Indonesia relating to Cooperation in Fisheries [1993] ATS 18.

¹⁰⁸ See Department of Agriculture, Fisheries and Forestry website <www.daff.gov.au> and follow prompts.

¹⁰⁹ As per fn 107, 1993 [ATS] 18.



Map 10.8: Australian and Indonesia Treaty boundary including the MOU on Traditional Indonesian Fishers' Rights

Source: Geoscience Australia (as amended)

Note: for more detail on boundaries see Chapter 7, Map 7.2

Note: for territory of Ashmore and Cartier Islands see Map 10.8

notorious for its harsh and clumsy handling of refugees who came by sea and for its “Pacific Solution”. Since the change of government in 2007 such people are now taken to the detention centre in Christmas Island, mentioned above, where they are given access to facilities and processed in an orderly and lawful manner. This problem, however, is a continuing one.

In summary on the Territory of Ashmore and Cartier Islands, the administration is over uninhabited quays, islands and reefs and it is mainly concerned with fisheries and their protection and that of the environment generally. The Northern Territory laws apply in part and Commonwealth laws and Ordinances in part. As this territory is uninhabited the services required for it are not extensive and such law enforcement as is required is supplied by government vessels that visit the territory from time to time.

10.9 Conclusion

In conclusion to this whole chapter it may be seen from what has been set out that Australia's offshore territories have a wide range of administrative and legal needs. There is, of course, a need to have a system of law in all regions offshore and a pragmatic and varying range of solutions has been arrived at to meet this need. Two of the offshore areas dealt with are not territories as such but are parts of the nearest State, but they have been mentioned in this chapter because they are offlying lands with many similarities to the offlying territories.

Off the Australian north-east coast the islands in the Coral Sea have been collected up into a Coral Sea Territory which is a sound framework to bring the rule of law to a disparate group of islands and reefs. There are no inhabitants, except for those on one island at a weather station, but there are many vessels in these seas and people may land from time to time so they all need a legal structure. The Commonwealth laws apply and the court at Norfolk Island has jurisdiction to sit on cases that may arise in the Coral Islands Territory.

Further south, the Norfolk Island Territory has been created and here there is an Administrator and a measure of self-government over the inhabitants, with a small elected Legislative Assembly. This has a limited jurisdiction over which to pass laws and there is an over-riding Commonwealth power in relation to those laws. As a result the onshore laws are a mixture of local and Commonwealth ones. The applicable court is derived from Australian Federal Court judges with appeals to the High Court by special leave. The offshore laws are those of the Commonwealth and they apply from the baselines.

Also off the Australian east coast is Lord Howe Island, which has a quite different governance. Due to historical circumstances this island is part of the State of New South Wales and, as a result, New South Wales laws apply to it. There is some measure of local government, exercised by a small Lord Howe Island Board, which is responsible for local services and governance. As a result the onshore laws are a mixture of local laws and State of New South Wales laws. Offshore there is a three nautical mile zone of New South Wales jurisdiction and then those of the Commonwealth apply.

South of Tasmania is Macquarie Island and this is different again. It is part of Tasmania but it has no permanent inhabitants except those in the Commonwealth research station there. As a result Tasmanian State laws apply onshore and over the first three miles to sea, but thereafter the Commonwealth laws apply in the usual way. It is something of an anomaly that it should be part of Tasmania and there is a lot to be said for its governance to be transferred to the Commonwealth and for it to be administered as an offshore territory.

A long distance to the west is the Territory of Heard Island and the Macdonald Islands, which are situated in the Southern Ocean and the extreme western part of Australia's sphere of influence. They are uninhabited, except for the occasional research party, and are in a cold and hostile environment. The fisheries offshore from them are, however, productive and they attract some unlawful fishing so the industry needs regular enforcement. The applicable laws onshore here are those of the Australian Capital Territory, with modifications for Commonwealth Ordinances and other laws, including those applying to marine parks and fisheries management plans. Offshore the Commonwealth laws apply from the baselines.

Moving north, the next offshore territories are the Indian Ocean Territories, comprising the Cocos (Keeling) Islands and Christmas Island. Both of these island groups are permanently inhabited and by agreement the Commonwealth applies the Western Australian laws on the land, the Western Australian government provides many of the services and the Western Australian courts have jurisdiction. There is some self-government in that each territory has a small council and its own Administrator. Commonwealth laws may still apply as the Commonwealth may direct. On Christmas Island there is a large detention centre for processing boat people who may arrive unlawfully in the region and the Commonwealth laws apply to it. Offshore the Commonwealth laws apply from the baselines.

Moving east one comes to the last offshore Australian territory, which is that of the Territory of the Ashmore and Cartier Islands. These uninhabited islands have applied Northern Territory laws on the land and the Northern Territory government may be contracted to provide such services as the Commonwealth may deem desirable. The Northern Territory courts have jurisdiction. There are no inhabitants but there is vigorous fisheries activity in the area so there are numerous boats. Because of the agreements with Indonesia there is a special fisheries memorandum of understanding under which traditional Indonesian fishery may be carried on in the areas and reefs agreed on under the memorandum of understanding. The Commonwealth offshore areas apply from the baselines.

In conclusion, it may be said that the laws applicable in Australia's offshore territories are complex. None of these territories has the same laws or governance. This results in a legal complexity that would benefit from simplification and a regular framework. The result is, however, pragmatic and any reforms would have to be approached intelligently and sensitively to ensure they met the needs of the areas and where there are permanent inhabitants, their needs as well.

Chapter 11

Offshore Shipping Laws

- 11.1 Introduction
- 11.2 Importance of International Conventions
- 11.3 Navigation Act 1912 (Cth)
- 11.4 Ship Ownership, Registration and Nationality
 - 11.4.1 Ship Ownership
 - 11.4.2 Shipping Registration Act 1981
 - 11.4.3 Nationality
- 11.5 Admiralty and Arrest of Ships
- 11.6 Carriage of Goods by Sea
- 11.7 Marine Insurance
- 11.8 Collisions and Groundings
 - 11.8.1 Collisions
 - 11.8.2 Groundings
- 11.9 Shipwreck and Salvage
- 11.10 Underwater Cultural Heritage and Historic Shipwrecks
 - 11.10.1 Introduction
 - 11.10.2 International Conventions
 - 11.10.3 Commonwealth Legislation
 - 11.10.4 State Legislation
 - 11.10.5 Conclusions on Underwater Cultural Heritage
- 11.11 Offshore Powers of Intervention in Marine Casualties
- 11.12 Pilotage and Towage
 - 11.12.1 Pilotage
 - 11.12.2 Towage
- 11.13 Marine Pollution
- 11.14 Port State Control
- 11.15 Conclusions

11.1 Introduction

Shipping is vital to Australia's well being. International trade ships carry trade goods and products and without them the country would quickly come to a halt and the economy in its present form would collapse. It is an international industry in the main as the international shipping goes from country to country and deals with national laws of each country and the international laws as well. Because of this many Australian laws apply offshore to various international shipping activities.

It is not only international ships that are affected as the domestic shipping and boating laws also apply offshore. As the fisheries, tourism and recreational boats go about their business the laws need to apply to them whilst on the waters whether it be within the national boundaries, international waters, or adjacent to the Australian shores. When one comes to the ships and boats that are based in Australia some different considerations apply from the international ships, but they interact and so offshore laws apply to both.

Mixed into the different aspects of shipping are several categories of laws. Public law applies to many of the activities, such as the enforcement of some criminal law and application of regulation of ships for prevention of collisions at sea. Private law applies to such matters as carriage of goods by sea and marine insurance. Finally, there are areas of offshore laws where the laws are a mixture of public and private laws, such as the regulation and enforcement of marine pollution laws and the crewing certification and manning of ships.

A final introductory remark is that the offshore shipping laws are continually changing. The many international conventions are subject to change regularly and the international and Australian national laws follow them and so they, too, are subject to much change. The national maritime safety regulatory system is a good example as it is being revised and applied throughout Australia, which will have a major impact on construction, crewing, operations and regulation by government.

This chapter is concerned with setting down an outline of the laws in these various areas. It will deal with many topics, most of which deserve a whole book to themselves. Its purpose is, therefore, only to mention the important legislation that applies offshore so that a general picture of the offshore shipping laws emerges. Readers are encouraged to refer to the specialised books and articles for the detail.¹

11.2 Importance of International Conventions and Agreements

Because shipping and navigation are worldwide activities there are a large number of international conventions and governmental agreements as well as numerous relevant international entities, companies and cus-

¹ There are numerous excellent British shipping law books but too few books that deal with Australian shipping laws. M Davies and A Dickey, *Shipping Law* (Lawbook Co, Sydney, 3rd edn, 2004), and M White (ed), *Australian Maritime Law* (Federation Press, Sydney, 2nd edn, 2000) cover much of the field. DJ Cremeann, *Admiralty Jurisdiction: Law and Practice in Australia, New Zealand, Singapore and Hong Kong* (Federation Press, Sydney, 3rd edn, 2008), is the leading Australian text on Admiralty and the arrest of ships whilst SC Derrington and JM Turner, *The Law and Practice of Admiralty Matters* (Oxford University Press, Oxford, 2007) covers the British system and includes the law in Australia and a number of other common law countries.

toms. It is not possible to attempt to set them out although some mention will be made of the main ones in the appropriate sections. The International Maritime Organization has about 40 international conventions, guidelines and resolutions, the International Labour Organisation has a large number as well and then there are the huge number of other agreements driven by various international non-government bodies, of which the CMI² is an important one from the legal point of view. These international conventions and agreements are of fundamental importance when it comes to understanding Australia's shipping laws. They underpin most of the public and private maritime law in its various manifestations. Some of the major aspects have been set out in the earlier parts of this book, examples of which are the offshore maritime zones under UNCLOS, see Chapter 2 and again in Chapter 6, and the agreements that underpin the laws in the Southern Oceans and the Antarctic, see Chapter 9. It has not been possible for most chapters to do more than set out the actual Commonwealth legislation and its application offshore but readers may wish to have in mind that nearly all offshore laws are based on some international convention, regulation, agreement or customary international legal practice.

11.3 Navigation Act 1912 (Cth)

As mentioned above, shipping and boating in its various forms is vital to the Australian national interest. Large commercial ships carry the greater part of Australia's trade, most of it overseas. Medium and smaller commercial ships are involved in fisheries, tourism, offshore oil support and so on. Then there are thousands of recreational boats. The laws applying to all of these vessels and their activities are complex and the Commonwealth and State Parliaments' jurisdictions overlap. Each State, which word as used here usually includes the Northern Territory, has laws applicable to recreational and some other smaller vessels, with deep ocean offshore and international shipping being covered by the Commonwealth laws. This section of this chapter deals with the Commonwealth laws about regulation of ships, of which the principal Act for present purposes is the *Navigation Act 1912*.

This Australian Act is derived from the large, detailed and successive versions of the British Merchant Shipping Acts, which series of Acts were the legal underpinning for the great successes of the British commercial fleet and its international cargo carrying capacity in the 19th and 20th centuries. Australia was the beneficiary of this structure and these laws in having the security of the British fleet to protect its national interests whilst, at the same time and on the other hand, paying the fairly high

² Comite Maritime International which, in English, is usually shortened to the acronym of CMI see <www.comitemaritime.org>.

costs associated with this monopoly of commercial shipping to carry goods and people to and from its shores. The British Merchant Shipping Acts applied in and to Australia throughout the colonial period, from 1778 to federation in 1901, and then they were gradually replaced over the first half of the 20th century by Australian legislation, especially the ever-expanding *Navigation Act 1912*.

The current edition of the *Navigation Act 1912* is massive. Its bulk comprises four volumes with the current text of the legislation itself in Volume 1, amounting to almost 430 sections over 280 odd pages and the next three volumes includes nine schedules of international conventions and notes. The jurisdiction claimed by the Act is also massive as it involves applying Australian laws to large areas of the sea and to people in a wide number of activities. It is appropriate, therefore, to describe this by mentioning the constitutional complexities and control the Commonwealth jurisdiction and then to set out the various parts of the Act that control the various activities within that jurisdiction.

The *Navigation Act 1912* applies, of course, only to the limits of Commonwealth jurisdiction under the Constitution, the Offshore Constitutional Settlement 1979 and several agreements amongst the Commonwealth and the States, as discussed in Chapter 2. This jurisdiction is wide, but its limitations on the more domestic vessels and activities are there and these include that it currently does not apply to:

- (a) trading ships unless they are on an overseas or an interstate voyage;
- (b) fishing or fishing support vessels unless they are on an overseas voyage;
- (c) waterways or pleasure craft;
- (d) naval ships from the defence forces of any nation.³

In relation to trading ships and fishing support vessels, however, there is power in the Act for the Commonwealth to declare that the Act applies to them, which is done on application by the owner of the relevant vessel.⁴ There are exceptions and qualifications scattered throughout the Act but it may be seen that the basic jurisdiction, from the constitutional limitation point of view, is that the States are left to control all of the pleasure craft, the inland waterways vessels (on rivers, dams etc) and the trading and fishing vessels on intrastate voyages ie where they are based in and voyage to and from one or more ports in the same State. The Commonwealth laws apply to the rest.

In relation to the huge amount of shipping activity related to the offshore oil and gas industry, readers will recall that the permanently fixed

³ Section 2. All of the major terms are defined in Pt 1, particularly but not exclusively in s 6.

⁴ Sections 8AA, 8AB.

oil rigs and other such installations are dealt with in Chapter 3. One of the difficult issues relates to mobile offshore installations, such as jack-up rigs and drilling ships which are moored and then mount the drill through the ship itself down into the seabed. The international and national law deals with these by categorising these rigs as ships when they are in mobile form and oil rigs when they are firmly attached to the seabed. Although the distinction is sometimes difficult to make, the system works fairly well. In the mobile mode, therefore, the *Navigation Act 1912* applies to them, as ships, and in the firmly attached mode they come under the offshore petroleum legislation. This leaves the offshore industry support vessels, tugs, supply ships, maintenance vessels, etc. and for them the *Navigation Act 1912* generally applies and, further, the government may, on application of the relevant owner, declare that the Act applies even though it otherwise would not.⁵

This then is the jurisdiction of the *Navigation Act 1912* generally, and it now remains to describe the express areas of law and activities over which the Act claims jurisdiction. It should be borne in mind that although the Act is massive, it leaves to regulations and orders another huge amount of detail that is not appropriate for inclusion in the Act itself.

As mentioned, Pt I deals with jurisdiction, definitions, application etc and Pt II goes on to deal with masters and seafarers and the manning of ships generally. It sets out the qualifications required, the details of manning, wages, discipline, health and so on. Part III deals with foreign seafarers and is short because generally Australian law reflects the international law in that its laws do not apply to onboard activities of foreign flagged vessels unless expressed so to apply.⁶

Part IIIA deals with pilotage of ships but, of course, this only applies to offshore areas as port pilotage comes under State laws. The main offshore pilotage areas are the Great Barrier Reef and the Torres Strait, which areas are dealt with in Chapter 10. This part also provides the legislative basis for the regulations to require compulsory pilotage in certain of these waters. Pilotage is dealt with in a little more detail further on in this chapter.

Part IV deals with ships and shipping and their many requirements for safe construction and operation. Provision is made for regular surveys, life-saving equipment, load lines (so ships are not overloaded), radios and distress equipment and so on. Also in this part are the construction aspects required under the international conventions to which Australia is a party. This is one of the parts the subject of a national maritime safety structure overhaul, which is mentioned in the Introduction.

5 Section 8A.

6 *Re Maritime Union of Australia (CSL Pacific Case)* (2003) 214 CLR 397; [2003] HCA 43.

The law relating to collisions and loss of or damage to ships is provided for in Pt IV, Div 11. When it comes to construction and operation of ships concerning pollution, the International Maritime Organization⁷ has many conventions, and Australia is a party to most, and Divs 12, 12A-12C deal with the ship construction and equipment requirements set out under one or more of those conventions. Marine pollution is also dealt with in more detail further on in this chapter.

Part V sets out the responsibilities of the owner towards passengers and also empowers the owners and master to deal with passengers who may be offensive or detrimental to the orderly running of the ship. Because ships have, from time to time, special functions and special personnel onboard Pt VA makes provision for authorising, empowering and controlling them. These people are neither crew nor passengers so this part fills a legislative gap for them.

Mention has been made of the many International Maritime Organization conventions and Pt VB provides for regulations to be made to give Australian effect to them in respect of the construction and operation of offshore industry vessels and mobile units and the personnel on them. As mentioned, there is some overlap with the legislation that regulates the offshore oil and gas industry and provision is made for that legislation to prevail in the event of inconsistency with provisions under this Act.⁸

Encouragement and regulation of the coasting trade, or cabotage, is an important and difficult issue for coastal states, including Australia. In Australia's case the major issue is whether foreign flagged and operated ships, with lower operational costs, partly from lower standards and conditions for the crews, should be permitted to carry coastal cargo at the expense of the Australian shipping industry. It is a complex area but, mainly because of ineptitude by a succession of Commonwealth and State governments, there is very little coasting trade in Australia. Such Australian coasting trade as there is, and the laws about permits for foreign flagged vessels to carry coastal trade, has its legislative basis in Pt VI of the *Navigation Act 1912*.

The laws regulating wrecks and salvage of shipping are important and the legislative basis for Commonwealth laws are set out in Pt VII.⁹ Historic wrecks, however, come under a different Act.¹⁰ Division 2 empowers the Receiver of Wreck to proceed to a wreck on the beaches and

⁷ International Maritime Organization, a United Nations organ based in London that deals, in the main, with international regulation of shipping safety and the pollution of the marine environment from ships.

⁸ Section 283K.

⁹ The Australian law is set out in detail in M White, "Salvage, Towing, Wreck and Pilotage" in M White (ed), *Australian Maritime Law* (Federation Press, Sydney, 2nd edn, 2000), Ch 9.

¹⁰ *Historic Shipwrecks Act 1976* (Cth).

to take charge to safeguard the survivors, the ship and the cargo, and gives the Receiver extensive powers to give directions to all sorts of people, some of whom may be strangers to the situation.¹¹ Division 3 gives domestic force of law to most of the *International Convention on Salvage 1989* and sets the legal framework for saving persons and salvaging ships and cargo off Australian coasts. It should be noted that the constitutional limitations mentioned above and set out in s 2 of the Act do not apply.¹² It follows that these salvage laws apply to all vessels off the Australian coast but the Act clarifies and expressly provides that these laws do not apply to offshore industry fixed rigs or mobile units, to inland waterway craft or to historic wrecks or property of historic origin offshore.¹³ These topics are dealt with in more detail under.

The balance of the *Navigation Act 1912* deals with other legal aspects. Part IXA provides for appeals to the Administrative Appeals Tribunal for review of many of the numerous decisions made by Commonwealth officials under the Act. Part X provides for "Legal Proceedings" as the Act refers to them, which covers many aspects relating to offences and their prosecution and penalties therefore. An interesting part of Div 1 of Pt X goes to jurisdiction under the Act. It provides that, where there may be doubt about jurisdiction, the ship or person is taken to be within the provisions of the Act unless the contrary is proven.¹⁴ Another provision hidden away in this Act is to the effect that, in addition to jurisdiction granted elsewhere to a court of summary jurisdiction, any court has jurisdiction if its geographical jurisdiction abuts any sea coast or navigable water.¹⁵ Finally, Pt XA deals with tonnage measurements of ships and Pt XI with various miscellaneous provisions. The nine schedules to the *Navigation Act 1912* set out nine international conventions all or part of which conventions are given effect by it.

Not unexpectedly there are numerous provisions in relation to the Act that are unclear, confusing or controversial. One example of lack of clarity is the geographical area to which the *Navigation Act 1912* is expressed to apply. Section 2 of the Act deals with those vessels to which it applies, eg to vessels on interstate or international voyages, and to those to which it does not apply eg to vessels on intrastate voyages, but there is real doubt as to the geographical area to which the Act is meant to apply. One can say confidently that the provisions apply, where so expressed, to Australian-registered vessels wherever they may be, and they also apply

¹¹ See M White, "Salvage, Towage, Wreck and Pilotage" in M White (ed), *Australian Maritime Law* (Federation Press, Sydney, 2nd edn, 2000), especially Sections 9.19 and 9.20.

¹² Section 317.

¹³ Section 316.

¹⁴ Section 379.

¹⁵ Section 380.

to all vessels in the Australian territorial sea generally.¹⁶ The difficulties now arise. First, inside the territorial sea it is unclear when a State or Northern Territory law may apply where the activity or incident crosses the three nautical mile line, as the State or Northern Territory law applies inside it and the Commonwealth law beyond it.¹⁷ Further, there is doubt as to when the Act is meant to apply to non-Australian vessels in the contiguous zone or EEZ. In the event of a collision between a foreign ship and an Australian one in the EEZ, it is unclear in what circumstances the *Navigation Act 1912* applies to the vessels.¹⁸ Clarity is needed for the purposes of civil liability and the application of the criminal law. One example is s 264, which makes it an offence for a master not to go to the aid of a stricken ship after a collision, subject to some defences. If the facts involve a master who is not an Australian national or citizen on a non-Australian ship, does the provision apply? If it does, do the provisions of the *Criminal Code* apply?

These issues are not without difficulty, as the general provisions about application of criminal law offshore, as described in Chapter 4, are that the adjacent State or Northern Territory criminal laws are to apply. On this point of jurisdiction, UNCLOS provides that in the event of a collision or navigational incident on the high seas no penal or disciplinary proceedings may be instituted against the master or crew except by the flag state or the state of the national concerned.¹⁹

In conclusion about the *Navigation Act 1912*, it may fairly be said that its jurisdiction is extensive and complex. It applies a wide variety of laws to a wide variety of geographical areas and over many activities, thus covering ships and other property as well as Australian and foreign personnel. It needs simplification. There have been various reports made to the Commonwealth government, some of which were supported by the relevant government departments, but a series of transport ministers with no interest and little ability has resulted in a transport department with few shipping skills which, in turn, has brought little or no progress in this area. It is hoped that this will change and there have been signs in this direction in more recent years.

¹⁶ *Acts Interpretation Act 1901* (Cth) s 15B provides that Acts, in general, apply in the territorial sea.

¹⁷ See discussion on the Offshore Constitutional Settlement 1979 in Chapter 2.

¹⁸ Section 258 provides merely for regulations to make provisions for lights, signals, etc in the *Convention on the International Regulations for the Prevention of Collisions at Sea 1972*. It does not clarify how the Australian law applies them in the circumstance under discussion.

¹⁹ Article 97.

11.4 Ship Ownership, Registration and Nationality

11.4.1 Ship Ownership

Even though a ship is merely a chattel the questions about ownership of it are complex.²⁰ This book is about the Australian offshore laws and the question is only addressed because the ownership issues pursue a ship offshore just as much as when alongside. The first point to make is that there are several degrees of “ownership” in a ship in that it is not unusual for a merchant ship to be owned by one entity that has divided the interest into shares in the ship, traditionally up to 64 of them.²¹ Each of the shareholders, therefore, has an interest as an owner and has legal rights and responsibilities. These entities may be regarded as the beneficial owners and, quite often, it is difficult to ascertain from the public record who they are as there is some benefit in the owners staying concealed in the event of liability for pollution or for costs or damages from a marine casualty. These remarks apply to privately owned vessels only. Defence ships are owned by the Commonwealth government and the various Australian States and the Northern Territory also own ships. Sometimes government also charter ships from private owners, or other governments.

For most international merchant ships there is often a tier of interests involved. Under the beneficial ownership may lie a demise charter, also known as a “bare boat” charter, which is the charter of the ship bare of crew, fuel, navigation equipment, stores and cargo for the time stated in the charter party. Under Admiralty law the demise charterer is often regarded as the owner as it is this entity that appoints the captain, officers and crew and can give the directions as to how, when and where the ship is to operate. Basically the test of a demise charter is whether possession and control of the ship has passed to the charterer. If so, it is a demise charter and, under maritime law, the charterer takes on some of the responsibilities of an owner.

Continuing down the possible tier of interests, under the demise charter, or directly under the beneficial owner, may be a time charter, which is, as one expects, a charter of the ship for the time specified in the charter party. There is also a voyage charter, which is the charter of the ship to carry cargo for a particular voyage from a specified port to another specified port. A voyage charter may be granted by the beneficial owner, the demise charterer or even a time charterer. Neither a time nor a

²⁰ The best Australian book that discusses ownership, registration and nationality is M Davies and A Dickey, *Shipping Law* (Lawbook Co, Sydney, 3rd edn, 2004). There are, of course, numerous British and United States texts on these subjects, although United States texts should be used with caution.

²¹ Under the *Shipping Registration Act 1982* (Cth) s 11 regulates the shares in an Australian ship.

voyage charterer has a right of ownership in the ship, but if the issue at hand relates to their interests they may certainly appear on the court record as an “owner” to defend their interests if that should be appropriate.

A further entity to mention is the ship operator or manager. Quite often the owner or charterer contracts out to an operator or manager the responsibility of providing captain, officers and the crew and, possibly, other services. Ship-board personnel may be employed by the operator, the manager, the demise charterer or the beneficial owner, depending on the situation in each case.

These aspects of ownership are mainly contractual and as such are matters for private law and the contracting parties can make such terms as they see fit. However, if a ship becomes involved in some incident offshore then the laws relating to the ship and the incident will become part of the matrix of private and public laws that apply to the ship, the cargo and all of the persons onboard. The points made above are, of course, all points derived from the general Admiralty and shipping law. Statutory provisions also have a part to play and, in some cases, the statute may intrude on the definition of owner, operator, master and so on. One such statute is the *Shipping Registration Act 1981* (Cth) to which attention will now be directed.

11.4.2 Shipping Registration Act 1981

Before 1982 Australian ships were “British” ships registered under the relevant part of the British *Merchant Shipping Act 1894*, which situation steadily became unacceptable so Australian legislation was introduced. Australian ship registration law is now set out in the *Shipping Registration Act 1982* (Cth) although it needs to be kept in mind that smaller vessels may also be registered under the appropriate legislation in the States and the Northern Territory. As will be discussed shortly, all ships should have a nationality and the manner in which this is achieved is by registration. This gives an international and national status to the ship which attracts the rights and liabilities that belong to properly registered ships.

Under the *Shipping Registration Act 1982* every Australian-owned ship is to be registered and an owner in breach is guilty of an offence.²² Exceptions are Australian ships operated by a foreign resident under a demise charter, foreign ships on demise charter to Australian operators, ships less than 24 metres in length, government ships, fishing vessels and pleasure and small craft²³ and these ships are permitted to register if they apply. A vessel may sail under only one flag at a time so vessels that are registered in a foreign country may not register in Australia and vice

22 Section 12.

23 Sections 12(3), 13, 14.

versa. "Australian-owned" is defined as owned by an Australian national alone or where the ownership is in shares in the vessel, where the majority of them are Australian nationals.

The question of owner has already been discussed, and the *Shipping Registration Act 1982* has its contribution to the complicated question of who is the owner of a ship. It defines "owner" as the person registered as such under the Act and regulations, with exceptions for where this definition is not appropriate, such as with incorrect entries, lost ships, etc.²⁴

The Australian register is maintained in an office based in Canberra, managed by the Australian Maritime Safety Authority. Details of registration are available and a search of the register is an important aspect of the regulation of shipping.²⁵ The register has details of the name, ownership and other useful information, and the Act provides for mortgages to be registered and caveats to be entered against ownership and mortgage claims. It is an offence for an unregistered ship to sail anywhere, to assume an Australian nationality if not entitled to it, or to conceal an Australian nationality when it should be revealed.²⁶

Appeals from many of the decisions of the Registrar lie to the Administrative Appeals Tribunal and appeals from decisions about caveats and rectification or removal from the shipping register itself lie to the Supreme Court of the States and the Territories. Appeals from there lie to the Federal Court and, with leave, up to the High Court.²⁷

The *Shipping Registration Act 1982* establishes a sensible system of laws for registration and the Registrar operates an efficient system of registration. The number of Australian ships is, however, pitifully small due to the lack of tax and other incentives offered by the Commonwealth government compared to other governments.

11.4.3 Nationality

Nationality of ship and a flagged ship and similar phrases have the meaning that the ship concerned is registered with a particular country under its shipping register as, under international maritime law, they are required to do.²⁸ From the legal point of view one of the important consequences is that the law of that country applies onboard the ship, sometimes known as the "internal economy rule". The national laws of that country then apply onboard to all personnel on the ship, unless the ship is in the port or territorial sea of a foreign country when its laws may apply if they are so expressed to do, as to which see under.

24 Section 3.

25 See the Australian Shipping Registration office website <www.amsa.gov.au/shipping/registration>.

26 Part II, Div 4, Part VI.

27 Sections 78, 81, 82.

28 UNCLOS Arts 91, 92.

The international maritime law is the basis for much of this more public law relating to shipping which in its more modern context has largely been codified in UNCLOS. For instance, UNCLOS has numerous provisions about the rights of states with their ships on the high seas and none about stateless ships ie ships without nationality. States have a right to sail ships on the high seas flying their flag; states are to fix the conditions on which it grants its nationality to ships and for their right to fly its flag; and ships may sail only under the flag of one state. The duties of the flag state include to exercise its jurisdiction onboard in administrative, technical and social matters, in relation to seaworthiness, manning, training of crews, to keep a register of its ships and to hold an inquiry into every marine casualty or incident of navigation on the high seas.²⁹ Any warship is entitled to board a foreign merchant ship if there are reasonable grounds for suspecting, amongst other things, that it is without nationality or if it is refusing to show its flag.³⁰

Foreign government ships, other than those in commercial enterprises, are, of course, exempt from these provisions but they, as a matter of practice, fly their national flag and are otherwise identified with their country.

It may be seen, therefore, that serious obligations lie on flag states and that ships are obliged to be registered with a state. The nationality of ships is, therefore, of some consequence.

11.5 Admiralty and Arrest of Ships

Admiralty law, maritime jurisdiction and the arrest of ships by the court all developed from the earliest maritime law in the Mediterranean Sea region. Currently, however, these laws have been refined and clarified so that much of their earlier breadth is covered by more precise aspects of maritime law. The Australian Admiralty law is codified in the *Admiralty Act 1988* (Cth) and it is mainly concerned with the arrest of ships by civil process, mainly as a security for any eventual judgment of the court in favour of a claimant. The process is ancient and it has some offshore application but it will not be developed in this book as that would require inordinate space and, anyway, this has been done adequately elsewhere.³¹

²⁹ All of these provisions, and more, are contained in UNCLOS Pt VII "High Seas". The application of the Australian laws to foreign flag ships in its ports, and more widely, was the subject of discussion by the High Court in *Re Maritime Union of Australia (CSL Pacific Case)* (2003) 214 CLR 397; [2003] HCA 43; see also S Knight, "Case Note: The CSL Pacific Case" (2004) 18 *MLAANZ Journal* 186.

³⁰ Article 110.

³¹ See DJ Cremeen, *Admiralty Jurisdiction: Law and Practice in Australia, New Zealand, Singapore and Hong Kong* (Federation Press, Sydney, 3rd edn, 2008); DJ Cremeen, "Actions in Rem: Arrest of Ships; Maritime Liens" in M White (ed), *Australian Maritime Law* (Federation Press, Sydney, 2nd edn, 2000); and in the wider British context SC Derrington and JM Turner, *The Law and Practice of Admiralty Matters* (Oxford University Press, Oxford, 2007).

The *Admiralty Act 1988* applies to all ships, irrespective of places of residence or domicile of their owners and to all maritime claims howsoever arising. It applies to the external territories but not to inland waterways.³² The jurisdiction certainly extends offshore but it is rare for an arrest of a vessel to take place offshore. Due to the difficulties of service and enforcement most process is effected on ships when they are in port.

Jurisdiction in Admiralty matters is granted to the courts of the States and to the Federal Court³³ and the constitutional basis for the latter is the provision that grants power to the Commonwealth Parliament to make laws "Of Admiralty and maritime jurisdiction".³⁴

Clarification of one point may be useful and that relates to the role of the action in rem in this process. The action in rem is an Admiralty jurisdiction which, in British law, made the res, in this case the ship, liable to arrest (detention) as security for any eventual judgment. An admiralty action in rem was always a separate jurisdiction in the courts to the more usual action in personam. Both jurisdictions are granted to the respective Australian courts under the *Admiralty Act 1988*, but the action in rem is only required if the ship is to be arrested. After that, and especially if one or more of the owners or other interested parties appear in the litigation, the case also is progressed as in an action in personam. The action in rem then only again takes on its different characteristics if the vessel needs to be sold and the money from sale distributed. Actions for personal injury or wrongful death do not need to be actions in rem unless the ship itself is to be arrested. They can be commenced against a defendant who is a natural person or corporation in the usual way.

11.6 Carriage of Goods by Sea

The law relating to carriage of goods by sea is essentially private law, mainly one of contract. It is derived from ancient maritime law and practice, more modern international conventions and agreements and some current Australian statute law. It is not usually associated with laws that apply offshore, but in any casualty or other incident of a cargo ship at sea off the Australian coast, the laws relating to carriage of goods by sea will normally have some part to play. If nothing else, if the cargo is lost, damaged or delayed they will be the basis for deciding liability and on which damages will be assessed.

32 Sections 7, 5(3).

33 Part II.

34 Constitution ss 76, 77. A detailed discussion on the early history of Admiralty law and its application in Australia, as well as the constitutional background, is to be found in H Zelling and M White, "Constitutional Background and Jurisdiction of Courts" in M White (ed), *Australian Maritime Law* (Federation Press, Sydney, 2nd edn, 2000), Ch 1.

There are many different contracts for carriage of goods by sea and the choice is usually dictated by the type, size, characteristics and frequency of carriage of the cargo. The different types of charter have been mentioned above in the discussion on owners and this need not be repeated. A distinction to make amongst them all is that the demise and time charters are usually for the whole ship rather than for carriage of the goods themselves, whereas, for instance, a voyage or a slot charter³⁵ is for carriage of the goods themselves. An excellent summary of the various situations is set out by M Davies and A Dickey in *Shipping Law*.³⁶

Current Australian law concerning marine cargo liability for carriage of goods by sea is set out in *Carriage of Goods by Sea Act 1991* (Cth), as amended, which is primarily based on the international agreements of The Hague-Visby Rules with some Australian modifications. Most of the Australian States also have legislation relating to carriage of goods by sea.

It is not for this book to go into detail of the law of carriage of goods by sea and suffice to say that readers are referred to the Australian books on the topic. Books relating to the law in foreign jurisdictions need to be approached with caution as the foreign legislation and laws are not always comparable with those in Australia.

11.7 Marine Insurance

Marine insurance is an extremely important aspect of the merchant shipping industry. Somewhat like the topics of Admiralty, arrest of ships and carriage of goods by sea, marine insurance is essentially a matter of private law. If, however, an offshore maritime casualty occurs then it is a matter of primary importance whether goods are insured and on what terms and with which insurance company.

The Australian marine insurance law is encapsulated in the *Marine Insurance Act 1909* (Cth), as amended from time to time, but readers should be aware that the *Insurance Contracts Act 1984* (Cth) also has application. A problem was that the *Marine Insurance Act 1909* is somewhat favourable to insurers and as much of the reinsurance is done in the London market this was not seen to be in the Australian national interest. The *Review of the Marine Insurance Act 1909*³⁷ made recommendations for

35 A slot charter occurs where a party charters for a space in a ship which is not the whole ship which that party may well sell to others for the carriage of their goods. An example is where a party charters a block of container spaces in a container ship and then has the benefits and detriments of selling those spaces to shippers who wish to transport goods.

36 M Davies and A Dickey, *Shipping Law* (Lawbook Co, Sydney, 3rd edn, 2004), Ch 11, which is followed by detailed chapters describing the law of the various types of carriage contracts.

37 Australian Law Reform Report No 91, 2001.

reform although the domination of reinsurance from London was one reason they did not recommend more radical changes.

The current situation is that the *Marine Insurance Act 1909* covers most of the insurance of marine risks, but pleasure craft and fisheries vessels now come under the *Insurance Contracts Act 1984*. It can be a critical issue for claimants under which Act their claim may fall, as illustrated by the High Court case of a claim by the owner of a para-sailing tow-boat for an accident on the Swan River, near Perth in Western Australia. The question was whether the accident and activity came under the provisions for marine insurance or not. It was argued that the contract was not a contract of marine insurance but was a contract of general insurance and so the *Insurance Contracts Act* applied and not the *Marine Insurance Act*. Notice of an accident and a claim had not been given within time but it was common ground that this was not fatal to a claim for indemnity from the insurer if it was a general insurance claim. A majority of the High Court held that it was a contract for marine insurance so the claim failed.³⁸ Unfortunately the members of the court were divided as to what was the essential test on what constitutes a contract of marine insurance so the jurisprudence on the point was not much advanced.

11.8 Collisions and Groundings

11.8.1 Collisions

The law relating to collisions³⁹ between ships applies offshore and in internal waters, as it does on inland waters as well for that matter. These laws are based on an international code which is to be found in the *Convention on the International Regulations for the Prevention of Collisions at Sea 1972*, which is an International Maritime Organization convention and the details of which may be found on the International Maritime Organization website. The 1972 convention was designed to update and replace the *Collision Regulations 1960* which were adopted at the same time as the 1960 SOLAS convention.⁴⁰ The convention was adopted in 1972 and entered into force in 1977 and it encompasses the following aspects:

- Part A – General Rules
- Part B – Steering and Sailing (Rules 4-19)

³⁸ *Gibbs v Mercantile Mutual Insurance (Australia) Ltd* [2003] HCA 39.

³⁹ An impact between a ship and a wharf or other marine structure is sometimes referred to as an “allision”, but this word is mainly obsolete and is currently rarely used. The exception is the United States maritime literature which does still use the word in some works.

⁴⁰ *Convention for the Safety of Life at Sea*, which is another International Maritime Organization convention of which the details can be found at <www.imo.org>.

- Section 1 - Conduct of vessels in any condition of visibility
(Rules 4-10)
- Rule 6 - safe speed
- Rule 10 - vessels in or near traffic separation schemes
- Section II - Conduct of vessels in sight of one another
(Rules 11-18)
- Rule 13 - overtaking
- Rule 14 - head-on situations
- Section III - Conduct of vessels in restricted visibility (Rule 19)
- Part C - Lights and Shapes (Rules 20-31)
- Part D - Sound and Light Signals (Rules 32-37)
- Part E - Exemptions (Rule 38)

These COLREGS, as they are known, are closely studied by mariners the world over and are in force worldwide, although there may be local variations in some waters.

In Australia, because of the separation of powers between the Commonwealth and the States, they have been given effect by the Commonwealth in the *Navigation Act 1912* and by each of the States and the Northern Territory.⁴¹ As a result the same maritime "Rules of the Road", as they are called colloquially, apply throughout Australian waters.

The COLREGS serve a similar function to the traffic regulations for motor vehicles and they are used to gauge the liability for collisions and the conduct of the relevant mariners in their ships, but it is the law of tort, negligence in this case, that actually applies. On reading the many cases on collisions one finds only limited reference to the law of tort and that is because it is usually accepted and does not need discussion. Maritime situations have been involved in many of the major developments of the law of negligence.⁴²

A collision will often result in major legal proceedings, which may include claims for damages against the party responsible for collision for wrongful death or personal injury, criminal proceedings, investigation into possible professional action against the holders of professional

⁴¹ Details of the Australian laws may be found in M Davies and A Dickey, *Shipping Law* (Lawbook Co, Sydney, 3rd edn, 2004), Ch 15 and AW Street and B Larkin, "Navigation: Collisions and Liability: Marine Inquiries" in M White (ed), *Australian Maritime Law* (Federation Press, Sydney, 2nd edn, 2000), Ch 8.

⁴² An example is the Agony of the Moment Rule which provides, when in a situation of grave imminent danger a seaman does or omits to do something that contributes to a collision, that act or omission, taken in the agony of the moment before an impending collision of which he is not the cause, will not amount to negligence. See *The Sisters* (1876) 1 PD 117; *Vennall v Garner* (1830) 1 Cr & M 21; and in particular *Bywell Castle* (1879) 4 PD 219, CA. For an Australian case on pure economic loss in which a maritime case played a seminal role, see *Caltex Oil (Aust) Pty Ltd v The Dredge Willemstad* (1976) 136 CLR 529, later further developed in another factual context in *Perre v Apand Pty Ltd* (1999) 198 CLR 180 and *Fortuna Seafoods Pty Ltd (as trustee for the Rowley Family Trust) v The Ship "Eternal Wind"* [2005] QCA 405.

qualifications, damages for marine pollution and civil actions for loss of or damage to the ship, cargo and other property. Australian laws will apply to Australian ships and ships that collide in the territorial sea. Beyond that the jurisdiction of the courts is clouded and more than one court may have jurisdiction and more than one set of laws may apply.

11.8.2 Groundings

When small ships go aground it is usually an inconvenience but when big ships go aground it is usually a disaster and may involve loss of life or personal injury, damage or sinking of the ship, loss of or damage to cargo and other property and, too often, a major marine environmental disaster. If the grounding occurs to an Australian ship, or in Australian waters, there is always an inquiry, instigated by the Commonwealth, through the Australian Transport Safety Bureau,⁴³ or by the State or Northern Territory through their respective government departments or boards.

The laws relating to all of these aspects arising from a major grounding are touched on under various headings but could not be addressed in this book in detail. If the grounding occurs in a port or within three nautical miles of the baseline then the local State or Northern Territory laws probably apply. If not, then only Commonwealth laws apply.

11.9 Shipwreck and Salvage

Shipping casualties occur and will continue to occur regularly, although an enormous effort is put into ship safety and rescue. Part of the rescue relates to property, ships and cargo, about which there is a well-established legal structure. The Australian laws of salvage derive from the early salvage laws in the Rhodian, Greek, Roman, Laws of Oleron, Black Book of Admiralty and British tradition as brought to Australia with the British penal settlement in 1788. The author has addressed the Australian laws of salvage elsewhere,⁴⁴ and there is no call to deal again with it in detail here. The partial codification of such laws is, as mentioned above, in the *Navigation Act 1912* (Cth) which gives effect to the *International Convention on Salvage 1989*,⁴⁵ but there is a deal of salvage law that lies outside the Act.

43 The Australian Transport Safety Bureau is established under the *Transport Safety Investigation Act 2003* (Cth) with its head office in Canberra and a website that is informative and helpful: <www.atsb.gov.au>. The results of its investigations are always produced in a written report that is available in hard copy or on its website.

44 M White, "Salvage, Towage, Wreck and Pilotage" in M White (ed), *Australian Maritime Law* (Federation Press, Sydney, 2nd edn, 2000), Ch 9. The Australian, and some British and other, sources on salvage and wreck are set out in that chapter.

45 The *International Convention on Salvage* is in the *Navigation Act 1912* Sch 9.

The provisions of the Act include setting out the jurisdiction over which the laws operate. Wrecks and salvage are dealt with in Pt VII of the Act, which addresses two main areas; namely the functions and powers of the Receiver of Wreck and the laws relating to salvage.

In relation to the Receiver of Wreck, the officer has wide powers to take control of the scene of the wreck and direct people and property for its preservation and security. The geographical jurisdiction over which the Receiver has these powers is where a ship is wrecked, stranded or in distress at any place on or near the coast of Australia or any of its tidal waters.⁴⁶ It may be seen immediately that this geographical area is usually the exclusive province of the States as it is usually on the coast, in inland waters, inside the line from which the territorial sea is measured or in the territorial sea itself. All of these are usually in the States geographical areas, as discussed in Chapter 2. The *Historic Shipwrecks Act* 1976 is the main Act relating to historic wrecks, defined in that Act as over 75 years old, and historic relics; as to which see shortly.

In relation to historic wreck, however, certain provisions of the *Navigation Act* Pt VII do not apply, and these include the powers of the Receiver of Wreck and also the salvage laws⁴⁷ but the "authorities" can require the owner of an historic wreck to remove same at the owner's cost or to do so itself and then recover the costs from the owner.⁴⁸

As to salvage, the *Navigation Act* 1912 gives effect to the *International Convention on Salvage* 1989, for the most part, and applies this law to salvage operations in Australia,⁴⁹ except for offshore industry fixed structure, or mobile units on location, or operations in inland waters where all vessels are of inland navigation or maritime cultural property of prehistoric, archaeological or historic interest.⁵⁰ Unlike so much of the offshore jurisdiction, salvage does, in the main, apply to the Crown in right of the Commonwealth, a State or a Territory, so as to allow salvage claims by them and against their ships and other property.⁵¹

It can be seen from the above that here, once again, no pattern emerges in relation to the offshore jurisdiction relating to salvage laws. The jurisdiction granted to the States out to three miles under the Offshore Constitutional Settlement 1979 does not apply here, as the Commonwealth jurisdiction operates to apply salvage laws in the waters of the ports, the territorial sea and out to the limits of the continental shelf.

46 Section 296(1).

47 Sections 295A, 295B.

48 Sections 295A, 295B, 314, 314A.

49 Section 316.

50 Sections 316, 317.

51 Sections 329B, 329C.

11.10 Underwater Cultural Heritage and Historic Shipwrecks

11.10.1 Introduction

Australian waters abound with underwater cultural heritage shipwrecks so it is appropriate to devote some attention to their relevant laws. It is mainly wrecks, though, on which interest is focused, as there are few underwater cultural relics apart from them. There may be some fish traps and other such archaeological treasures but, unlike some other parts of the world, there are no sunken cities or civilisations. Predominant amongst historic shipwrecks are the *Batavia*, the Dutch ship that went aground off Western Australia in 1629, the *Gilt Dragon*, which has been the subject of major litigation which will be discussed shortly, and HMS *Pandora*, wrecked off the north Queensland coast in 1791 returning to the United Kingdom with the *Bounty* mutineers. There are, of course, numerous others.

The question of the legal regime for the protection of underwater cultural heritage, in the form of historic shipwrecks, first came to prominence in Australia in *Robinson v Western Australian Museum* in 1977.⁵² The High Court had to consider whether the Western Australian legislation, which vested proprietary and possessory rights of offshore historic shipwrecks in the Western Australian Museum, was valid in relation to an historic shipwreck whose remains were discovered off the Western Australian coast, in that case the *Gilt Dragon* which had been lost in 1656. The majority held that the Western Australian State legislation was not valid in relation to the particular wreck but, as noted in Chapter 2, the jurisdiction was returned to the States after the Offshore Constitutional Settlement 1979 and subsequent legislation.

This overlap of jurisdiction between the State and Commonwealth Parliaments relating to underwater cultural heritage is the subject of this section. It is convenient to start the discussion with the international conventions.

11.10.2 International Conventions

The *United Nations Convention on the Law of the Sea 1982* (UNCLOS), the *International Convention on Salvage 1989* and the *UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001* (Underwater Cultural Heritage Convention) are the most significant international conventions on the topic of underwater cultural heritage, a phrase which includes, importantly in this particular discussion, shipwrecks.⁵³

52 (1997) 138 CLR 283.

53 The *UNESCO Convention on the Protection of Underwater Cultural Heritage 2001* [2009] ATNIF 3 has not so far been ratified by Australia.

At the international level a debate has emerged concerning the contentious issue of the application of salvage law to historic shipwrecks and relics and salvors' rights to possession of abandoned and historic shipwrecks, and the protection of historic shipwrecks.⁵⁴ This is reflected in the development of these conventions and the extent they have been ratified by state parties. A trend towards the greater restriction of salvage in favour of protection and preservation of underwater cultural heritage can be observed. UNCLOS provides a duty to preserve objects of an "archaeological and historical nature"⁵⁵ and state parties are to cooperate for that purpose, although this is probably limited to the jurisdiction of the territorial sea and is certainly subject to "the law of salvage and other rules of admiralty".⁵⁶ UNCLOS also provides that in the deep seabed objects of an archaeological and historical nature should be preserved or disposed of for the benefit of mankind as a whole.⁵⁷ Overall, UNCLOS directs state parties to preserve underwater cultural heritage, but it also supports the laws of salvage and finds/derelict.

The *International Convention on Salvage 1989* expressly gives rights of salvage of underwater shipwrecks but allows state parties the right to make a reservation and not to apply its provisions in relation to, amongst other things, "maritime cultural property of prehistoric, archaeological or historic interest ... situated on the sea-bed".⁵⁸ Australia has given effect to the convention⁵⁹ but has availed itself of this reservation.⁶⁰

54 See, eg, C Forrest, "Has the Application of Salvage Law to Underwater Cultural Heritage Become a Thing of the Past?" (2003) 34(2) *J Mar L & Com* 309; R Melikan, "Shippers, Salvors and Sovereigns: Competing Interests in the Medieval Law of Shipwreck" (1990) 11 *J Legal Hist* 163; DR Owen, "The Abandoned Shipwreck Act of 1987: Goodbye to Salvage in the Territorial Sea (1988)" 19 *J Mar L & Com* 499; DR Owen, "Some Legal Troubles with Treasure: Jurisdiction and Salvage (1985)" 16 *J Mar L & Com* 139; see generally G Brice, *Brice on Maritime Law of Salvage* (Sweet and Maxwell, London, 4th edn, 2003).

55 UNCLOS Art 303(1).

56 UNCLOS Art 303(3).

57 UNCLOS Art 149.

58 UNCLOS Art 30(1)(d).

59 For discussion of Australian salvage, see M White, "Salvage, Towage, Wreck and Pilotage" in M White (ed), *Australian Maritime Law* (Federation Press, Sydney, 2nd edn, 2000), Ch 9. For discussion on the *Underwater Cultural Heritage Convention* see S Dromgoole (ed), *The Protection of Underwater Cultural Heritage: National Perspectives in the Light of the UNESCO Convention 2001* (Martinus Nijhoff Publishers, 2006); and for articles, see C Forrest, "Has the Application of Salvage Law to Underwater Cultural Heritage Become a Thing of the Past?" (2003) 34(2) *J Mar L & Com* 309; R Melikan, "Shippers, Salvors and Sovereigns: Competing Interests in the Medieval law of Shipwreck" (1990) 11 *J Legal Hist* 163; DR Owen, "The Abandoned Shipwreck Act of 1987: Goodbye to Salvage in the Territorial Sea" (1988) 19 *J Mar L & Com* 499; G Brice, *Brice on Maritime Law of Salvage* (Sweet and Maxwell, London, 4th edn, 2003).

60 *Navigation Act 1912* (Cth) ss 295A, 295B. The right to such a reservation is in the *Salvage Convention 1989* Art 30(1)(d).

The Underwater Cultural Heritage Convention was developed to provide an international framework for the protection and preservation of underwater cultural heritage.⁶¹ It entered into force in January 2009, having been ratified by the 20 state parties needed to have that effect.⁶² Australia is not, at least so far, a party to this convention.

The problems with the convention include that it is poorly drafted and was brought into being by UNESCO with a narrow focus that lacked proper recognition of the salvage and shipping interests. Its terms include that the law of salvage and the law of finds (law of derelict) are not to apply unless authorised⁶³ and, whilst it provides that UNCLOS provisions are not to be prejudiced, that is directly in conflict with UNCLOS Art 303(3) that preserves the laws of salvage.⁶⁴ Further, preservation of the wreck in situ is stated to be the first option⁶⁵ and wrecks are not to be commercially exploited⁶⁶ both of which sentiments are in conflict with the laws and practice of salvage and finds/derelict.

As a result the Underwater Cultural Heritage Convention has been criticised for being a compromise between the interests of marine archaeology and salvors which has resulted in its being vague and susceptible to alternative interpretations.⁶⁷ The sentiment that occasioned the exclusion of salvage law was that salvors were likely to damage the cultural significance of the wreck in the course of extracting the valuable aspects.⁶⁸ The convention's regime, exemplified in Art 4, consequently subordinates economic and commercial interests to the preservation of items of archaeological value which has given rise to some debate.

61 The convention builds on the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970, UNESCO Convention for the Protection of the World Cultural and Natural Heritage 1972.

62 Article 20, *Convention on the Protection of the Underwater Cultural Heritage*, List of States Parties available from the <www.unesco.org>.

63 Article 4.

64 UNCLOS Art 303 provides: "3. Nothing in this article affects the rights of identifiable owners, the law of salvage, or other rules of admiralty, or laws and practices with respect to cultural exchanges".

65 Article 2(5). This sentiment is repeated in the Annex, Rule 1, but in slightly different terms, which is poor drafting.

66 Article 2(7). This sentiment is repeated in the Annex, Rule 2, but in slightly different terms, which, once again, is poor drafting.

67 See C Forrest, "Has the Application of Salvage Law to Underwater Cultural Heritage Become a Thing of the Past?" (2003) 34(2) *J Mar L & Com* 309 at 344-346.

68 See the Report of the International Law Association Cultural Heritage Law Committee on the Draft Convention; and see G Brice QC, "Salvage and the Underwater Cultural Heritage" (1996) 20 *Marine Policy* 337. Also see S Dromgoole (ed), *Legal Protection of the Underwater Cultural Heritage: National and International Perspectives* (Kluwer Law International, 1999), and S Dromgoole and N Gaskell, "Wreck" (1997) 2 *Art, Antiquity and Law* 103 and 207. The text is also a chapter in N Palmer and E McKendrick, *Interests in Goods* (Lloyd's of London Press, London, 2nd edn, 1997).

It may be seen, then, that the offshore jurisdiction relating to underwater cultural heritage is addressed by two well-supported international conventions, but there are problems with the third one. It is now appropriate to turn to the Commonwealth laws that have implemented these conventions.

11.10.3 Commonwealth Legislation

The *Historic Shipwrecks Act 1976* (Cth) is the central piece of legislation setting out the Commonwealth laws relating to historic shipwrecks. It provides for three main avenues. The first relates to wrecks of the Dutch East India Company that were lost off the West Australian coast, and an agreement annexed to the Act vests all of the Dutch government's rights in the Commonwealth government. The second is that the Act itself claims jurisdiction over the waters, airspace, seabed and subsoil of the territorial sea and out to the limits of the continental shelf. The third is that provision is made for proclamation of this Act applying to such State waters as the States may agree and also declaring application of the Act to historical ships and zones around such ships. The result is that the rights to historic shipwrecks and the relics associated with them vest in the Commonwealth, or the States have those rights where there is valid legislation to that effect.⁶⁹

The Commonwealth has jurisdiction over the remains of a ship situated in Australian waters, being the territorial sea of Australia and waters of the sea (not State waters) on the landward side of the territorial sea of Australia,⁷⁰ and waters above the continental shelf of Australia.⁷¹ The Commonwealth does not have jurisdiction above the low water mark or internally from proclaimed baselines due to the constitutional limitation of Commonwealth legislation or in the coastal waters of the States and the Northern Territory. As mentioned, however, there is power of proclamation of historical sites, with the consent of the State, to wrecks and zones in coastal waters adjacent to that State.⁷²

Under the *Historic Shipwrecks Act 1976* (Cth) the minister has power to gazette ships as being an "historic shipwreck",⁷³ and declare an area around them as a protected zone.⁷⁴ The wreck and the zone are then

⁶⁹ For a discussion on "Wreck" in the international scene, including on historic shipwrecks and international conventions, see S Dromgoole and N Gaskell, "Wreck" (1997) 2 *Art, Antiquity and Law* 103 and 207. See also S Dromgoole, *The Protection of Underwater Heritage: National Perspectives in the Light of the UNESCO Convention 2001* (Martinus Nijhoff, 2nd edn, 2006) and C Forrest, "Has the Application of Salvage Law to Underwater Cultural Heritage Become a Thing of the Past?" (2003) 34(2) *J Mar L & Com* 309.

⁷⁰ Section 3(1).

⁷¹ Section 5(1).

⁷² Section 2.

⁷³ Section 5.

⁷⁴ Section 7.

controlled by the Commonwealth government. Persons in possession of or finding such wreck are obliged to hand them over or to report the find and a reward may be paid to them. Permits may be granted to explore such areas and, in certain cases, to remove objects from them.⁷⁵ "Historic wrecks" under the Act are defined as those ships in the waters mentioned above that are at least 75 years old. This minimum antiquity of 75 years is in contrast with the minimum of 100 years under the Underwater Cultural Heritage Convention, as mentioned above. There is also a national shipwrecks database that is jointly managed by the Commonwealth and the States on which there are thousands of wrecks, which are, of course, of varying importance historically.⁷⁶

Wrecks, old and new, are salvaged where it is possible and the Australian salvage provisions derive from the ancient salvage law, much of which has been codified and applied in the *Navigation Act 1912* (Cth). The general provisions of this Act do not, however, apply to those historic wrecks that come under the *Historic Shipwrecks Act 1976*.⁷⁷

Mention has been made that the geographical jurisdiction of historical shipwrecks is shared with the States (in which expression for present purposes the Northern Territory is included), so it is convenient to set out which States have enacted what legislation.

11.10.4 State Legislation

The States and Northern Territory have jurisdiction and State legislation applies to wrecks located above the low water mark in the inter-tidal zone, on the landward side of the baseline and over "coastal waters" adjacent to their respective coasts. "Coastal waters" comprise the waters within the boundary of the area described in the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*, as agreed in the Offshore Constitutional Settlement 1979.⁷⁸ In relation to these historic wrecks each of the States has made its own, and disparate, legislative arrangement.

The *Heritage Act 1995* (Vic),⁷⁹ the *Heritage Act 1977* (NSW),⁸⁰ the *Historic Cultural Heritage Act 1995* (Tas)⁸¹ and the *Historic Shipwrecks Act*

75 In *Victoria v Commonwealth* (1937) 58 CLR 618 the High Court held that there was no inconsistency between the provisions of the *Marine Act 1928* (Vic) and the *Navigation Act 1912* (Cth) and the Victorian port officer had power to remove or destroy a dangerous wreck in Port Phillip and hold liable the owners for the costs of so doing.

76 See <www.environment.gov.au/heritage/shipwrecks> and follow prompts to database.

77 *Navigation Act 1912* ss 295A, 295B.

78 *Historic Shipwrecks Act 1976* (Cth) s 3(5).

79 Part 5.

80 Part 3C.

81 Part 9.

1981 (SA) all explicitly address historic shipwrecks. Queensland and the Northern Territory Acts do not draw a distinction between objects underwater and those on land and their Acts do not expressly provide for historic shipwrecks.⁸²

These various State Acts are different but overall they provide for the remains of ships having cultural heritage significance, situated in State waters, to be declared historic shipwrecks and be recorded in the register or published in the *Gazette*.⁸³ The remains of all ships and articles associated with such ships over 75 years old are deemed historic⁸⁴ and the relevant minister can proclaim other ships to come within the schemes. The discovery of a ship or part thereof must be notified⁸⁵ and any person who obtains an article which is or has become an historic shipwreck or relic must give notice of the find.⁸⁶ A protected zone up to 100 hectares may be established around the shipwreck or relic.⁸⁷ Interference with a wreck such as the taking, destruction, damage, removal, disturbance or otherwise of such items or their purchase, possession, or disposal is prohibited.⁸⁸ Certain activities including salvage and other interference with a wreck is an offence.⁸⁹

For its part, off the Western Australian coast some of the wrecks are of Dutch colonial ships, which makes them of particular historical interest. The Western Australian legislative scheme comes under the *Marine Archaeology Act 1973* (WA), which Act was early on the historic shipwreck scene as it predates the Commonwealth legislation. The legislation was declared invalid by the High Court in *Robinson v Western Australian Museum*⁹⁰ because it extended beyond the low water mark or State historic boundaries. However the provisions of the Act were then saved by the Offshore Constitutional Settlement 1979, *Coastal Waters (State Powers) Act 1980* (Cth) and the State legislation that followed, as discussed in Chapter 2.

82 *Queensland Heritage Act 1992* (Qld); *Heritage Conservation Act 1991* (NT).

83 *Heritage Act 1977* (NSW) ss 48, 49; *Queensland Heritage Act 1992* (Qld) ss 57(1), 57(2); *Historic Shipwrecks Act 1981* (SA) ss 5, 6, 12; *Historic Cultural Heritage Act 1995* (Tas) s 65; *Heritage Act 1995* (Vic) ss 97, 98; *Heritage Conservation Act 1991* (NT) ss 26, 33.

84 *Historic Shipwrecks Act 1981* (SA) s 4A; *Historic Cultural Heritage Act 1995* (Tas) s 64(1); *Heritage Act 1995* (Vic) s 100.

85 *Historic Shipwrecks Act 1981* (SA) s 17; *Historic Cultural Heritage Act 1995* (Tas) s 72; *Heritage Act 1995* (Vic) s 115.

86 *Historic Shipwrecks Act 1981* (SA) s 10; *Heritage Act 1995* (Vic) s 100.

87 *Historic Shipwrecks Act 1981* (SA) s 7; *Historic Cultural Heritage Act 1995* (Tas) s 69; *Heritage Act 1995* (Vic) s 103.

88 *Heritage Act 1977* (NSW) s 51; *Historic Shipwrecks Act 1981* (SA) s 13; *Historic Cultural Heritage Act 1995* (Tas) s 66; *Heritage Act 1995* (Vic) s 111; *Heritage Conservation Act 1991* (NT) s 33;

89 *Historic Shipwrecks Act 1981* (SA) s 14; *Heritage Act 1995* (Vic) s 112; *Heritage Conservation Act 1991* (NT) s 33.

90 (1997) 138 CLR 283 discussed above fn 51.

The *Marine Archaeology Act 1973* (WA) vests the property in and right to possession of all historic ships lost, wrecked or abandoned, or stranded, on or off the coast of Western Australia before 1900, and also to maritime archaeological sites, in the Western Australian Museum on behalf of the Crown.⁹¹ The Act also creates an offence of altering, removing, damaging or dealing with a maritime archaeological site, ship, relic or thing without or contrary to the Trustees' consent,⁹² allows for the creation of a protected zone,⁹³ and requires notification of new finds.⁹⁴

11.10.5 Conclusions on Underwater Cultural Heritage

It may be seen from what has been discussed above about offshore historic shipwrecks that the offshore jurisdiction relating to offshore underwater heritage is a confused mixture of Acts and jurisdictions. The States have jurisdiction over coastal waters. On the other hand the Commonwealth has jurisdiction over the coastal waters where a State does not effect legislation over historic wrecks or where the Commonwealth and the State agree to it being proclaimed under the Commonwealth Act.

When it comes to the legislation, the Commonwealth Act is conformable with the *International Convention on Salvage 1989*. In relation to historic shipwrecks, the Australian delegation was an active participant in the UNESCO *Convention on the Protection of the Underwater Cultural Heritage 2001*, which came into force in January 2009, but Australia has not yet ratified it. If it is ratified, there will be a conflict between the 75 year period defining "historic" wrecks under the Commonwealth Act and the 100-year period of definition under the UNESCO convention.

In relation to the legislation by the States, it may be observed that they have differently named Acts and are differently administered. In some cases they come under the historic shipwrecks legislation and in some cases they come under the environmental legislation. The whole area of protection and preservation of offshore underwater heritage is due for revision in order to simplify the legislation and its administration.

11.11 Offshore Powers of Intervention in Marine Casualties

In 1967 there was a major tanker grounding off the south-east coast of England and a massive oil spill that followed this *Torrey Canyon* accident. The problem was that the coastal state, Britain, had no power in inter-

91 Section 6(1).

92 Section 8(1).

93 Section 9.

94 Section 17(1).

national maritime law to deal with the ship and reduce the pollution⁹⁵ because it was a foreign flagged vessel and the grounding was beyond the British territorial sea. The International Maritime Organization arranged a conference which agreed to the 1969 Intervention Convention.⁹⁶ The convention gave powers to coastal states to deal with maritime casualties off their shores where the ship was not under their flag and not within their territorial seas if the coastal state's waters, coastline or related interests were being polluted, or were likely to be polluted, from the casualty.⁹⁷ The powers are extensive and allow the relevant governments to require the owner of the vessel to deal with the situation. In default of the owner doing so the convention gives power to the government to do so. The relevant pollutant was originally only about oil but, starting with a 1973 protocol, the list of pollutants that trigger the convention is now very extensive.

A key aspect of the convention is that there be "grave and imminent danger to their coastline or related interests from pollution or threat of pollution ... which may reasonably be expected to result in harmful consequences".⁹⁸ Other key provisions are that warships or other government ships not used for commercial purposes are excepted, the coastal state must consult with other relevant states, including the flag state, and the coastal state whose measures cause damage to others is liable to pay compensation unless they are "reasonably necessary" to achieve the aims. If the state parties differ they are to follow either the conciliation or arbitration models set out in the Annex to the convention.

The Intervention Convention has been given effect in Australia by the *Protection of the Sea (Powers of Intervention) Act 1981*, which gives extensive powers to the Commonwealth government to intervene in the case of an offshore shipping casualty that is polluting, or threatening to pollute, its marine environment. Intervention may be warranted if there is "a grave and imminent danger to the coastline of Australia, or to the related interests of Australia, from pollution or threat of pollution of the

⁹⁵ On 18 March 1967 the *Torrey Canyon*, an 118,000 ton oil tanker registered in Liberia, ran aground on Seven Stones Reef, some miles from Lands End, England. The marine casualty spilled enormous amounts of oil, over 100,000 tonnes, which slowly drifted on to the British and French shores. Being Liberian flagged and outside the territorial sea (three miles as it then was) the British government had no right in international law to attempt to control the situation. In the event, after some days, the British government had its naval and air forces bomb the ship to set alight the oil, which lessened the extent of the disaster.

⁹⁶ *International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969*. This area of the law has been more fully set out by the author in M White, *Australasian Marine Pollution Laws* (Federation Press, Sydney, 2007).

⁹⁷ Of course if the maritime casualty is flagged with the coastal state or within its territorial sea or other waters it already has jurisdiction for its laws to apply to it.

⁹⁸ Article I.

sea".⁹⁹ As mentioned above, the substance that was initially identified was oil, but in subsequent changes this has been extended to a wide range of listed pollutants.¹⁰⁰

Wide powers are given to the Australian Maritime Safety Authority to deal with the casualty, but to sink or destroy the ship or cargo requires the approval of the minister. The Australian Maritime Safety Authority may issue directions to the owner, master or salvor to deal with the casualty, or the Authority itself may move or otherwise deal with the ship or cargo.¹⁰¹ The drafting about in which seas these powers may be exercised is a little convoluted. The high seas are expressly mentioned in relation to the place of the casualty and the high seas or elsewhere in relation to the actions that the Authority is empowered to take.¹⁰² As well as that, the rights and powers under international law are also preserved.¹⁰³ A separate section gives jurisdiction otherwise than under a convention or a protocol in relation to an Australian flagged ship on the high seas and any ship in internal waters or the Australian coastal sea (the territorial sea), but the section notes the Australian constitutional provisions that restrict the Commonwealth jurisdiction to ships on overseas or interstate trade.¹⁰⁴ These jurisdictional provisions in Australia are complex, but it would seem that, subject to the constitutional restrictions, the Australian Maritime Safety Authority is given power to deal with an Australian ship out to the limit of the EEZ and also on the high seas, and with a foreign flagged ship from the baseline to in or near the outer limit of the EEZ.¹⁰⁵ It could well be the case that the powers extend offshore to foreign flagged vessels anywhere in the EEZ anyway and apart from the Intervention Convention due to the obligations to protect and preserve the marine environment set out in MARPOL.¹⁰⁶

99 Section 8(1) provides: "Where the Authority is satisfied that, following upon a maritime casualty on the high seas or acts related to such a casualty, there is grave and imminent danger to the coastline of Australia, or to the related interests of Australia, from pollution or threat of pollution of the sea by oil which may reasonably be expected to result in major harmful consequences, the Authority may take such measures, whether on the high seas or elsewhere as it considers necessary to prevent, mitigate or eliminate the danger". Section 9(1) is in similar terms but deals with "substances other than oil". Warships and other government ships are excluded: ss 8(3), 9(3).

100 See the schedules to the Act. As to amendments, at time of writing the *Powers of Intervention Act 1981* itself has some major amendments in the legislative process.

101 Article 8.

102 Sections 8(1), 9(1).

103 Sections 8(5), 9(5).

104 Section 10(1), (8).

105 Section 10. Under the Act the casualty does not have to be in these waters as it is sufficient if the pollution amounts to grave and imminent danger to Australia's interests, which could be interpreted as threatening to enter Australian waters or to affect Australian installations.

106 These aspects are discussed in Chapter 3, but one especially has in mind the general obligation in this regard of the coastal state under Art 192.

The Act makes detailed provisions about the Australian Maritime Safety Authority giving “directions” and contravention or failure to comply with a valid direction is an indictable offence for which prosecution may be brought with no time limit.¹⁰⁷ The power to recover expense incurred in dealing with the vessel or its cargo is contained in a separate Act, *Protection of the Sea (Civil Liability) Act 1981* Pt IV.

It can be seen, therefore, that the *Powers of Intervention Act 1981* gives wide powers to the Commonwealth as administered through the Australian Maritime Safety Authority. These powers extend offshore from the Australian coast and the Authority may direct and otherwise intervene with the management of a shipping casualty which pollutes or is likely to pollute the Australian coast or the waters off it.

11.12 Pilotage and Towage

11.12.1 Pilotage

Pilotage is the provision of services of a mariner skilled in ship navigation and handling to assist and guide the ship into or out of port or in other and potentially dangerous waters. Whether a ship takes a pilot used to be a private matter, mainly contract law, but many governments have waters in which ships are obliged by law to take a pilot, of which Australia is one. The law underpinning the basis for compulsory pilotage is set out in the *Navigation Act 1912*, and the author has addressed the details of Australian laws on this matter elsewhere.¹⁰⁸

The relevance of these laws for this book is that the Commonwealth compulsory pilotage laws apply offshore in certain areas in the Great Barrier Reef and the Torres Strait, as to which see the discussion in Chapter 12, and these pilots are sometimes referred to as “reef pilots” to distinguish them from “port pilots”. Nearly all ports of any size require ships to take pilots, in order to protect the port facilities, other ships and orderly port management from accidents from unskilled ship handling. Port pilotage relates to internal waters as it applies within the port limits, or close thereto, so it is a matter for State laws. An aspect of compulsory pilotage of which readers should be aware is that the State legislation and the Commonwealth *Navigation Act 1912*¹⁰⁹ all either limit the amount or completely indemnify the pilots from liability for negligent navigation that causes damage to or by the ship.

107 Sections 11-20.

108 M White, “Salvage, Towage, Wreck and Pilotage” in M White (ed), *Australian Maritime Law* (Federation Press, Sydney, 2nd edn, 2000), Ch 9.

109 Section 410B. For the State legislation, see M White, “Salvage, Towage, Wreck and Pilotage” in M White (ed), *Australian Maritime Law* (Federation Press, Sydney, 2nd edn, 2000), Ch 9, fn 300.

The jurisdiction claimed by the *Navigation Act* for pilotage purposes is very wide. The constitutional limits of that Act do not apply, see the discussion above, and the Act is expressed to apply to all ships, Australian or foreign flagged, in the EEZ or in transit to or from the Australian coastal sea, ie the territorial sea.¹¹⁰ It may be seen, therefore, that the Commonwealth pilotage laws have very extensive jurisdiction offshore from Australia.

11.12.2 Towage

One ship may take another in tow in many situations but the main Australian situations occur when ships enter or leave a berth in a port and need one or more tugs for assistance, where one vessel is broken down or otherwise disabled and needs a tow as a means of propulsion or, finally, where the tow is a "dumb" barge¹¹¹ and has no propulsion of its own. It is unusual for tugs in the Australian situation to be involved in pushing barges, unlike the European river situation, although tugs may push a vessel in berthing operations.

The Australian laws relating to towage are mainly derivative of the British laws and they are the same whether applied to the offshore waters or the internal waters.¹¹² The relationship between the tug and the tow is usually governed by contract law and if the tow is undertaken in the course of salvage it will also include the salvage laws. The Australian laws will apply if they are Australian ships, or occur in Australian waters, or the proper law of the contract is expressly or impliedly Australian law. If foreign ships are involved whether Australian law has any application will depend on the circumstances.

11.13 Marine Pollution

In a book dealing with Australia's offshore laws some mention about the laws on marine pollution from ships should be made. This is only a mention, as the topic is enormous and it would need a whole book devoted just to that one topic, which has been covered by the author elsewhere.¹¹³

110 Whether they do apply is left to the regulations, but *Navigation Act 1912* s 186A gives jurisdiction for them to be applied if the regulations so provide. As mentioned above, the High Court decided in *Re Maritime Union of Australia (CSL Pacific Case)* (2003) 214 CLR 397; [2003] HCA 43 that the Australian laws may apply and whether they do or not turns on the details in the relevant Act.

111 The phrase "dumb" barge is used, not surprisingly, to describe a vessel, usually a barge, without its own propulsion.

112 Only one Australian book addresses towage at all, which is M White, "Salvage, Towage, Wreck and Pilotage" in M White (ed), *Australian Maritime Law* (Federation Press, Sydney, 2nd edn, 2000), Ch 9.

113 M White, *Australasian Marine Pollution Laws* (Federation Press, Sydney, 2nd edn, 2007). Also see M Davies and A Dickey, *Shipping Law* (Lawbook Co, Sydney, 3rd edn, 2004), Ch 19.

It may be helpful, however, to draw attention to the obligation on Australia, as on all coastal states, to protect and preserve the marine environment.¹¹⁴ This obligation extends offshore to the limits of the continental shelf or the EEZ, whichever is the further, and it also extends to protecting it from land-based pollution getting into it through the waterways, the atmosphere or by dumping.¹¹⁵

To give effect to this obligation the Australian governments, in right of the Commonwealth, the States and the Northern Territory, have passed a raft of laws and regulations. A whole legal industry has grown around them, not to mention the industries that carry on the business of shipping, ports, exploration and exploitation of offshore oil and gas, fishing, offshore tourism and their regulation and administration. Every aspect, and some of them are referred to in some detail in this book, has laws and regulations, guidelines, practices, standards and the like. The international conventions are very extensive, the Commonwealth laws equally so and on top of that each State and the Northern Territory has passed its own laws and regulations.

The marine pollution laws are often called into play when there is a discharge of pollution from a ship, either deliberately or by accident. A prosecution may well result, which will usually be by the State or Northern Territory authority with the Australian Maritime Safety Authority providing support as may be required. There are several hundred of these Australia-wide each year. Because of the excellent set of International Maritime Organization marine pollution conventions, such as the *Convention on Civil Liability for Oil Pollution Damage* (CLC convention), the *Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage* (Fund convention), the *Convention on Civil Liability for Bunker Oil Pollution Damage* (Bunkers convention) and the *Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea* (HNS convention),¹¹⁶ there is usually a guaranteed insurance fund to pay for the costs of cleaning up and to compensate those who have suffered loss or damage due to the pollution.

As demonstrated in the other parts of this book, there are abundant laws that apply offshore and when one adds to these the many marine pollution laws the result is a matrix of considerably increased complexity.

¹¹⁴ UNCLOS Pt XII, including in particular Art 192.

¹¹⁵ Article 194.

¹¹⁶ The CLC convention and the Fund convention relate to insurance for oil spills from tankers; the Bunkers convention relates to oil spills from non-tankers and the HNS convention, not yet in force, relates to pollution from toxic cargoes.

11.14 Port State Control

The regulation of ships for their adequate and safe construction and operation primarily falls on the flag state. This responsibility is, unfortunately, neglected by many flag states and especially the flag states of convenience. The international maritime community developed, therefore, a structure for checking and regulating the foreign ships that enter its ports, known as port state control.¹¹⁷ This structure is underpinned by a number of international conventions, mainly International Maritime Organization ones, that set the standards for these ships and empower coastal states in this regard.¹¹⁸ In international law a coastal state is not obliged to make its ports available to foreign ships but it is the custom that this be done in international comity and to foster international trade, but a state may not discriminate against foreign states under the guise of port state control. The coastal state is entitled in international law to make it a condition of entry into its ports that it comply with the applicable laws of the coastal state, and this complies with international custom and laws. The Australian responsibility for port state control is discharged by the Australian Maritime Safety Authority, especially by its marine surveyors.¹¹⁹

Although the relevant port state control laws are only enforced by inspection of ships once the ships are in an Australian port,¹²⁰ the actual laws have application offshore in most cases. For instance, there are Commonwealth laws applying all, or nearly all, of the international conventions. An example of an Act that applies widely offshore is the *Navigation Act 1912*, mentioned above.¹²¹ Australian jurisdiction in this area also has another dimension in that Australia is party to two regional agreements, memoranda of understanding (MoU), that exchange information on port state control. These are the Asia-Pacific Regional Co-

¹¹⁷ A flag state already has jurisdiction over its own flagged vessels so the port state control structure is not necessary for them, although much the same laws apply as for those for foreign ships.

¹¹⁸ Examples of international conventions are UNCLOS, MARPOL 1973/78, *International Convention on Load Lines 1966* (LL), *International Convention for the Safety of Life at Sea 1974* (SOLAS), *Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1978* (STCW), *London Convention 1972* (LC), *International Convention on Civil Liability for Oil Pollution Damage 1969* (CLC) and the *International Convention on Tonnage Measurement of Ships 1969* (Tonnage).

¹¹⁹ There is no Australian book that deals with the topic but the Australian Maritime Safety Authority website is very useful and informative: <www.amsa.gov.au>.

¹²⁰ A coastal state may also apply its laws in its territorial sea, but there are limitations as both innocent passage and the rights through international straits used by shipping impose limitations. Further, from a practical point of view the coastal state inspectors would have difficulty accessing such ships and carrying out effective inspections if they were under way.

¹²¹ *Navigation Act 1912* ss 190AA and 210 contain the legislative authority for the Australian Maritime Safety Authority inspectors to inspect and, if warranted, detain ships under port state control.

operation on Port State Control (Tokyo MoU) and Port State Control in the Indian Ocean Region 1998 (Indian Ocean MoU). Obviously the details relating to port state control are too extensive for this section of this chapter, but it may be seen that the offshore jurisdiction dimension of the port state control laws has an offshore dimension of some proportions.

11.15 Conclusions

The kaleidoscope of Australia's offshore jurisdiction mentioned in the earlier chapters is added to by the topics dealt with in this chapter. The Australian dependence on shipping results in an active set of industries that have ships and ports operating offshore and the set of laws that regulate them are many and varied. The *Navigation Act 1912* plays a major part in this, as do the *Shipping Registration Act 1981* and the *Admiralty Act 1988*. The laws relating to carriage of goods by sea are also an important mixture of private and public law in which the *Carriage of Goods by Sea Act 1991* and the *Marine Insurance Act 1909* play their part.

The marine pollution laws that apply offshore are also complex. They relate to the planning laws on the land in the catchment areas where rivers run into the sea and also on control of ports. The main aspect of this section, however, is on the laws relating to pollution from ships. There are many such laws and they extend from the inland waterways to the outer limits of the continental shelf. They impact on all ships offshore, at least to the outer limits of the EEZ, and to Australian flagged ships anywhere in the world. The powers of intervention when a shipping casualty occurs offshore are of such importance that they have been given their own section, even though they come with the marine pollution area as whole. This exercise of offshore jurisdiction is well-founded in international law and practice but it still is an extraordinary exercise of power that Australia may take drastic steps in relation to a foreign ship beyond its territorial sea, even to the point of sinking it and its cargo.

The underwater cultural heritage laws that are directed offshore are quite extensive and they interact with the ancient maritime laws relating to salvage. If a wreck is over 75 years of age or is otherwise deemed of heritage importance it is important that it be approached carefully so the heritage is not destroyed but this also overlaps with the law of salvage and law of finds (law of derelict) that support the ship and its cargo being recovered for its commercial uses. Further, on the shore and in the near-shore seas the powers of the Receiver of Wreck over the wrecked ship and the cargo are mixed with the rights of the salvor in a quite unclear pattern. Also playing a part is the difficult aspect of the code of practice relating to refuge for damaged ships – should they be allowed into a safe refuge, should they be sunk in the deep ocean, or should they

AUSTRALIAN OFFSHORE LAWS

be pushed into some other nation's waters to present their risks to it? These laws and practices all overlap.

In short, what can be said about the exercise of the Australian offshore jurisdiction described in this chapter is that the combination of laws set out here is no less complex than those set out in other chapters.

Chapter 12

Offshore Geographical Areas

- 12.1 Introduction
- 12.2 Great Barrier Reef Marine Park
 - 12.2.1 Introduction
 - 12.2.1.1 General Characteristics
 - 12.2.1.2 Interaction of Commonwealth and Queensland Jurisdiction
 - 12.2.2 Commonwealth Laws
 - 12.2.2.1 Great Barrier Reef Marine Park Act 1975
 - 12.2.2.2 Criminal Laws
 - 12.2.2.3 Fisheries Laws
 - 12.2.2.4 Marine Environment Protection
 - 12.2.2.5 Environment Protection and Biodiversity Conservation Act 1999
 - 12.2.2.6 Offshore Installations
 - 12.2.2.7 Compulsory Pilotage
 - 12.2.2.8 Compulsory Ship Reporting
 - 12.2.2.9 Costs for Damage to the Reef
 - 12.2.3 Queensland State Laws
 - 12.2.3.1 Transport Operations (Marine Safety) Act 1995
 - 12.2.3.2 Transport Operations (Marine Pollution) Act 1995
 - 12.2.3.3 Environmental Protection Act 1994
 - 12.2.3.4 Fisheries Act 1994
 - 12.2.4 Conclusions on Great Barrier Reef Laws
- 12.3 Torres Strait
 - 12.3.1 Introduction and the Torres Strait Treaty 1978
 - 12.3.2 Fisheries Regulation in the Torres Strait
 - 12.3.3 Particularly Sensitive Sea Area
 - 12.3.4 Shipping and Compulsory Pilotage
 - 12.3.5 Conclusions on Torres Strait Laws
- 12.4 Offshore Marine Parks
 - 12.4.1 Introduction
 - 12.4.2 International Conservation Obligations
 - 12.4.3 Commonwealth Reserves
 - 12.4.4 Marine Protected Areas
 - 12.4.5 Other Forms of Habitat Protection
 - 12.4.5.1 World Heritage
 - 12.4.5.2 Commonwealth and National Heritage

- 12.4.5.3 Historic Shipwrecks
- 12.4.5.4 Biosphere Reserves
- 12.4.6 State and Territory Marine Reserves
 - 12.4.6.1 Queensland
 - 12.4.6.2 New South Wales
 - 12.4.6.3 Victoria
 - 12.4.6.4 Tasmania
 - 12.4.6.5 South Australia
 - 12.4.6.6 Western Australia
 - 12.4.6.7 Northern Territory
- 12.5 Offshore Native Title
 - 12.5.1 Introduction
 - 12.5.2 Extension Offshore of Native Title Rights
 - 12.5.3 The Inter-Tidal Zone Case
 - 12.5.4 Conclusions on Offshore Native Title
- 12.6 Conclusions

12.1 Introduction

This chapter addresses major offshore regions that have not otherwise been addressed. The first is the Great Barrier Reef, which lies off the north and eastern coast of Australia. It is a major tourist, fisheries, environmental and shipping region and has its own particular administration, which is set out in some little detail and the complexities of which are considerable.

The second is the Torres Strait, which is the international shipping strait between the north of Australia, Cape York Peninsula, and Papua New Guinea. This region is a fisheries, environmental and international shipping region with the particular requirements of the Torres Strait citizens addressed by special legislation. This arises under the international treaty between Australia and Papua New Guinea in which provision was made for the regulation of the fisheries, the protection of traditional fishing and the other activities relating to the Torres Strait islanders who live in the region.

Marine parks, or reserves, are an important category of particular offshore areas and the third section discusses the laws relating to them. The State marine parks are close inshore, in the coastal waters, to come within the State three mile jurisdiction while the Commonwealth marine parks are all beyond it. The exception is the Great Barrier Reef Marine Park which runs from the low water mark and it overlaps frequently with the Queensland jurisdiction, in some areas of which are Queensland marine parks, which complicates an already complicated legal situation. It should be mentioned that an important offshore geographical area is the Timor Sea where agreements between Australia and Timor-Leste over development of petroleum deposits is of major importance, but this topic is dealt with in Chapter 2 so there is no need to deal with it here.

Finally, the chapter deals with offshore native title claims. This topic has not easily fallen into any of the other chapters so it is appropriate it be mentioned here. The Australian law relating to offshore native title claims is still developing but the legislative provisions and major court cases to date are mentioned. The chapter ends by drawing some conclusions about these topics.

12.2 Great Barrier Reef Marine Park

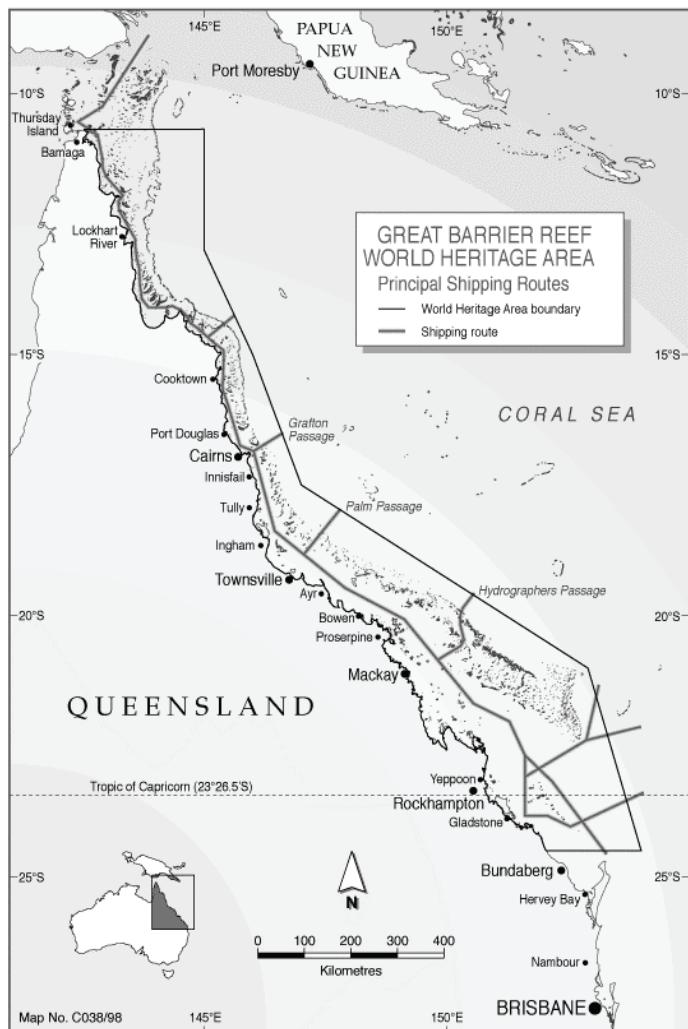
12.2.1 Introduction

12.2.1.1 General Characteristics

The Great Barrier Reef (GBR)¹ is situated off the north-east coast of the State of Queensland, and is depicted in Map 12.1, below. The GBR stretches for 2340 kilometres, covers approximately 344,400 square kilometres, and contains 2900 reefs, some 300 coral cays and about 600 islands.² It has economic significance for tourism and fishing and encompasses the major shipping channel that passes up the east coast of Australia (the inner route). There are thousands of shipping movements a year in the GBR and Torres Strait of ships over 50 metres in length,³ so the ship movements in the GBR are significant. Some of these ships are using the Queensland ports and some are only on transit passage through the area to or from more distant ports using the inner route. Some north-south shipping uses the outer route but it is, like the inner route, marked with many navigational hazards and for some shipping it is longer and so adds to the time and expense of the ships involved. The GBR is commercially important to Australia, employing many thousands of people in tourism and fisheries with a high overall economic value to the country. It was declared a World Heritage Area in 1981⁴ and a

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- 1 The marine pollution aspects of the laws in the Great Barrier Reef and the Torres Strait are dealt with in M White, *Australasian Marine Pollution Laws* (Federation Press, Sydney, 2nd edn, 2007). The emphasis in this chapter, however, goes wider than the marine pollution emphasis.
 - 2 The Great Barrier Reef Marine Park Authority has a vast amount of information, including these statistics, see <www.gbrmpa.gov.au> and follow prompts.
 - 3 Most ships use the inner route of the GBR, with the balance entering or departing through Hydrographers, Palm or Grafton Passages, and about 20 per cent are on transit through the GBR and do not call at any Queensland port. The Australian Maritime Safety Authority, in combination with the Queensland government's Maritime Safety Queensland, conduct regular shipping and safety reviews of the GBR and Torres Strait and the Australian Maritime Safety Authority website is helpful in this regard: <www.amsa.gov.au>.
 - 4 World Heritage Areas are established under the *Convention Concerning the Protection of the World Cultural and Natural Heritage* adopted by the General Conference of UNESCO on 16 November 1972, meeting in Paris from 17 October to 21 November 1972, at its 17th session. Details are available at <<http://whc.unesco.org>>.

AUSTRALIAN OFFSHORE LAWS



Map 12.1: The Great Barrier Reef and World Heritage Area

Source: Great Barrier Reef Marine Park

Particularly Sensitive Sea Area in 1990.⁵ Establishing the precise jurisdiction and the extent of the laws that apply in the GBR is not, however, an easy task.⁶

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- 5 Particularly Sensitive Sea Areas are declared by the International Maritime Organization, an organ of the United Nations, and full details are available at <www.imo.org> and follow prompts.
 - 6 I am indebted to the legal officers of the GBRMP Authority, Maritime Safety Queensland and the Queensland Department of Natural Resources (which includes fisheries) for discussions on this difficult question of what laws apply in the GBR.

The various maritime zones in the GBR amount to a complex matrix of zones and jurisdictions. The Australian baselines run up the Queensland coast, with most of it on the inner part of the GBR. From an international maritime law point of view, those areas that are within the baselines are internal waters, the area to the seaward from the baselines is territorial sea for 12 nautical miles, then comes the contiguous zone, then the EEZ and then the outer continental shelf. The GBR region ends at the outer reef, as may be seen from the map. The outer shipping route runs through the Coral Sea, which is mainly in the Australian EEZ but which also runs into the waters of neighbouring countries. The Coral Sea area is a Commonwealth territory, as has been described in Chapter 10. The Great Barrier Reef Marine Park covers about 99 per cent of the Great Barrier Reef World Heritage Area but it still leaves that 1 per cent that is not and so different laws apply to this part of the Reef area.

12.2.1.2 *Interaction of Commonwealth and Queensland Jurisdiction*

Leaving aside the particular laws that apply in the GBR and applying the Offshore Constitutional Settlement 1979 discussed in Chapter 2, then because most of the islands in the GBR are land in the State of Queensland, it follows that the waters within three miles of the islands and three miles out from the other baselines are in Queensland jurisdiction.⁷ However, the Offshore Constitutional Settlement 1979 and its subsequent legislation made particular provision for the GBR in that it provided that the *Great Barrier Reef Marine Park Act 1975* (Cth) was to apply to the whole of the region as defined in the Act and the rights and title to the seabed and territorial sea (then three miles width) that otherwise vested in the States are subject to the provisions of that Act. Also it provided that the Commonwealth and Queensland agreed to joint consultative arrangements for the management and preservation of the region, which extends to the low water mark, which latter phrase was to put it beyond doubt that the three mile Queensland jurisdiction around the land did not apply.⁸

This was the 1979 agreement and it was, of course, translated into legislation. The *Coastal Waters (State Powers) Act 1980* (Cth) granted legislative powers to the States, Queensland in this case, in the coastal waters (three miles) as if they were within the limits of the State and this included in relation to the seabed and the subsoil beneath and airspace

⁷ Because of the large number of islands, cays etc and some doubts as to the accuracy of the areas and boundaries under the Queensland letters patent issued to the Queensland colonial government, the exact areas and boundaries remain to be confirmed by future more detailed surveys.

⁸ See *Offshore Constitutional Settlement: A Milestone in Co-operative Federalism* (Australian Government Publishing Service, Canberra, 1980). A copy is an Annex to this book.

above.⁹ In the adjacent area (beyond the three mile limit) the States also had legislative powers over subsea mining from the land, ports, harbours and installations and works relating to them, and over such fisheries as came under an arrangement between the Commonwealth and the States.¹⁰

In the *Coastal Waters (State Title) Act 1980* (Cth) a general provision in s 4 vested all right and title to the property in the seabed, subsoil, water column and airspace as if within the limits of the State ie total sovereignty. This was, however, subject to several exceptions:

- (a) a right or title subsisting in any other person or the Commonwealth before the Act came in to force (which was on 14 February 1983);
- (b) the Commonwealth or its authorities' rights for purposes of communications, safety of navigation, quarantine and defence and structures relating to any of them;
- (c) the right in the Commonwealth or its authorities to authorise petroleum pipelines to cross the seabed; and
- (d) the provisions of the *Great Barrier Reef Marine Park Act 1975* so that nothing done under that Act was to constitute an infringement of the State's right or title.¹¹

It may be seen from these provisions that in the GBR region, if the *Great Barrier Reef Marine Park Act 1975* covers any particular activity then it has priority over any Queensland Act that otherwise applies to that activity. But if the Act does not cover that activity then, provided it was in Queensland coastal waters, subsoil, seabed or airspace, then the Queensland laws apply. For areas in the Reef areas outside the GBR region then the usual division of jurisdiction under the Offshore Constitutional Settlement 1979 applies.

It follows, therefore, that a careful study of the *Great Barrier Reef Marine Park Act 1975* decides many of these issues and that Act is addressed in the next section.

It is clear that Queensland ports and associated shipping facilities within the port limits, or other internal waters of the State, are in Queensland jurisdiction, even though some of the port limits extend out into the marine park. Those parts of the GBR comprising the waters and drying reefs that are not islands, come within the Commonwealth jurisdiction as they are not "land", which is necessary in order to be part of the State of Queensland.

It is also necessary to have in mind the difficult legal question of which entity, Commonwealth or State, has right and title to the inter-

9 Section 5(a).

10 Section 5(b).

11 Section 5(2), (3).

GEOGRAPHICAL AREAS

tidal zone between the high water and low water marks. This has never been settled as a general principle and the answer to it depends on the particular legislation and circumstance. The Offshore Constitutional Settlement 1979 claimed jurisdiction for the Commonwealth from the low water mark. As a general principle land is surveyed and the land title extends to the high water mark so, as a general principle, the State of Queensland ends at the high water mark. In some cases, see below, the Commonwealth or Queensland has right, title and interest in the land to the high water mark and in the waters and seabed from the low water mark. It remains undecided which of them has those vital interests in the inter-tidal space that divides the other two clear interests.

One should mention that areas that are internal waters of the State of Queensland are not part of the GBR region and, of course, Queensland laws apply there. Fortunately, the cooperation that was agreed in the Offshore Constitutional Settlement 1979 has worked very well and where Queensland marine parks overlap or adjoin particular zones of the GBR park, the relevant officers ensure the regulations concerning these waters are the same. An example of this cooperation is illustrated by the Emerald Agreement, which is an agreement signed between the Commonwealth and Queensland governments in Emerald, Queensland, on 10 May 1988 providing for cooperation between its officers in the management of the GBR region.¹² One may also say that thanks to the sensible and pragmatic administration of most officers, the complexities that politicians and lawyers have allowed to develop are somewhat lessened.

There are further complications on the topic of which entity, between the Commonwealth and Queensland, has the jurisdiction over particular waters in the GBR. The first is that the Commonwealth owns, or has leases in whole or in part, some islands and other lands in the GBR.¹³ For instance the Department of Defence has over 100 parcels of land, mainly in the Shoalwater Bay area, where it has confirmed, or in some cases assumed, ownership of land. Further, the GBRMP Authority has ownership, or in some cases only a leasehold interest, in whole or in part of some 21 islands in the GBR Marine Park. Many of these latter islands are owned or leased for the purpose of lighthouses and other navigational aids.¹⁴

When it comes to the seabed in the GBR different considerations apply. The main one is, as already set out, that in the Offshore Constit-

12 The Emerald Agreement may be found at the GBRMP Authority website at <www.gbrmpa.gov.au/corp_site/management/emerald_agreement> (accessed 27 February 2009).

13 I am indebted to Mr Michael O'Keefe, Director of Legal Services, GBRMP Authority, for this list of islands and other lands in which the Commonwealth has ownership or a lease and some details about them.

14 Under the Constitution s 51(vii), the Commonwealth has power to make laws for the peace, order and good government of "Lighthouses, lightships, beacons and buoys".

tutional Settlement 1979 the States and the Commonwealth agreed that the title to the seabed under the *Great Barrier Reef Marine Park Act 1975* would remain with the Commonwealth. As a result the *Coastal Waters (State Title) Act 1980* (Cth) provided that the rights and titles otherwise vested in the States are subject to the operation of the *Great Barrier Reef Marine Park Act 1975*.¹⁵ It is possible, therefore, that there are parts of the GBR region where the title to the seabed lies with the Commonwealth but the powers to regulate certain activities in the water column or the airspace above it lies with Queensland. This could only be decided after a close study of the surveys and charts together with an analysis of the legislation.

For those activities and people that are not covered by the provisions of the *Great Barrier Reef Marine Park Act 1975*, whether it is Queensland or the Commonwealth that has the jurisdiction for the first three nautical miles off the Queensland islands and other lands has never been tested. Reasoning from first principles and applying the Offshore Constitutional Settlement 1979 and its subsequent legislation, it would follow that where the land and foreshore is part of Queensland, or where the Commonwealth only has a lease of the land from Queensland, then the three miles of sea would be part of the coastal waters of Queensland and so in Queensland jurisdiction. If, on the other hand, the Commonwealth owned the islands or other land right down to the foreshore, then no Queensland jurisdiction would be generated and the Commonwealth laws would apply in the first three miles (unless some agreement had been put in place to some other effect, underpinned by suitable legislation by both entities). If the Commonwealth owned part of the island down to the foreshores¹⁶ and Queensland the balance down to the foreshores, then it should follow that the waters directly offshore from the respective parts would generate jurisdiction over those respective waters out to three miles.¹⁷ Finally, it would follow that if the Commonwealth did not own land that ran right down to the foreshores and the balance of it was owned by Queensland then the land on the foreshore, in this case Queensland's, would develop the offshore jurisdiction.

An illustration of the importance of these issues arose from the grounding of the merchant ship *Bunga Teratai Satu* on Sudbury Reef, which is south and east of Cairns and in the GBR, in 2000.¹⁸ Although the

¹⁵ See s 4(3).

¹⁶ Under the Constitution s 51(xxi), the Commonwealth has power to acquire property on just terms and under s 112 a State has power to surrender territory.

¹⁷ Where there was a complication, such as a bar or an isthmus, then the international rules established under international law for determining offshore jurisdiction could be applied in the usual way.

¹⁸ The author was in the case and is familiar with the facts, but these facts and subsequent cases are set out by Alan Girle, the then lawyer for the Queensland Environmental Protection Authority, in A Girle, "Record \$400,000 Fine For Environmental Offence" (2001) 16 AER 10.

GBRMP Authority had prosecuted it was a minor offence as the *Great Barrier Reef Marine Park Act 1975* then stood and the Queensland government wished to prosecute for the major offence of environmental damage done to the reef. Leaving aside other issues, the question arose as to whether the Queensland legislation, in this case the *Environmental Protection Act 1994*, applied. The earlier government gazettals had shown an island on or near Sudbury Reef so, in this case, the three mile jurisdiction certainly covered the vessel where it had grounded and so the Act applied. On the other hand a marine surveyor who had been asked to check the area found that, in the intervening years since the gazettal, the reef had been washed down by cyclones and it was covered at high water. The result was that it was not an island and it did not generate a three mile jurisdiction for the State of Queensland. On the other hand the government gazettal had declared it was an island and it had not been repealed at the time of the grounding. This was a major legal issue and it would normally have been destined for the High Court, but in the end the defendants pleaded guilty to the charges so the issue was not tested.

Finally and differently, another aspect is that the 1975 decision of the High Court in *Pearce v Florenca*¹⁹ established that if there were a "nexus" between the activity, people and vessel concerned and the peace, order and good government of the State then, notwithstanding that the State otherwise did not have jurisdiction for its laws to apply where that activity occurred, then its laws still did have application. In *Pearce v Florenca* the activity was fishing off the Western Australian coast and the connection between the people, the fishing boat and the activity was very close, so the High Court held that the Western Australian fisheries laws did apply despite the State not then otherwise having jurisdiction for this law.

This 1975 case was, of course, decided just after the *Seas and Submerged Lands Act Case*²⁰ and before the Offshore Constitutional Settlement 1979 came into effect. It is a question of fact whether this principle of law applies to any situation, so one could not be confident in stating exactly when and how the courts may find that it has application. But this law applies off the coast of Queensland as much as anywhere else so if the people concerned live in Queensland, have a vessel registered in Queensland, work out of a Queensland port and the charge is brought before a Queensland court in relation to a Queensland law, then it would seem to be applicable. Like other aspects of the offshore jurisdiction this case and its application is discussed in a little more detail in Chapter 2. One can conclude on this topic by mentioning that, of course, if there is an inconsistency between the Commonwealth laws and the Queensland laws,

19 (1976) 135 CLR 507.

20 *New South Wales v Commonwealth (Seas and Submerged Lands Act Case)* (1975) 135 CLR 337.

then in the absence of any other special arrangement or provision, the Commonwealth laws prevail to the extent of the inconsistency.²¹

12.2.2 Commonwealth Laws

12.2.2.1 Great Barrier Reef Marine Park Act 1975

The main Commonwealth Act regulating the GBR region is the *Great Barrier Reef Marine Park Act 1975*. The *Great Barrier Reef Marine Park Act 1975* is expressed as applying to "every external Territory",²² to acts and omissions relating to all persons, vessels, aircraft and platforms in the "Australian jurisdiction"²³ but, one would think unnecessarily, is expressed not to apply to them outside it.²⁴ Further, the Act is expressed to bind the Commonwealth and each of the States, which is usual for the Commonwealth and Queensland but strange that it should apply to other States, and also to the Northern Territory and Norfolk Island, when all of the GBR area is adjacent only to Queensland. As the Act was expressly created for the purposes of the GBR, why it is expressed to apply to distant and quite unconnected parts of Australia is very odd and it should be amended. In fact it is only applied in the GBR region.²⁵

The GBR and the Act and its application are administered by the Great Barrier Reef Marine Park Authority (GBRMP Authority), whose headquarters are in Townsville. This Authority provides for personnel and infrastructure for the establishment, management, care and development of the marine park within the GBR region.²⁶ The *Great Barrier Reef Marine Park Act 1975* achieves this by establishing the GBRMP Authority and a marine park, the extent of which is set out by government proclamation from time to time, and then authorising the GBRMP Authority to prepare the zoning plans mentioned above and to administer the areas in accordance with the regulatory structure for those various zones.²⁷ The *Great Barrier Reef Marine Park Zoning Plan 2003*, as amended from time to time, provides that almost one third of the park is now protected by a network of highly protected "no take" fishing zones and regulation of other activities such as those relating to tourism and ships. The regulatory enforcement structure is that it is an offence for persons to engage

21 Constitution s 109.

22 External territories are discussed in Chapter 10.

23 Defined in the Act as the land, waters, seabed and airspace of Australia, an external territory, the EEZ and the Australian continental shelf: s 5(4).

24 Section 5. This section is drafted in a strange manner in relation to the extent to which the Act is to apply, in that to a large extent the provisions of the sub-sections overlap.

25 Conversation with Mr Michael O'Keefe, Director of Legal Services, GBRMP Authority, on 11 February 2009.

26 Section 5.

27 Part V.

in conduct contrary to that allowed under the zoning plan and for which a licence or other permission has not been granted by the Authority.

There are extensive provisions for what constitutes an offence in the GBR Marine Park, which include any drilling or mining in it,²⁸ any discharge of waste (which is widely defined)²⁹ or of sewage³⁰ unless expressly authorised. There are the usual defences for offences for these discharges, which include that the discharge was incurred for the purpose of securing the safety of a vessel, aircraft or platform or of saving life.³¹

12.2.2.2 Criminal Law

The background and application of the Australian criminal laws are discussed in Chapter 4, but the summary is that in the GBR the Commonwealth *Crimes at Sea Act 2000* has the effect that the substantive Queensland criminal laws, mainly in this case the Queensland *Criminal Code*, applies offshore as part of the Commonwealth applied laws, out to the limit of the EEZ or agreed international boundary as appropriate. Of course where Queensland otherwise has jurisdiction, which is on the land and offshore out to three miles, then the Queensland criminal laws apply of their own force under the provisions of the Offshore Constitutional Settlement 1979. However, the *Crimes at Sea Act 2000* applies the Queensland criminal law offshore out to 12 miles,³² not the three miles under the Offshore Constitutional Settlement 1979 and its subsequent legislation. This is an anomaly but it probably does not present a problem as either way the Queensland criminal laws do apply offshore in what is otherwise Commonwealth jurisdiction.

Further, the nexus principle established under *Pearce v Florenca*, as discussed in Chapter 2, applies with the result that if there is sufficient connection (the nexus) between the relevant people, equipment and activity, then the Queensland criminal law can apply irrespective of any geographical limitation otherwise applicable to the Queensland criminal laws.³³

This Commonwealth grant of jurisdiction over its waters would also apply to the waters off the Commonwealth owned islands in the GBR, so the problems mentioned above about the jurisdiction offshore from Queensland islands, as opposed to that off Commonwealth islands, do

28 Section 38.

29 Section 38J.

30 Section 38J(4).

31 Section 38J(5).

32 *Crimes at Sea Act 2000* s 5.

33 *Pearce v Florenca* (1976) 135 CLR 337. The case was discussed, endorsed and applied in *Port MacDonnell Professional Fishermen's Association Inc v South Australia* (1989) 168 CLR 340 at 372. This case is mentioned and discussed in Chapter 2.

not arise. There is not space to further develop this aspect of the offshore laws, but it is necessary carefully to peruse the offshore criminal co-operative scheme as set out in the Schedule to the *Crimes at Sea Act 2000*. These provisions are expressed to apply to the substantive criminal laws of the State, so there are many other statutes that are not in this category of "substantive" that would have application.

12.2.2.3 *Fisheries Laws*

Fisheries is an important commercial and recreational activity in the GBR and is highly regulated by the zoning system established by the GBRMP Authority, mentioned above, and also the regulation of fishing licences. The laws that apply this system are mentioned above. These *Great Barrier Reef Marine Park Act 1975* fisheries laws only apply inside the marine park and to the zones gazetted for their application. In waters in the GBR region that are outside the GBR Marine Park and also outside Queensland jurisdiction, then the main Australian fisheries legislation would apply, the *Fisheries Management Act 1991* (Cth), which Act has been discussed in Chapter 7. In the Queensland waters the Queensland *Fisheries Act 1994* would apply, which Act is mentioned under.

12.2.2.4 *Marine Environment Protection*

The GBR is highly susceptible to pollution in its varying forms which comes in the main from the land, but this book is about offshore laws and the laws relating to pollution from the catchment areas are left for others. Shipping is the other source for its pollution, and the GBR's vulnerability to ship pollution, particularly to oil and chemical spills, has resulted in the Australian laws in the GBR having their own special characteristics. In the early 1970s, the issue of its special protection was dealt with, through the International Maritime Organization, in the major marine pollution from ships convention, MARPOL, in making the definition of "nearest land" lie substantially outside the main parts of the GBR.³⁴ As most discharges from ships were regulated by the distance from nearest land, this gave protection to the GBR area by severely restricting the discharge activities of ships in the reef area.

Over the past 30 years or so environmental protection has given rise to many international conventions and Australia is a party to nearly all of the marine environmental protection international conventions relating to shipping, which are mainly from the International Maritime Organi-

³⁴ For the definition of "nearest land" see MARPOL 73/78 Annex 1, reg 1(9), where nearest land is defined, as it is also in Annexes III and V. This definition has the effect that MARPOL does not allow discharges into most of the GBR from ships. The *Great Barrier Reef Marine Park Act 1975* also contains provisions about discharges from ships, as mentioned in the section above.

GEOGRAPHICAL AREAS

zation, and it gives effect to them by a series of Commonwealth laws. (The States and the Northern Territory also give effect to most of them and as to the Queensland laws applying in the GBR see shortly.) These Commonwealth laws are, in the main, under the Australian Maritime Safety Authority, which administers, regulates and enforces them vigorously.

The Australian laws relating to marine pollution from ships and the relevant international conventions have been fully addressed by the author in a separate book and there is no space to set them out here.³⁵ For readers who wish to make a start in the Commonwealth legislation in this area it may assist to mention that most of the relevant Acts commence with the title *Protection of the Sea* and may be found on the Commonwealth website for such laws.³⁶

When dealing with the GBR, mention should also be made of the National Plan; the plan setting out the responsibilities of government and industry for the cleanup of any oil or other pollution spills. For ease of administration the Australian and Papua New Guinea areas have been placed into areas and the area in which the GBR lies is known as REEFPLAN. As a result the contingency plan for the GBR area is referred to, because it involves the Queensland government officials and relevant Queensland based private sector, as the Queensland Coastal Contingency Action Plan, and REEFPLAN.³⁷ The National Plan is administered by the Australian Maritime Safety Authority and is a system of governance and is not directly underpinned with its own legislation.³⁸

Another government scheme for dealing with marine casualties offshore, including in the GBR, is the National Maritime Emergency Response, which is a government maritime emergency arrangement to deal with marine casualties, especially those likely to give rise to marine pollution.³⁹ Its aim is to protect the marine environment from actual or potential ship-sourced pollution by enhancing response arrangements under the National Plan through provision of an appropriate level of maritime emergency towage capability around the Australian coastline and the enhancement of the Emergency Response management framework. This includes the appointment of a single national decision maker

35 M White, *Australasian Marine Pollution Laws* (Federation Press, Sydney, 2nd edn, 2007).

36 See website <www.comlaw.gov.au> and follow prompts.

37 For mention of the Australian National Plan on pollution spills see M White, *Australasian Marine Pollution Laws* (Federation Press, Sydney, 2nd edn, 2007), Ch 11.

38 The Australian Maritime Safety Authority is very informative about the National Plan: see <www.amsa.gov.au> and follow prompts.

39 See <www.amsa.gov.au/Marine_Environment_Protection/National_Maritime_Emergency_Response_Arrangements>. The topic is often discussed as "refuge for ships", meaning that a stricken vessel needs and seeks refuge from the perils of the sea.

to coordinate a response to a maritime casualty. Because salvage awards have become too small to encourage the private sector to have salvage tugs and teams permanently available, the provision of emergency tows is an important part of the National Maritime Emergency Response. To this end the Australian Maritime Safety Authority implemented the national emergency towage program in July 2006 and it also appointed the national decision maker who will coordinate and manage Emergency Response action in the event of high risk of significant pollution from a maritime casualty in Commonwealth waters.⁴⁰

12.2.2.5 *Environment Protection and Biodiversity Conservation Act 1999*

Another relevant Commonwealth Act that applies in the GBR is the *Environment Protection and Biodiversity Conservation Act 1999*.⁴¹ This is a massive Act that is mainly concerned with uses, zoning and regulation of the land, but it also applies offshore. The Act provides that it extends to the "Australian jurisdiction" which is defined to mean all persons, aircraft and vessels within the limits of the Australian EEZ and outer continental shelf and to Australian persons, corporations, aircraft, vessels and their crews anywhere.⁴² The *Environment Protection and Biodiversity Conservation Act 1999* expressly provides that it is not intended to exclude the State and Territory laws, except where so provided, and so it does nothing to simplify the complex matrix of Commonwealth and State laws that apply in the GBR. As to the Queensland State laws on this subject, see shortly.

12.2.2.6 *Offshore Installations*

There are numerous offshore installations in the GBR as many of the tour companies run tourist boats out from the towns and harbours to floating facilities anchored on suitable reefs, from which snorkelling, diving and other reef activities are conducted for the visitors. The regulation of these offshore installations in the GBR, as has been mentioned, comes under the *Great Barrier Reef Marine Park Act 1975* and its zoning and licence system. Also applying to offshore installations, including in the GBR, is the *Offshore Installations Act 1987* (Cth), the provisions of which have been mentioned earlier in this book.⁴³ In relation to the boats themselves and

40 Ibid.

41 For a more complete discussion of the environmental aspects of the *Environment Protection and Biodiversity Conservation Act 1999* in offshore areas, see M White, *Australasian Marine Pollution Laws* (Federation Press, Sydney, 2nd edn, 2007), Section 7.11.

42 Section 5. Also note that under the *Acts Interpretation Act 1901* (Cth) legislation applies, unless it otherwise appears, to the "coastal seas of Australia".

43 See Chapter 3 above.

crews and passengers, they come under the Queensland boating laws as they are all intrastate vessels.

12.2.2.7 *Compulsory Pilotage*

There has been a system under which ships could voluntarily take a pilot through the Torres Strait and the GBR since the 1800s but it was first regulated by gazettal of Queensland government regulations in 1884⁴⁴ and this system has provided an invaluable service. Regulation of the pilotage service has been transferred from the Queensland government to the Commonwealth under which it is now administered by the Australian Maritime Safety Authority. The provision of pilotage services was once a government monopoly but the service has been privatised and there are now three main companies⁴⁵ which provide pilotage services through the inner route of the GBR (and the Torres Strait) to ships requiring pilots.⁴⁶

The system was voluntary for many years but compulsory pilotage through certain areas of the GBR was introduced in 1991 following the designation of the area as a Particularly Sensitive Sea Area the previous year. The present situation is that all vessels of 70 metres or more in length and all loaded oil tankers, chemical carriers and gas carriers of any length, must use the services of a pilot licensed by the Australian Maritime Safety Authority when navigating through such areas.⁴⁷ In Chapter 11 it is noted that the *Navigation Act 1912* (Cth) provides an underpinning for this compulsory pilotage, but the detail for the GBR region is also to be found in the *Great Barrier Reef Marine Park Act 1975*.⁴⁸

Under these provisions regulated ships, basically as mentioned all ships over 70 metres in length and all laden oil, gas and chemical tankers, are to take a pilot to pass through those parts of the GBR designated as compulsory pilotage areas and it is an offence not to do so and the owner and master may be prosecuted when next they enter an Australian port.⁴⁹ Masters and others who are qualified and experienced navigators in the area may be part of a ship's complement such that the ship may apply for

⁴⁴ A sound history of pilotage in the Torres Strait and the GBR is Captain John Foley, *Reef Pilots* (Banks Bros & Street, Sydney, 1982).

⁴⁵ The three main pilotage companies are Australian Reef Pilots Pty Ltd, Torres Pilots Pty Ltd and Hydro Pilots (Australia) Pty Ltd.

⁴⁶ These are reef pilotage companies and are to be distinguished from those companies that provide pilotage services in and out of ports.

⁴⁷ *Great Barrier Reef Marine Park Act 1975* Pt VIIA and s 3, definition of "regulated ship".

⁴⁸ Part VIIA.

⁴⁹ Sections 59B, 59C, 59D. The areas are between Cape York and Cairns and in the Whitsunday Islands passage. From Cape York the compulsory pilotage areas in the Torres Straits apply to the same ships, as mentioned in Section 12.3, Torres Strait.

an exemption certificate and an adverse decision on this may be appealed to the Administrative Appeals Tribunal.⁵⁰

The substantive pilotage regime applying under Australian law has been addressed elsewhere by the author,⁵¹ but the jurisdiction to regulate it and make it compulsory in selected portions of the GBR is in the *Great Barrier Reef Marine Park Act 1975*.⁵² It provides that the master and the owner are liable for the offence if a regulated ship navigates without a pilot in a compulsory pilotage area. This is an offence of strict liability,⁵³ which means that intention is not relevant to guilt. Body corporates are liable to a fine five times that of a natural person.⁵⁴ Stress of weather or other “unavoidable” cause are defences as is if the owner proves that it did not know that the ship was in contravention of the requirement.⁵⁵ There are other defences, such as those in the *Criminal Code* (Cth) of mistake of fact or honest but mistaken claim of right.⁵⁶

Of course compulsory pilotage only applies in the inner route in the GBR, Hydrographers Passage and the Whitsunday Islands as those areas pose the highest navigational risks. (It also applies in the Torres Strait (Great North East Channel), as to which see shortly.) There are a number of passages through the reef to the seas to the east of the outer reef, and there are a number of recognised routes in this outer route. From a navigational point of view the outer route also has its hazards as it has fewer navigational aids and less well developed charts. Further, it is harder to deliver assistance to marine casualties in the outer Reef and it does not have the benefit of the Great Barrier Reef and Torres Strait Vessel Traffic Service (REEFVTS) which, as mentioned in the next section, provides services to improve maritime safety. In the inner route assistance and oil cleanup equipment can be brought to bear on a marine casualty with some success, but this is not the case for a marine casualty in the outer parts. Aspects of these points may be seen from looking at Map 12.2.

12.2.2.8 Compulsory Ship Reporting

A compulsory reporting system for ships in the inner route, known as REEFREP, was established in the GBR in 1996 to improve ship safety.⁵⁷

50 Sections 59F, 59G.

51 M White, *Australasian Marine Pollution Laws* (Federation Press, Sydney, 2nd edn, 2007), Ch 9.

52 Part VIIA.

53 For “strict liability”, see *Criminal Code* s 6.1.

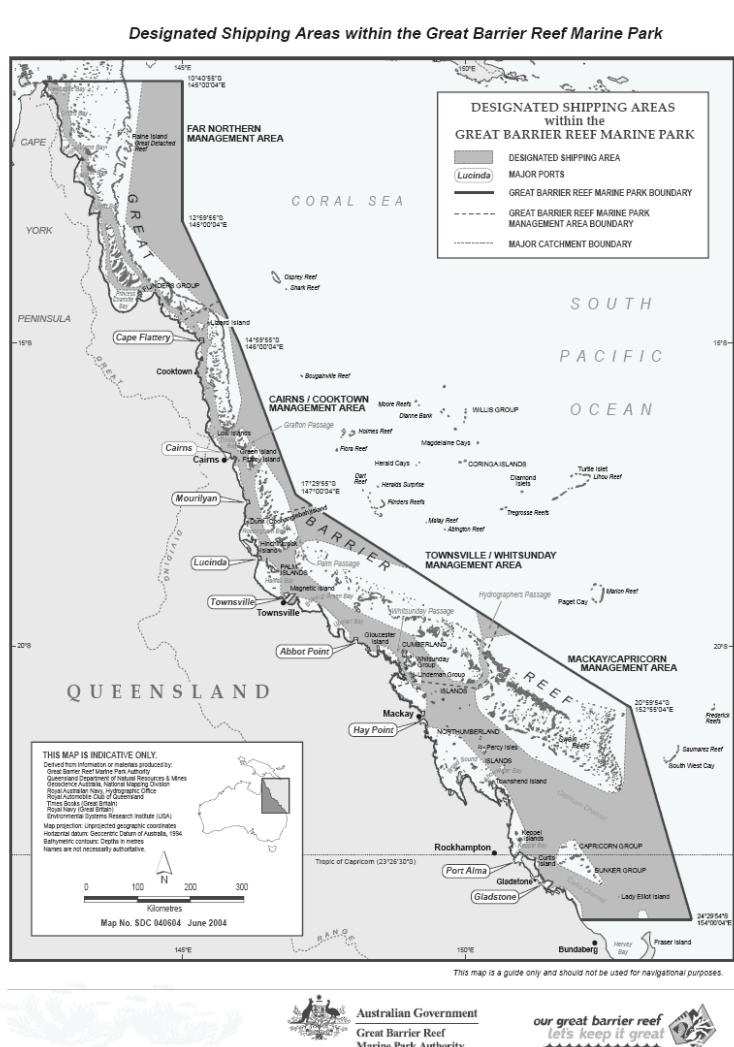
54 *Crimes Act 1914* s 4B(3).

55 Section 59H.

56 Readers would need to refer to the provisions in the Act and the Code in detail to further develop the elements of the offences and defences.

57 REEFREP is an interactive mandatory ship reporting system, established in accordance with SOLAS Ch V, reg 8-1, that was adopted by resolution of the International Maritime Organization Safety Committee (MSC52.66).

GEOGRAPHICAL AREAS



Map 12.2: Designated Shipping Areas in the GBR

Source: Great Barrier Reef Marine Park Authority

Under REEFREP, all ships over 50 metres long and all oil tankers, liquefied gas carriers, chemicals tankers and certain other specified ships,⁵⁸ are to report by radio at designated reporting points and when entering or

58 Other vessels are encouraged to participate. Defence ships are not included but the Australian Defence Force requires that they comply with the system, for obvious safety reasons for all.

leaving regulated ports. Information is passed back to other ships in the area to assist with their safe passage.⁵⁹ It is, in effect, a mandatory ship reporting system that applies to the GBR and the Torres Strait⁶⁰ and is and was a joint initiative of the Queensland government and the Australian Maritime Safety Authority. It is integrated with the Australian-wide offshore ship reporting system, AUSREP, which covers the remainder of the Australian coastline.⁶¹

As a comment on this AUSREP system, it is noted that a new development in relation to offshore reporting is a compulsory Long Range Identification and Tracking System (LRIT), which is part of the International Maritime Organization range of ship safety and ship rescue systems. The International Maritime Organization regulations on LRIT are included in SOLAS Ch V, Safety of Navigation, and apply to ships on international voyages of 300 gross tonnage and upwards and mobile offshore drilling units. The LRIT information that ships are required to transmit concerns the ship's identity, location and date and time of the position. The data derived through LRIT will be available only to the recipients who are entitled to receive such information. States that are party to SOLAS, which include Australia, will be entitled to receive information about ships navigating within a distance up to 1000 nautical miles off their coast.⁶²

In 2006 this reporting system was extended to become the Great Barrier Reef and Torres Strait Vessel Traffic Service (REEFVTS) under which REEFREP was continued but added to it were monitoring and surveillance systems made up of information from radar, automatic identification system and automated position reporting (under Inmarsat C, or VHF).⁶³ REEFVTS is operated under a joint scheme by the Commonwealth and Queensland governments, through the Australian Maritime Safety Authority and Maritime Safety Queensland, and covers the

⁵⁹ See the REEFREP website at <www.amsa.gov.au/Shipping_Safety/REEFVTS>; and see also the booklet *Reef Guide: A Shipmaster's Handbook to the Torres Strait and the Great Barrier Reef* (Queensland Transport and Australian Maritime Safety Authority, Brisbane, 1996).

⁶⁰ This mandatory reporting system was established consistently with SOLAS Ch 5, reg 8-1 and approved by the International Maritime Organization in 1996; see *Reef Guide: A Shipmaster's Handbook to the Torres Strait and the Great Barrier Reef* (Queensland Transport and Australian Maritime Safety Authority, Brisbane, 1996), Foreword.

⁶¹ Australian Ship Reporting System, administered by the Australian Maritime Safety Authority.

⁶² Full details may be obtained from <www.imo.org> and follow prompts. Also the Australian Maritime Safety Authority website is very useful on the Long Range Identification and Tracking System as it administers it for the Australian government.

⁶³ Under SOLAS Ch 5 a VTS system may be established when the volume of traffic or the degree of risk justifies it. Its Australian legislative basis is under the *Navigation Act 1912* s 191, and s 425(1AA) for marine orders. Marine Order 56 gives regulatory authority to the system.

same area as REEFREP.⁶⁴ The services provided are ship traffic information, navigational assistance and maritime safety information with the aim of contributing to marine safety.

The legislation that underpins this compulsory ship reporting system is in the *Navigation Act 1912*, which gives the statutory basis for the numerous marine orders that provide the actual regulation of the scheme.⁶⁵

12.2.2.9 Costs for Damage to the Reef

Before leaving the GBR region it is worth mentioning that there is legislative authority for the government to recover damages to meet the costs of restoration of the reef after a ship grounds there, or any other culpable person causes damage to it.⁶⁶ Upon conviction the court may hear evidence on the matter and order a suitable sum be paid by the convicted person or company.⁶⁷

12.2.3 Queensland State Laws

As already mentioned, adding to the complexity of the laws in the GBR is that the Commonwealth and Queensland State laws overlap and intertwine. State laws are not addressed in other parts of this book but in the GBR region the State and the Commonwealth laws have such a complex interrelationship it is best if the main Queensland Acts are briefly mentioned. Three particular Queensland laws will be addressed here but there are, of course, many other Queensland laws that have some relevance offshore. Shipping safety and the protection of the environment are the two main areas of regulation and their jurisdiction has been discussed in the introduction to this topic. Basically of course, that jurisdiction is out to three miles from the Queensland land areas and also where there is sufficient nexus between the activity and the people and Queensland to establish jurisdiction.

64 The Australian Maritime Safety Authority is described in Chapter 11. Maritime Safety Queensland is an agency in the Queensland Department of Transport.

65 *Navigation Act 1912* s 191, and s 425(1AA) for marine orders. Marine Order 56 actually gives regulatory authority to the system.

66 *Great Barrier Reef Marine Park Act 1975* s 38MC which states: "38MC Vessels causing damage in the Marine Park: *Operators*. (1) A person is guilty of an offence if: (a) the person operates a vessel; and (b) the vessel is in the Marine Park and the person is negligent as to that fact; and (c) that operation results in, or is likely to result in, damage to the Marine Park and the person is negligent as to that fact. Penalty: 2,000 penalty units. *Owners and operators*. (2) If a vessel is operated in the Marine Park and that operation results in, or is likely to result in, damage to the Marine Park, the operator and the owner of the vessel are each guilty of an offence punishable on conviction by a fine of not more than 500 penalty units. (3) An offence under subsection (2) is an offence of strict liability". The Act also states: "Note: For strict liability, see s 6.1 of the *Criminal Code*".

67 Sections 61A, 61B.

12.2.3.1 Transport Operations (Marine Safety) Act 1995

The relevant Queensland shipping Acts include the *Transport Operations (Marine Safety) Act 1995* (TOMSA). This Act provides the regulatory laws for the safety of shipping in the Queensland coastal waters (ie out to three nautical miles from the baselines which includes around all of the numerous Queensland islands).⁶⁸

This Act, and *Transport Operations (Marine Pollution) Act 1975* (TOMPA), as to which see shortly, are administered by Maritime Safety Queensland established under the *Maritime Safety Queensland Act 2002* (Qld), although the department is being reorganised (2009). “Queensland waters” is defined in the *Acts Interpretation Act 1954* (Qld) s 36, as all waters within the limits of the State or “coastal waters” of the State. Coastal waters are defined, also in s 36, as those parts of the territorial sea that are within the “adjacent area” of Queensland, other than those parts mentioned in the *Coastal Waters (State Powers) Act 1980* (Cth) s 4(2) and the sea on the landward side of the territorial sea not otherwise within the limits of the State.

The objectives of TOMSA are to provide a balance between regulating the maritime industry to ensure safety while also enabling effectiveness and efficiency to be developed.⁶⁹ The Act applies to all ships “connected with Queensland”, those in compulsory pilotage ports (which encompasses most Queensland ports), ships on intrastate voyages and ships on interstate and overseas voyages while they are in Queensland waters.⁷⁰ Basically, TOMSA is expressed to have jurisdiction over all ships in waters off the coast of Queensland out to the three nautical mile limit. The general offshore jurisdiction over shipping, which is regulated under the *Navigation Act 1912* (Cth), has been discussed above in Chapter 11 and TOMSA does not apply if the *Navigation Act 1912* applies.⁷¹ As to the actual persons over whom TOMSA claims jurisdiction, these include all persons in the jurisdiction and also all entities such as the State and, so far as the legislative power of the Queensland Parliament permits, the Commonwealth and the other States and the Territories, unless exempted by a regulation.⁷² Exceptions are ships belonging to the Australian Defence

⁶⁸ The distinction between an “island” and a “reef” as the words are popularly used is that a reef is covered at high tide so is not an island. In international law the distinction is made between an island and a “low-tide elevation” with the island, in the main, giving rise to a territorial sea and an EEZ, see UNCLOS Art 121, and a low-tide elevation not doing so, see Art 12. This is only a generalisation and both articles need to be carefully read for their full meaning and effect.

⁶⁹ Section 3.

⁷⁰ Section 11. Readers are referred to Chapter 2 above for the constitutional background to these Acts, and also to M White, *Australasian Marine Pollution Laws* (Federation Press, Sydney, 2nd edn, 2007), Chs 6, 7, 9.

⁷¹ Section 12.

⁷² Sections 17, 18, 18A. There is administrative power to except certain vessels from the TOMSA jurisdiction if they are better regulated under the Commonwealth laws, in this case the *Navigation Act 1912*.

Force or the naval, military or air forces of a foreign country.⁷³ This is, indeed, a sweeping jurisdiction claimed by an Act of a State Parliament in a federation of States such as Australia.⁷⁴

12.2.3.2 Transport Operations (Marine Pollution) Act 1975

In relation to the marine environment in the GBR, the Commonwealth laws generally relating to this topic are mentioned in Chapter 11, and basically readers will need to refer to a specialised book on the subject.⁷⁵ The Queensland law on ship pollution is to be found in the *Transport Operations (Marine Pollution) Act 1975* (TOMPA). This Act gives effect to MARPOL and provides the State regulatory structure relating to discharges from ships and sets out where, when and how they may or may not occur. The objective of TOMPA to protect Queensland's marine and coastal environment by minimising discharges of ship-sourced pollutants into coastal waters, is primarily achieved by giving effect to MARPOL.⁷⁶ Basically, TOMPA provides for offences by the master and owner for discharge of pollutants from a ship into Queensland coastal waters, or into waters where the pollution subsequently enters coastal waters, unless the Act so allows.⁷⁷ The jurisdiction claimed by TOMPA is the same as that claimed by TOMSA above.

12.2.3.3 Environmental Protection Act 1994

The Queensland *Environmental Protection Act 1994* is the general environment Act that regulates many environmental activities on land⁷⁸ and off-shore. It is a large Act, of some 640 sections, three schedules and numerous endnotes amounting to some 600 pages. Its stated object is to protect Queensland's environment while allowing for development that improves the quality of life and maintains ecological processes.⁷⁹

73 Section 16.

74 Of course if the State law is inconsistent with a Commonwealth law that covers the field of the relevant activity, person, thing or place then, under the Constitution s 109, the Commonwealth law prevails to the extent of the inconsistency.

75 M White, *Australasian Marine Pollution Laws* (Federation Press, Sydney, 2nd edn, 2007).

76 Section 3. For a full discussion of MARPOL see M White, *Australasian Marine Pollution Laws* (Federation Press, Sydney, 2nd edn, 2007), Ch 3.

77 TOMPA deals with the provisions of MARPOL and the regulatory and enforcement ancillary laws associated with such offences. Section 9 is the main section that makes it an offence if the pollutant is discharged outside but subsequently enters Queensland coastal waters.

78 Other legislation with some relevance are the *Coastal Protection and Management Act 1995*, the *Marine Parks Act 2004*, the *Fisheries Act 1994* and the *Crimes at Sea Act 2001*. These all have some application in the GBR but it is limited for present purposes and, because of space restrictions, it is not intended to deal with these Acts beyond this mention of them.

79 Section 3.

The *Environmental Protection Act 1994* sets out to achieve its object by having environmental policies, environmental impact statements and reports, development approvals and registration, a special and complex structure for petroleum activities, a similarly special and complex structure for mining activities. There is, of course, a large bureaucratic structure for dealing with the many policies, impact statements, reports, registrations, administrations and so on.

The provisions for regulating activities, creating offences, and dealing with legal proceedings are contained in Chs 6 to 10 of the Act. They establish offences of graduated seriousness from environmental nuisance, to environmental harm and then to serious environmental harm,⁸⁰ and provide for a wide range of other offences and an equally wide range of provisions for enforcement. After an internal departmental review, appeals may be taken to the Land Court or to the Planning and Environment Court (a division of the Queensland District Court), as may be appropriate.⁸¹

The jurisdiction claimed by this Act is of uncertain nature as it is not expressly set out. As to persons and entities, it binds "all persons, including the State (of Queensland) and, so far as legislative power permits, the Commonwealth and other States".⁸² The body of the Act sets out a whole raft of limitations and obligations on persons but, in obscure drafting, it is expressed not to limit other Acts or any civil right or remedy.⁸³ It claims extraterritoriality in that an offence is committed within the State by conduct outside the State if the relevant conduct would have been an offence if engaged in inside the State.⁸⁴ Many of the obligations and offences are committed in relation to "land" but land is defined in its Dictionary as including water and land covered by water.⁸⁵

It may be seen that the *Environmental Pollution Act 1994* (Qld) has major applications in the GBR over those parts of it that are in Queensland waters, and over the waters outside the GBR out to the three mile limit. This Act performs a similar function in attempting to protect the offshore marine environment, but its relationship with the Commonwealth Acts, let alone the other Queensland Acts, is complex.

80 Sections 436-439.

81 See Chapter 3 of the Act.

82 Section 22.

83 Sections 23, 24. It should be noted that s 23(2) expressly sets out the six Acts that override the *Environmental Pollution Act 1994* of which the main relevant one is the *Transport Operations (Marine Pollution) Act 1995*, which gives effect to MARPOL. For further discussion see M White, *Australasian Marine Pollution Laws* (Federation Press, Sydney, 2nd edn, 2007), Ch 8.

84 Section 25. The section does not deal with the situation if the activity was lawful at the place where it was done even if unlawful in the State of Queensland.

85 Schedule 3, Dictionary.

12.2.3.4 *Fisheries Act 1994*

As mentioned in the Introduction, the Queensland legislation takes effect up to three miles offshore from the baselines on the main land and the Queensland islands in the GBR, so amongst other laws the *Fisheries Act 1994* (Qld) has effect. Its main purpose is to provide for the use, conservation and enhancement of fisheries resources and fish habitats in a way that seeks to balance ecological sustainable development.⁸⁶ The Act provides that it applies to persons, things, acts and omissions on Queensland land or in Queensland waters and also to recreational fishing carried on in the AFZ adjacent to the Queensland coast.⁸⁷ Exceptions to the application of the Act include activities to which a Commonwealth law applies, fisheries in the Torres Strait, as to which see under, landing fish in Queensland taken under the Commonwealth fishing concessions or a Commonwealth-State cooperative fishery.⁸⁸ It is a defence to a charge under the Act if the person is an Aboriginal or Torres Strait Islander who was acting under their respective traditions to satisfy personal, domestic or non-commercial needs.⁸⁹

The *Fisheries Act 1994* (Qld) also provides for administration, a ministerial advisory body, authorities and licences, fishery development approvals, protection of the fish habitats and management of fisheries in its many forms. Various offences under the Act and Regulations are established and most of these are dealt with at first instance in the Magistrates Court. There are, of course, numerous administrative decisions made in the course of the administration of this Act and a person whose interests are adversely affected by an order, direction, requirement or other decision of the chief executive may appeal from any of these administrative decisions to the Fisheries Tribunal, a three person body chaired by a barrister or solicitor.⁹⁰

Of particular interest is the provision in the Queensland Act and the regulations⁹¹ for the "Commonwealth-State management of fisheries", set out in the *Fisheries Act 1994* (Qld) Pt 7. The Act empowers the minister to agree with the Commonwealth to a joint management of a fishery over

86 Section 3.

87 The power to regulate Queensland recreational fisheries beyond the three mile limit lies in the "nexus provision", as discussed in *Pearce v Florena* (1975) 135 CLR 507; as to which see Chapter 2 for discussion.

88 Section 11.

89 Section 14.

90 Part 9. All Queensland tribunals are currently being combined under the one legislative structure (2009).

91 The *Fisheries Regulation 2008* makes extensive provision for regulating areas, types of fishing equipment, types of fish stock and categories of persons (recreational and commercial) and it also sets out the powers to deal with diseased fish. The Act and all of the regulations may be found on the Queensland government website for the Queensland Parliamentary Counsel: <www.legislation.qld.gov.au> and follow prompts.

such fisheries as are provided under the *Fisheries Act 1991* (Cth),⁹² which is then administered by the Joint Authority. This Joint Authority is then clothed with all of the powers of the Chief Executive Officer under the Act⁹³ and it is the Queensland laws that apply to such fishery agreements.⁹⁴

12.2.4 Conclusions on Great Barrier Reef Laws

It can be seen from the above that the jurisdiction of the laws that operate in the GBR gives rise to a complex legal situation. There are general regulatory and zoning laws, administered by the GBRMP Authority although a small part of the World Heritage Area is in Queensland territory and not that of the Commonwealth. The numerous Queensland islands in the GBR each generate a three mile territorial zone in which the Queensland laws operate and not the Commonwealth ones except where the *Great Barrier Reef Marine Park Act 1975* prevails. The marine environmental laws, therefore, for the first three miles from the land are those of the State of Queensland and thereafter those of the Commonwealth under the *Environment Protection and Biodiversity Conservation Act 1999*. However, an exception applies to activities, people and vessels if they have sufficient connection with the State of Queensland to have a "nexus" between them and the law which they have offended. Overarching are the laws, both Commonwealth and State, regulating shipping and also fisheries.

It is difficult not to use the word "chaotic" to describe this complex jurisdictional matrix of offshore laws in the GBR. It is only saved by the sensible administration of the system by those charged with administrative responsibilities in the area and reasonable cooperation by most of those in the shipping, fisheries and tourism industries that use it.

12.3 Torres Strait

12.3.1 Introduction and the Torres Strait Treaty 1978

The Torres Strait, between the north of Cape York and Papua New Guinea, has always been a sensitive marine area as it has similar characteristics to much of the GBR. Historical reasons saw the Colony of Queensland

92 The "Commonwealth Fisheries Act" is defined in the Dictionary at the end of the Queensland Act as the *Fisheries Management Act 1991*; which Commonwealth Act is dealt with at some length in Chapter 7 above.

93 Section 136(3).

94 Section 134. Under the *Coastal Waters (State Powers) Act 1980* (Cth), as to which see Chapter 2 above, power is granted to the States to make laws with respect to fisheries in Australian waters beyond the outer limits of the coastal waters of the State under an arrangement with the State in accordance with the laws of the State: s 5(c).

declare its maritime boundaries close to the Papuan coast in the late 19th century to prevent non-British European powers from establishing colonies in the area. After Australian federation in 1901 the sea boundary for Australia was the sea boundary of the former Colonies, including the Colony of Queensland, and so the boundary was established close to what later became Papua New Guinea. (It became independent in 1975.) To make some provision to deal with this injustice and for the peoples of the Torres Strait, who are Australians but have particular ties with the people of Papua New Guinea and also with the sea, Australia and Papua New Guinea entered into the *Torres Strait Treaty 1978*.⁹⁵

Under the *Torres Strait Treaty 1978* doubts as to sovereignty and sea boundaries were settled and provision was made for a protected zone where the customary traditional rights of the inhabitants were preserved. Mining and any oil drilling in the Strait were banned for an initial period of 10 years, which has since been extended. A Torres Strait Joint Advisory Council was established and an administrative commission provided the regulatory and administrative structure.⁹⁶ The treaty establishes a sea boundary between the two countries, provides for certain free movement of Torres Strait Islander and Papua New Guinea nationals in the area without the need for visas (Torres Strait Protected Zone), regulates and shares fisheries resources, and protects the traditional way of life and rights of the Strait's inhabitants. Whilst the seabed jurisdiction zone marks the maritime boundary, there are Australian islands to its north, suitably marked and identified, which are Australian land. These Torres Strait islands generate a territorial sea of only three nautical miles, unlike the rest of the Australian territorial sea of 12 miles.

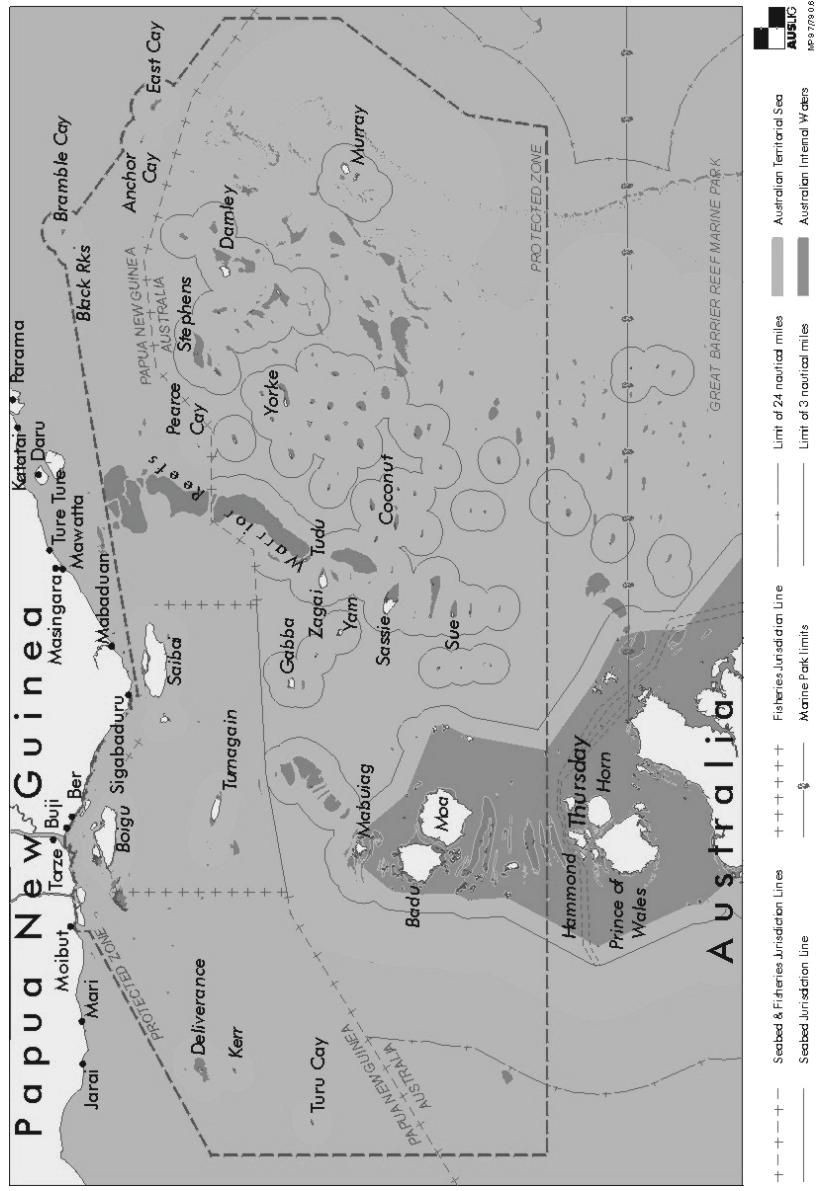
12.3.2 Fisheries Regulation in the Torres Strait

The Commonwealth legislation regulating fisheries in the Torres Strait is contained in the *Torres Strait Fisheries Act 1984* (Cth).⁹⁷ This Act provides for a complex system of interlocking laws and regulations relating to fisheries in this region. The *Torres Strait Fisheries Act 1984* applies "extra-

95 The *Treaty between Australia and the Independent State of Papua New Guinea concerning Sovereignty and Maritime Boundaries in the area between the two Countries, including the area known as the Torres Strait, and Related Matters* signed at Sydney on 18 December 1978 and which entered into force on 15 February 1985. For more complete discussion, see K Stuart, *The Torres Strait. International Straits of the World Series, Vol 12* (Martinus Nijhoff Publishers, The Hague and Boston, 1997); K Stuart, *Australia's Maritime Boundaries: Wollongong Papers on Maritime Policy No 4* (Centre for Maritime Policy, University of Wollongong, 1995). Also see the material on DFAT website <www.dfat.gov.au>, follow prompts to *Torres Strait Treaty*.

96 To give effect to the provisions of the *Torres Strait Treaty* the Commonwealth passed the *Torres Strait Treaty (Miscellaneous Amendments) Act 1984* and Queensland passed the *Torres Strait Fisheries Act 1984*.

97 The main Australian fisheries regulatory Act, the *Fisheries Management Act 1991* (Cth), does not apply in the protected zone: s 9.



Map 12.3. Australia's Maritime Zones in the Torres Strait

Source: Geoscience Australia

territorially" according to its tenor⁹⁸ and, as has been noted, the territorial sea in the Torres Strait is only claimed for the regulated islands out to three nautical miles from the baselines, in contrast to the 12 mile claim for the rest of Australia. Fisheries regulation in the Torres Strait lies with the Queensland legislation in these three nautical mile waters, except where the Queensland and Commonwealth governments agree that the Commonwealth legislation shall apply.⁹⁹ The Act provides for and applies to a protected zone¹⁰⁰ and it can also apply to specifically designated types of fishery. The traditional owners are given special exemptions for traditional fishing and also for community catch, which may be commercial fishing but only for the limited community purpose. Private fishing from Australian boats is not covered by the Act.¹⁰¹ The Act only applies to the Australian (southern) part of the protected zone, which zone is set out in Annex 9 of the treaty,¹⁰² with the northern part coming under Papua New Guinea laws. Traditional inhabitants of Papua New Guinea who, before the treaty, had customarily engaged in fisheries in the Australian waters were recognised by government proclamation.¹⁰³

The Commonwealth Act establishes the administrative structure for regulating activities in the area and gives effect to the treaty through the Protected Zone Joint Authority.¹⁰⁴ Of course there are administrative officers appointed to give effect to the management, but the policy is made by the Joint Authority, which is composed of one Commonwealth minister, one Queensland minister and the chair of the Torres Strait Regional Authority.¹⁰⁵

The Queensland government's legislation regulating fisheries in the area and giving effect to the treaty is the *Torres Strait Fisheries Act 1984*.¹⁰⁶ Its provisions only apply to the protected zone and any area adjacent to it so proclaimed by the Queensland government.¹⁰⁷ The *Torres Strait Treaty 1978* is a schedule to the Act and its main purpose is to promote the good order, management and development of the fishing industry and the

98 Section 6.

99 The "Protected Zone coastal waters of Queensland" is not within "areas of Australian jurisdiction" of the Act: s 3, Definitions.

100 The areas mentioned in the treaty are set out in detail in annexes to it, with the protected zone set out in Annex 9 and the Fisheries Jurisdiction Line set out in Annex 8.

101 These aspects are to be found in s 3, Definitions.

102 The *Torres Strait Treaty 1978* is Annex 1 to the Act.

103 Section 15(2).

104 Section 30.

105 Section 30. The Torres Strait Regional Authority is established under the *Aboriginal and Torres Strait Islander Act 2005* (Cth) s 142. The Torres Strait Regional Authority website, which is informative, is at <www.tsra.gov.au>.

106 The other two Queensland Acts specific to the Torres Strait are the *Torres Strait Islander Cultural Heritage Act 2003* and the *Torres Strait Islander Land Act 1991*.

107 Section 4.

fisheries in the Torres Strait area.¹⁰⁸ This Queensland Act recognises traditional and community fishing in the same way as the Commonwealth Act. Its main provisions are directed to the joint management of the fisheries with the Commonwealth in the protected zone.¹⁰⁹

12.3.3 Particularly Sensitive Sea Area

Turning now to the marine environmental aspects one notes that, because of its international aspects and also because of the *Torres Strait Treaty* 1978, the Torres Strait did not come within the GBR structure even though the importance of the marine environment aspects otherwise warranted it. An initiative in 2005 by the Australian and Papua New Guinea governments did, however, move some way to protect the Strait's waters from risks associated with shipping casualties. Acting on a submission from the two governments the International Maritime Organization, in reliance on the powers under MARPOL Annexes I, II and V and the IMO Guideline A.927(22), declared the Torres Strait a Particularly Sensitive Sea Area (PSSA). This empowered the two states to take steps for its protection, including the introduction of traffic separation services, which can extend to requiring designated ships to take a pilot.¹¹⁰ The relevant International Maritime Organization resolution recommended that governments encourage their ships to take pilots in the area, with the emphasis on its being a recommendation.

12.3.4 Shipping and Compulsory Pilotage

The Australian government, however, went one step further and implemented a regulatory structure making pilotage compulsory, along similar lines to that required in parts of the GBR. The legislation provides for prosecution of offenders if they offend and then subsequently enter into an Australian port.¹¹¹

108 See the introductory paragraph to the Act.

109 Part 3; especially ss 13-16.

110 For full details see the IMO MEPC 53rd Session, Agenda Item 24, 25 July 2005, including Annex 1, "Description of the Particularly Sensitive Sea Area: Torres Strait". The inclusion of the Torres Strait as a Particularly Sensitive Sea Area was, in fact, an extension of the GBR Particularly Sensitive Sea Area to cover this similar sensitive sea area to its north. The eastern and part of the western boundary of the new Particularly Sensitive Sea Area aligns with the "nearest land" definition included in Annexes I, II, IV and V of MARPOL. As has already often been noted, MARPOL and marine pollution from ships is the subject of M White, *Australasian Marine Pollution Laws* (Federation Press, Sydney, 2nd edn, 2007).

111 The *Navigation Act 1912* (Cth) Pt VIIA establishes compulsory pilotage for "regulated ships" in the "compulsory pilotage areas" in particular s 59B and creates the offence of entering an Australian port after navigating without a pilot in that the master and the owner are liable: ss 59C, 59D. Section 3 defines a "regulated ship" as including vessels over 70 metres long and all loaded oil tankers, chemical carriers or liquefied gas carriers. Exceptions are defence vessels and a vessel where

The compulsory pilotage provisions in the Torres Strait has met with resistance from some International Maritime Organization members in the deliberations.¹¹² This is because making the pilotage compulsory could amount to interference with the right of transit passage through straits used for international navigation, which is contrary to UNCLOS Pt III. The Australian government maintains that this is not so and it is merely a regulation of shipping for greater shipping safety and protection of the marine environment.¹¹³

The REEFREP and REFVTS systems, mentioned above in Section 12.2, also apply in much of the Torres Strait. The risks of pollution in the Torres Strait have to be borne in mind as navigation is difficult, with strong currents and many navigational hazards. Shipping traffic has increased, particularly the tanker traffic, since the establishment of an off-shore oil loading terminal on the Papua New Guinea side of the Strait. There has been only one significant oil spill from a shipping casualty which was the tanker the *Torrey Canyon* in 1969.¹¹⁴ This casualty gave rise to much activity by Australia, including the formation of the National Plan, which plan also applies in the Torres Strait but has been fully explained elsewhere.¹¹⁵

12.3.5 Conclusions on Torres Strait Laws

As one would expect from the national and international structure in the Torres Strait, the legislation in the jurisdiction is complex. It comprises:

- (a) an international treaty that brings into play international legal aspects;

(cont)

the master has an exemption. Defences are stress of weather or other unavoidable cause or if the owner proves that it "did not know" that the regulated ship was in contravention of the Act: s 59H.

¹¹² For instance, see R Beckman, "Australia's Pilotage System in the Torres Strait: A Threat to Transit Passage" (2007) 153 *Maritime Studies* 1; J Roberts, "Compulsory Pilotage in International Straits: The Torres Strait PSSA Proposal" (2006) 37 *Ocean Dev & Int'l L* 93.

¹¹³ See Sea Power Centre, "Compulsory Pilotage in the Torres Strait" (2007) 153 *Maritime Studies* 23. For a detailed article on the facts and law, including the Australian position on this topic, see S Bateman and M White, "Compulsory Pilotage in the Torres Strait – Overcoming Unacceptable Risks to a Sensitive Marine Environment" (2009) 40 *Ocean Dev & Int'l L* 184.

¹¹⁴ The case arising from the salvage of the *Torrey Canyon* went to the High Court: see *Fisher v The Oceanic Grandeur* (1972) 127 CLR 312, discussed in M White (ed), *Australian Maritime Law* (Federation Press, Sydney, 2nd edn, 2000), Ch 5. Casualties occur from time to time in the Torres Strait, which are all duly investigated by the Australian Transport Safety Bureau, a recent example being the grounding of the Hong Kong registered products tanker *Atlantic Blue* on Kirkcaldie Reef in the Torres Strait on 7 February 2009: see <www.atsb.gov.au/publications/investigation_reports> (accessed 27 February 2009).

¹¹⁵ See M White, *Australasian Marine Pollution Laws* (Federation Press, Sydney, 2nd edn, 2007).

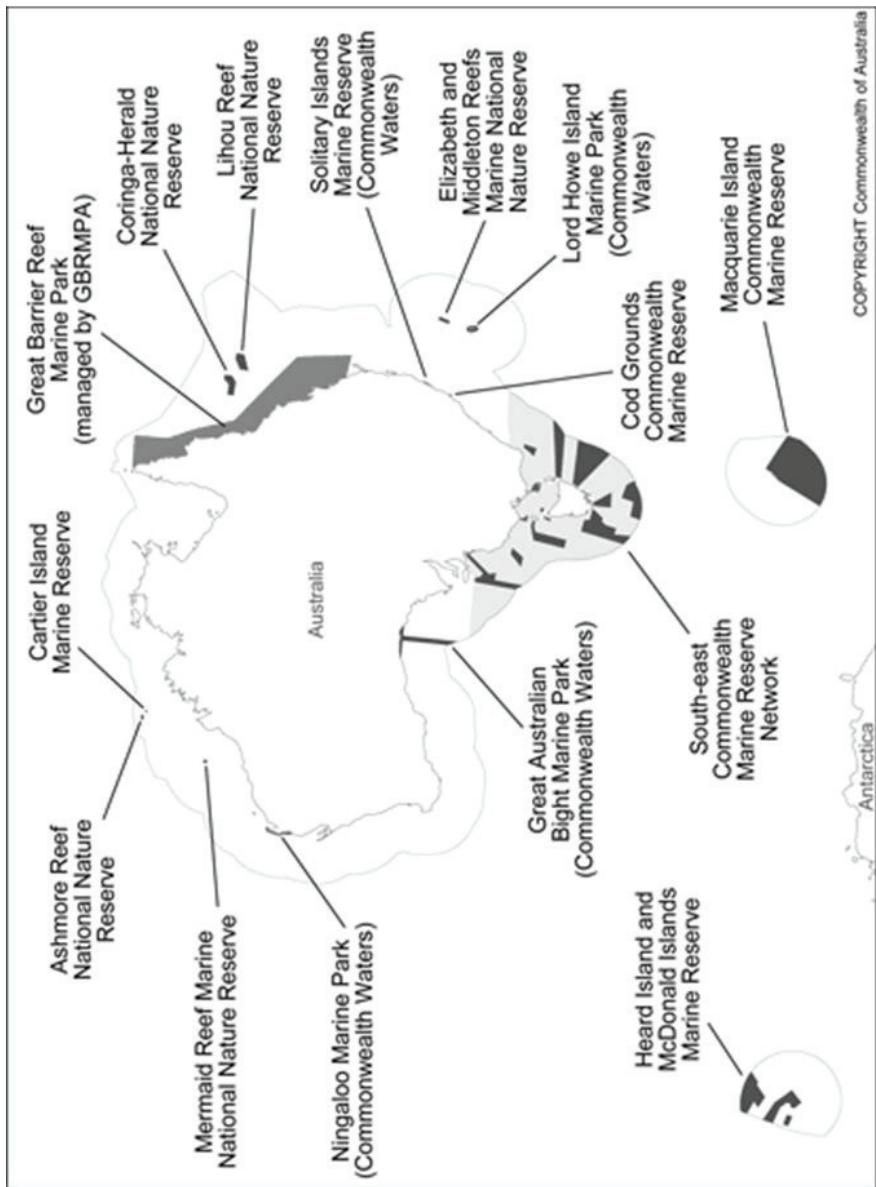
- (b) a special commission regulating the area;
- (c) fisheries legislation establishing a protected zone, which complications include:
 - (i) regulation of fisheries;
 - (ii) special provisions for the traditional inhabitants carrying on traditional fishing but also for traditional inhabitants to carry on commercial fishing for the community (community fishing);
 - (iii) government proclamations for particular types of fisheries;
 - (iv) special provision for Papua New Guinea citizens who had customarily carried on fishing in the Australian zone;
 - (v) a National Plan for dealing with pollution spills; and
 - (vi) controversial compulsory pilotage through the area (an international strait) for particular ships;
- (d) as well, the other usual Australian and Queensland laws also apply in their particular geographical areas according to their tenors.

It can truly be said that the offshore laws applying in the Torres Strait are difficult to rationalise. It has all of the issues relating to a strait for international shipping, a particularly sensitive sea area, a specially administered area arising from an agreement between Australia and Papua New Guinea and the home of a people, the Torres Strait islanders, who have important traditional links and rights. When one adds the hazards to navigation and the compulsory pilotage regime it could not be anything else but a complex matrix of national and international laws.

12.4 Offshore Marine Parks

12.4.1 Introduction

Another particular offshore geographical category worthy of mention is that of the marine parks. Once again the division of the offshore jurisdiction amongst the Commonwealth and the States becomes relevant as some of the marine park areas extend over the three mile line. This section will mention the main legislation only but readers may wish to bear in mind that there is much legislation, Commonwealth and State, which touches on these areas. There is not space here to set out the detailed maps of the areas, although Map 12.4 gives a good indication, nor to describe and discuss the substance of the laws, but sufficient description is included to enable readers to have an overview.



Map 12.4 Australia's Offshore Protected Areas

Source: Commonwealth Department of Environment, Water, Heritage and the Arts
 <www.environment.gov.au/coasts/mpa/index.html>

The main Commonwealth Act relating to marine parks is the *Environment Protection and Biodiversity Conservation Act 1999*. This Act has already been mentioned in this chapter but not in respect of marine parks, which will now be covered. Its main objects include the protection of the environment, especially those aspects of national importance, which include the wetlands and the marine environment. The Act regulates activities over many marine activities, including whales and other cetaceans,¹¹⁶ including offences relating to foreign whaling vessels, and other marine species that are listed under the Act.

In relation to the geographical areas, the Act creates such areas as a whale sanctuary in the Australian EEZ (excluding, of course, the coastal waters under the jurisdiction of a State or the Northern Territory).¹¹⁷ The jurisdiction of the *Environment Protection and Biodiversity Conservation Act 1999* is expressed to apply to all persons within the outer limit of the continental shelf¹¹⁸ and to Australian citizens and other persons with defined Australian links anywhere.¹¹⁹ Important Commonwealth marine parks under this Act include in the Great Australian Bight, off Lord Howe Island, Macquarie Island and the Ningaloo Marine Park (off the Western Australian north-west coast), as may be seen from Map 12.4 (see previous page). The Great Barrier Reef, of course, has its own Act, as discussed above. All of these particular areas have management plans and detailed regulatory structures.

The States and the Northern Territory have jurisdiction out to the three mile limit, and this includes jurisdiction over marine parks, and the States have all availed themselves of the opportunity to enact legislation to make express provision for such parks.¹²⁰

¹¹⁶ Cetaceans are an order of aquatic, chiefly marine, mammals, including whales, dolphins, porpoises etc: see *Macquarie Dictionary* (Macquarie University, Sydney, 1981)

¹¹⁷ See generally Ch 5, Pt 13, Div 3.

¹¹⁸ Australia lodged its claim to the limits of the outer continental shelf with the relevant Commission under UNCLOS in 2004 and these were approved in 2009, all of which may be viewed on the United Nations Oceans and Law of the Sea website on <www.un.org/Depts/losIndex.htm>.

¹¹⁹ Section 5.

¹²⁰ For the main Acts see: *Marine Parks Act 1997 (NSW)*; *Marine Parks Act 2004 (Qld)*; *Fisheries Management Act 2007 (SA)*; *Living Marine Resources Management Act 1995 (Tas)*; *Heritage Act 1995 (Vic)*; *Conservation and Land Management Act 1984 (WA)*, in which land is defined as including tidal waters, lagoons, swamps etc and extensive provision is made for marine reserves and also see the fisheries restrictions in the *Fish Resources Management Act 1994 (WA)*; *Marine Act (NT)* and the *Marine Pollution Act (NT)*. The States have a number of environment Acts but they do not seem to cover marine parks because these parks usually have their own specialised legislation.

12.4.2 International Conservation Obligations

It has been recognised that protecting biodiversity is essential for “evolution and for maintaining life sustaining systems of the biosphere”.¹²¹ In Australia, a 1996 Commonwealth report identified loss of biodiversity as one of Australia’s most serious environmental problems.¹²² One of the key methods of protecting biological diversity lies in protecting the ecological habitats that support biological diversity.¹²³ As such, it is not surprising to find a number of international instruments aimed at creating sanctuaries for flora and fauna.

The Rio Declaration on Environment and Development, endorsed by Australia, requires nations to conserve, protect and restore the integrity of the Earth’s ecosystems.¹²⁴ A number of other international agreements impose similar obligations upon Australia.¹²⁵ Significantly, UNCLOS imposes obligations on member states to prevent, reduce and control pollution¹²⁶ and this is without prejudice to other obligations which may require a nation to protect and preserve the marine environment.¹²⁷

12.4.3 Commonwealth Reserves

Under the *Environment Protection and Biodiversity Conservation Act 1999* the Commonwealth may declare an area of land or sea to be a Commonwealth reserve, so long as it lies within a Commonwealth marine area, or is an area outside Australia in which Australia has agreed to undertake biodiversity or heritage obligations.¹²⁸ A Commonwealth marine area is defined as an area for which the Commonwealth has control in international law, but excludes State and Northern Territory waters.¹²⁹

A Commonwealth reserve must be classified under the International Union for the Conservation of Nature system as one of the following:¹³⁰

121 Preamble to the *Convention on Biological Diversity*, finalised at the Earth Summit in 1992, entered into force 29 December 1993 [1993] ATS 32.

122 *Australia: State of the Environment 1996* (An Independent Report Presented to the Commonwealth Minister for the Environment by the State of the Environment Advisory Council, Commonwealth of Australia, 1996); G Bates, *Environmental Law in Australia* (LexisNexis, Sydney, 6th edn, 2006), p 430.

123 Ibid, p 431.

124 United Nations Conference on Environment and Development *Rio Declaration on Environment and Development*, done at Rio de Janeiro on 14 June 1992, Art 2.

125 See, eg. *Convention on Conservation of Nature in the South Pacific*, entered into force 26 June 1990 [1990] ATS 41.

126 UNCLOS Art 194. See also, D Fisher, *Australian Environmental Law* (Lawbook Co, Sydney, 2003), p 65.

127 Article 237.

128 Section 344.

129 Section 24.

130 Sections 346-347.

1. a strict nature reserve – contains outstanding or representative ecosystems, geological or physiological features or species;
2. a wilderness area – consists of a large area that is unmodified, or only slightly modified, by modern or colonial society, retains its natural character, and does not contain permanent or significant habitation;
3. a national park – an area in natural condition;
4. a natural monument – contains a specific natural feature, or natural and cultural feature, of outstanding value because of its rarity, representativeness, aesthetic quality or cultural significance;
5. a habitat or species management area – contains habitat for one or more species;
6. a protected landscape or seascape – an area of land, with or without sea, where the interaction of people and nature over time has given the area a distinct character with significant aesthetic, cultural or ecological value, or
7. a managed resource protected area – contains natural systems largely unmodified by modern or colonial technology.¹³¹

Before a reserve is declared, its proposal must be gazetted, public feedback considered, and a report sent to the relevant minister.¹³² The activities that are controlled in Commonwealth reserves can be found in *Environment Protection and Biodiversity Conservation Regulations 2000 Pt 12* and include scientific research,¹³³ dumping of waste,¹³⁴ and commercial¹³⁵ and non-commercial fishing.¹³⁶

12.4.4 Marine Protected Areas

Currently, the Commonwealth manages many marine protected areas that are Commonwealth reserves under the *Environment Protection and Biodiversity Conservation Act 1999*,¹³⁷ which areas are depicted in the Map 12.4, above. A large marine protected area is the south-east Commonwealth Marine Reserve Network, which came into existence on 3 Septem-

¹³¹ List from G Bates, *Environmental Law in Australia* (LexisNexis, Sydney, 6th edn, 2006), pp 443-444, based on the Australian International Union for the Conservation of Nature Reserve Management Principle for Commonwealth Marine Protected Areas, available at <www.environment.gov.au/coasts/mpa/publications/pubs/iucn-principles.pdf>. Much useful information is on the Commonwealth website.

¹³² Section 351.

¹³³ Regulation 12.10.

¹³⁴ Regulation 12.14.

¹³⁵ Regulation 12.34.

¹³⁶ Regulation 12.35.

¹³⁷ Department of the Environment, Water, Heritage and the Arts, <www.environment.gov.au/coasts/mpa/index.html>.

ber 2007.¹³⁸ It encompasses 13 marine reserves over 226,458 square kilometres and is the world's first temperate deep-sea reserve network.¹³⁹ Each reserve may be divided into up to five different zones, with each zone prohibiting different forms of activity.¹⁴⁰

Other notable marine parks include the Ningaloo Marine Park off the coast of Western Australia and the Ashmore Reef and Cartier Island Reserves to its north. The Ningaloo Marine Park was declared in 1987 and covers 5076 square kilometres.¹⁴¹ It protects a diverse range of marine habitats, including continental seabeds, coral reefs, lagoons, and open ocean. These habitats support over 200 species of coral, 600 species of mollusc and 500 species of fish.¹⁴² The rapid drop-off to the park's north means that migrating whales and pelagic fish can be found unusually close to shore.¹⁴³

12.4.5 Other Forms of Habitat Protection

Apart from declaring certain areas to be reserves under the *Environment Protection and Biodiversity Conservation Act 1999*, the Commonwealth may pursue a number of other avenues in order to protect the marine environment and associated wildlife.

12.4.5.1 World Heritage

Areas of particular cultural or historical importance may be protected under the *International Convention on the Protection of the World's Natural and Cultural Heritage* 1972.¹⁴⁴ The complete list of Australian places on the World Heritage list can be found on the website of the Department of the Environment, Water, Heritage and the Arts.¹⁴⁵ World heritage areas may be declared under the *Environment Protection and Biodiversity Conservation Act 1999*.¹⁴⁶ The Act provides offences for activities that will have a significant impact on the world heritage values of a particular area.¹⁴⁷

138 "Marine Reserves Declared" (2007) 161 *Australian Maritime Digest* 3.

139 Department of the Environment, Water, Heritage and the Arts, <www.environment.gov.au/coasts/mpa/southeast/index.html>.

140 Department of the Environment, Water, Heritage and the Arts, <www.environment.gov.au/coasts/mpa/southeast/activity.html>.

141 Ningaloo Marine Park: Commonwealth Waters, online brochure available at <www.environment.gov.au/coasts/mpa/publications/pubs/ningaloo-brochure.pdf>.

142 Ibid.

143 Ibid.

144 Opened for signature, 23 November 1972, entered into force for Australia and generally, 17 December 1975 [1975] ATS 47.

145 <www.environment.gov.au/heritage/places/world/list.html>.

146 Section 14.

147 Section 15A.

12.4.5.2 Commonwealth and National Heritage

Similar provisions to those applying to world heritage areas apply to national heritage areas¹⁴⁸ and Commonwealth heritage areas.¹⁴⁹

12.4.5.3 Historic Shipwrecks

The Commonwealth may protect shipwrecks under the *Historic Shipwrecks Act 1976* (Cth).¹⁵⁰ There are currently 15 wrecks within the Commonwealth protected or no-entry zones, and there are numerous offshore State wrecks also protected¹⁵¹

12.4.5.4 Biosphere Reserves

A biosphere reserve is a land, coastal or marine area designated for inclusion in the World Network of Biosphere Reserves under UNESCO.¹⁵² Australia currently has 14 biosphere reserves.¹⁵³

12.4.6 State and Territory Marine Reserves

As already mentioned the States have all declared marine reserves within their three nautical mile areas under the framework of the Offshore Constitutional Settlement¹⁵⁴ and these will now be mentioned.

12.4.6.1 Queensland

In Queensland, a marine park may be declared under the *Marine Parks Act 2004*.¹⁵⁵ A park may be declared in “Queensland waters”,¹⁵⁶ a term that includes coastal and internal waters.¹⁵⁷ Parks may be divided into different zones so that each zone may be managed according to specific requirements.¹⁵⁸ The Act and its associated regulations¹⁵⁹ create a series of offences for environmental damage,¹⁶⁰ littering,¹⁶¹ prescribed commercial activity¹⁶² and other misconduct¹⁶³ within a marine park.

148 See s 15C (offences) and s 34BA (declaring national heritage areas).

149 See s 341.

150 Section 5.

151 Department of the Environment, Water, Heritage and the Arts, <www.environment.gov.au/heritage/shipwrecks/legislation/index.html>.

152 Section 337.

153 Department of the Environment, Water, Heritage and the Arts, <www.environment.gov.au/parks/biosphere/index.html>.

154 Discussed in Chapter 2.

155 Section 8.

156 Section 8(2)(a).

157 *Acts Interpretation Act 1954* (Qld) s 36.

158 Sections 21-24.

159 *Marine Parks Regulation 2006* (Qld).

160 Section 50.

161 Regulation 142.

162 Regulation 129.

GEOGRAPHICAL AREAS

Areas may also be declared “fish habitat areas” under the *Fisheries Act 1994* (Qld).¹⁶⁴ In these areas, marine plants are protected¹⁶⁵ and all works and related activity are banned.¹⁶⁶ The chief executive may also take action that is reasonably necessary to restore land, waters and marine plants that have been removed, destroyed or damaged¹⁶⁷

12.4.6.2 New South Wales

In New South Wales, aquatic reserves may be declared for the purpose of conserving biodiversity of fish and marine vegetation under the *Fisheries Management Act 1994*.¹⁶⁸ Reserves may be declared in waters within the limits of the State and waters on the landward side of waters adjacent to the State within the Australian fishing zone.¹⁶⁹ The minister may prohibit any specified activity within an aquatic reserve.¹⁷⁰ The Governor may also declare certain areas to be a marine park under the *Marine Parks Act 1997* (NSW).¹⁷¹ The use and enjoyment of marine parks are mainly controlled by regulations.¹⁷²

12.4.6.3 Victoria

In Victoria, the *National Parks Act 1975* (Vic) creates a number of areas that are marine national parks and marine sanctuaries.¹⁷³ Fisheries reserves may also be declared under the *Fisheries Act 1995* (Vic) over any area not otherwise reserved under the *National Parks Act* or the *Crown Land (Reserves) Act 1987* (Vic).¹⁷⁴ A fisheries reserve may be declared in order to protect critical habitat and nurseries, and for further education or scientific research.¹⁷⁵

12.4.6.4 Tasmania

In Tasmania, the minister may establish a marine resources protected area under the *Living Marine Resources Management Act 1995* (Tas).¹⁷⁶ This

163 See, eg, reg 146.

164 Section 120.

165 Section 123.

166 Section 122.

167 Section 124.

168 *Fisheries Management Act 1994* (NSW) s 194.

169 Section 7.

170 Section 197E.

171 Section 6.

172 Section 15, 17.

173 Section 17D, Schs 7, 8.

174 *Fisheries Act 1995* (Vic) s 88.

175 Section 88(2)(b).

176 Section 105.

may be done to protect representative samples of marine and estuarine habitats, maintain genetic diversity, and to establish scientific reference areas.¹⁷⁷ The minister may make rules that prohibit or restrict fishing and related activities in a marine resources protected area¹⁷⁸ and, of course, this has been done.

12.4.6.5 South Australia

The Governor of South Australia may declare that waters, or land and waters, are an aquatic reserve under the *Fisheries Management Act 2007* (SA).¹⁷⁹ The Act applies to all waters within the State, as well as to waters on the landward side of waters adjacent to the State within the Australian fishing zone.¹⁸⁰ Persons must not interfere with, or remove, animals or plants within an aquatic reserve.¹⁸¹ In a number of reserves, however, the regulations make exceptions for fishing with hand lines and rods.¹⁸²

12.4.6.6 Western Australia

In Western Australia, the *Conservation and Land Management Act 1984* (WA) allows marine nature reserves to be created for the purpose of conserving and restoring the natural environment, protecting indigenous flora and fauna, and preserving any feature of archaeological, historic or scientific interest.¹⁸³ The Act creates offences for taking, destroying or interfering with flora or fauna within a marine nature reserve.¹⁸⁴

12.4.6.7 Northern Territory

In the Northern Territory, fishery management areas may be declared by the minister under the *Fisheries Act (NT)*.¹⁸⁵

12.4.7 Conclusions on Offshore Marine Parks

It may be seen from what has been set out above that there are extensive offshore areas declared to be marine parks and other designations for the protection and preservation of the marine environment in them. The Commonwealth has established them in various parts all around Aust-

¹⁷⁷ Section 105.

¹⁷⁸ Section 104.

¹⁷⁹ Section 4.

¹⁸⁰ Section 5.

¹⁸¹ Section 77.

¹⁸² See *Fisheries Management (Aquatic Reserves) Regulations 2008* s 5.

¹⁸³ Section 13A.

¹⁸⁴ Sections 101A, 101B, 101C.

¹⁸⁵ Section 22.

ralia, as shown in Map 12.4 above, and many of them are of great environmental and heritage value. The States and the Northern Territory have each also set aside areas as marine parks or other similar areas for their protection and have legislation to restrict fishing and other activities. When one combines these areas with those of the Great Barrier Reef Marine Park it may be seen that an extensive area of Australia's offshore areas has been proclaimed as a special area for their protection and preservation.

12.5 Offshore Native Title

12.5.1 Introduction

The origins and development of native title law relating to land claims in Australia and in other countries have been widely discussed in many cases, authoritative books and articles. This book, however, will only focus on the offshore jurisdiction of such claims. As the topic is only covering the offshore area for native title then it fits into this chapter on offshore geographical areas.¹⁸⁶

The main point established by the case that first recognised native title in Australia, *Mabo's Case*, decided in 1992,¹⁸⁷ was that the common law in Australia did, indeed, recognise native title. To succeed, the claimants needed to prove the traditional laws and customs that were observed by the relevant Indigenous peoples as they existed at the time of the establishment of the British penal settlement in 1778, that they had maintained their connection with the land or waters since then and that their title had not since been extinguished.¹⁸⁸ The political process took over after this decision and these common law rights were codified and altered in the *Native Title Act 1993* (Cth), the objects of which Act included providing for the recognition and protection of native title and the establishment of ways for future dealings with them.¹⁸⁹

Like the original court decision, the core sections of the *Native Title Act 1993* provided that the rights, interests and customs were acknowledged and that the Aboriginal people or Torres Strait islanders should still have a connection with the land or waters and those particular rights and interests "are recognised by the common law".¹⁹⁰ *Mabo's Case* only settled the matter for claims over the land, so one of the key elements thereafter raised was whether the *Native Title Act 1993* and the associated

¹⁸⁶ There is a similar discussion on offshore native title in Chapter 7.

¹⁸⁷ *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

¹⁸⁸ Ibid at 58-61 per Brennan J.

¹⁸⁹ Section 6.

¹⁹⁰ Section 223.

common law extended offshore from the coastline so that the law could recognise native title rights offshore if they were otherwise able to be proven.

12.5.2 Extension of Native Title Offshore

The *Native Title Act 1993* itself clearly expressed that it extended offshore as s 6 provided:

This Act extends to each external Territory, to the coastal sea¹⁹¹ of Australia and of each external Territory, and to any waters of which Australia asserts sovereign rights under the *Seas and Submerged Lands Act 1973*.

The question became not whether the *Native Title Act 1993* could extend offshore, as it clearly provided that it could, but whether the common law, which traditionally did not extend beyond the low water mark,¹⁹² would recognise native title that was claimed to extend offshore.

This question was decided in the affirmative in *Commonwealth v Yarmirr*¹⁹³ in 2001 in which, by majority, the High Court held that native title rights and interests were capable of being recognised by the common law offshore in respect of the sea and the seabed beyond the low water mark. The trial court heard the evidence and found that the claimants were entitled to exercise their traditional laws and customs offshore, in this case to hunt, fish and gather for the purpose of satisfying their personal, domestic and non-commercial domestic needs. A major contention in the claim was whether the claimants had exclusive jurisdiction over the offshore areas that they had established in law. In the High Court it was held that the courts below were correct in that the common law did recognise native title rights offshore, so this was a win for the claimants. However, they lost on the exclusivity points as the court held that the claimed offshore seas were subject to navigation, fishing and other rights by others, so the native title rights were not exclusive. An important feature was that the sea claims did not extend beyond the 12 mile territorial sea (although they did extend beyond the Northern Territory rights of only out to the three mile limit under the Offshore Constitutional Settlement 1979).

¹⁹¹ Defined in Pt 15 in terms of *Acts Interpretation Act 1901* (Cth) s 15 where it is expressed in terms of the territorial sea (12 miles) and the airspace above it and the seabed and subsoil beneath it.

¹⁹² *R v Keyn* (1876) 2 Ex D 63 was the main case on which reliance was made for this proposition.

¹⁹³ *Commonwealth v Yarmirr* (2001) 208 CLR 1. It is also known as the *Croker Island Case* as that was the island in the Northern Territory on which much of the claim was based.

The next case in relation to offshore tests was *Western Australia v Ward* in 2002,¹⁹⁴ in which native title claims were made to vast areas of land in the Kimberley District in Western Australia and also to the mud flats and inter-tidal zones on the north coast and the eastern side of the Gulf.¹⁹⁵ The case was mainly about the rights over the land but in relation to the claims over the waters, the majority of the court held that any rights to fishing in the waters claimed had been extinguished.¹⁹⁶ It was also held that partial extinguishment of some of the native title rights was possible so, applying this to waters for offshore purposes, some fishing and hunting rights could be continued and some extinguished. Finally, on the facts of that case it held that public rights to fish would be recognised and that no exclusive right to fish under native title existed. Some parts of the *Ward* claim related to inland waters, which leads on to the next case to be mentioned.

Ward's Case was followed closely by *Yorta Yorta Aboriginal Community v Victoria* in the same year,¹⁹⁷ which arose from an inland waters claim. The claim was over land and rivers and the only water component was that some of the claims straddled the Murray and the Goulburn Rivers, in Victoria and New South Wales. In the event, the High Court held that the trial judge had been correct in dismissing the claim. The court upheld the trial judge in finding that the claimants had ceased to occupy or even to continue to acknowledge and continue to observe the traditional laws and customs in the claimed areas. For instant purposes it can be noted that any offshore jurisdictional claims to native title can fail, therefore, if the original laws and customs were not proven at the time of British settlement and the connection with them has since been maintained by the claimants. This is no surprise as it is what the *Native Title Act* provides, but the *Yorta Yorta Case* is evidence that an otherwise good claim can be lost if the Aboriginal or Islander people lose contact with their land.

The decision in the Federal Court by the late Justice Richard Cooper in the *Lardil Case* in 2004 also involved offshore aspects.¹⁹⁸ The Lardil and other peoples claimed land and waters in the Gulf of Carpentaria off the mainland gulf shore and off the Wellesley Island group and other islands in the Gulf. It was complicated by there being four different claimant peoples and there were 11 different respondents. In the result the judge made a number of determinations that dealt with the following points:

194 (2002) 213 CLR 1; [2002] HCA 28.

195 Ibid at [36].

196 Ibid at [468.23].

197 (2002) 214 CLR 422; [2002] HCA 58.

198 *Lardil Peoples v Queensland* [2004] FCA 298. There was no appeal from this decision. The parties came to an agreement in 2008 which was sanctioned by the Federal Court in *Lardil Peoples v Queensland* [2008] FCA 1855. There had been earlier litigation by the Lardil Peoples over a mooring buoy off the port of Weipa, Queensland, of which the appeal may be found in *Lardil Peoples v Queensland* [2001] FCA 414.

- (a) The claims were from the high water mark to the “visual horizon”, and his Honour then had to determine what distance this was. It is well known, of course, that the horizon depends on the height of eye of the beholder and the object that is beheld. In the end he held that it was five nautical miles which was the distance. The judge allowed a height of eye of 1.6 metres for a person standing on the coastal dunes, allowing 4 metres, which gave a distance of the test he adopted, “as far as the eye can see”, to the horizon of 4.9 nautical miles which he rounded up to 5 nautical miles.¹⁹⁹
- (b) The rights included to fish, hunt, gather living and plant resources and for religious and spiritual purposes to the seaward of the high water mark, and also above and adjacent thereto for personal, domestic and non-commercial purposes.
- (c) Each of the peoples had access to the waters and to the rivers the judgment specified.
- (d) In those specified areas amongst the peoples so named the rights were to be shared equally.
- (e) In other specified areas the rights belonged only to the peoples specified.
- (f) Where the areas overlapped then the centre line between them should be the boundary.
- (g) None of these rights gave exclusive possession, occupation, use and enjoyment of the land or waters to the exclusion of others, including innocent passage, right of navigation and the common law public right to fish.
- (h) The rights are subject to regulation, control, curtailment or restriction by valid laws of the Commonwealth or the State.²⁰⁰

It may be seen that *Lardil* sets out a good summary of the offshore jurisdiction in relation to native title.²⁰¹

¹⁹⁹ [2004] FCA 298 at [227]-[233]. If the evidence had been accepted that the height should be from a headland or bluff that was higher than the claim would have succeeded offshore to a greater distance. The calculation makes no allowance for an object, such as a canoe, which is beyond the horizon and which could still be seen for some further distance, the distance depending on its height. The judge also found that there was a connection with the deeper water, but that it was not sufficient to give native title rights.

²⁰⁰ Ibid, Determination [1] to [11]. Schedules 1-5 set out a summary of the rights that the court ordered, declared and determined. In the later case of *Griffiths v Northern Territory* [2006] FCA 903, which involved land and tidal and inter-tidal waters, Weinberg J had to consider aspects of fisheries and native title. He set out an excellent summary to accompany the orders he made, with a clear exposition on the issues that had to be proved under s 223(1) of the *Native Title Act*.

²⁰¹ For a note on this case, see S Huber, “The Wellesley Island Decision: Offshore Native Title post Yarmirr and Ward” (2004) 23 UQLJ 242.

12.5.3 The Inter-Tidal Zone Case

Then in 2008 came the High Court decision in *Northern Territory v Arnhem Land Aboriginal Land Trust*,²⁰² relating to exclusive fishing rights to the Aboriginal Land Trust over the inter-tidal zone adjacent to their lands, it being noteworthy that the Land Trust had title over this inter-tidal zone. Most land title, of course, only extends to the high water mark but this grant was to the low water mark and so included the inter-tidal zone.

The case was based on the statutory rights granted to the Arnhem Land Aboriginal Land Trust under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). These rights were quite extensive and included giving to the Land Trust a grant in fee simple, the important aspect being, as noted above, that the rights extended down to the low water mark. The dispute was over whether those rights over this zone between the high and low water lines were exclusive, so that they could if they chose exclude all others, or whether they were subject to the rights of those who held a licence to fish there under the *Fisheries Act* (NT). As fisheries is a major industry and is closely tied to extensive tourism, this matter aroused considerable controversy, hence the matter being taken to the High Court. By a 5-2 majority the court held that the fee simple grant did give exclusive rights so the claimants could exclude others from that inter-tidal zone if they chose. The case did not decide the rights to the inter-tidal zone in places where no such grant had been made so that issue will need to be decided on another day.

12.5.4 Conclusions on Offshore Native Title

In conclusion on native title law it can be fairly said that the Australian offshore jurisdiction recognises native title. What rights and interests are recognised depends on proving the connection and rights at the time of British sovereignty, maintaining a connection with the land since then and that the rights had not since been lost or extinguished. These rights are mainly a right to traditional hunting, fishing and gathering, as well as traditional ceremonial activities, on the shore, the inter-tidal zone and offshore for some distance. The maximum distance offshore is set by the *Native Title Act 1993* as 12 nautical miles and the actual distance depends on the evidence. *Lardil* is the only case that has extensively canvassed this issue and the trial judge found that the distance was, on the evidence, "as far as the eye can see". He accepted the expert calculations that this was to the horizon for an average person standing on the coastal dunes, which comes out at about five nautical miles. It is possible that for other coastal areas the evidence would be different and so the distance would be different. These native title rights offshore are not exclusive to the

²⁰² [2008] HCA 29.

native people claimants but must be shared with rights to navigate, fish, etc established by common law or statute.

12.6 Conclusions

It may be seen from the matters mentioned in this chapter that there are numerous particular offshore geographical areas over which Australian legislation, Commonwealth and States, claims jurisdiction. They are of great importance to the marine environment and some, like the Great Barrier Reef, are of major heritage importance. Amongst the complexities is that the States and the Northern Territory have jurisdiction over the first three miles, bearing in mind that offshore from the Australian external territories the Commonwealth has jurisdiction from the low water mark. Exceptions even to this general rule include the Great Barrier Reef and the Torres Strait. Even in the Commonwealth areas, there are numerous Acts that apply, their relevance being determined by the geographical area, the category of the persons and the activities being performed.

A further aspect is that the native title rights apply offshore. The exact details have not been settled on this area of the law. It is clear, based on the *Yarmirr* and *Ward* cases, that the common law will recognise such offshore rights as may be established by law. Further, *Northern Territory v Arnhem Land Aboriginal Land Trust* established that, provided the statute law so states, the native title rights may extend over the intertidal zone. Beyond this, however, it remains to be seen.

The particular areas offshore are, therefore, as complicated a matrix of laws as may be found anywhere.

Chapter 13

Summary and Proposals for Reform

- 13.1 Introduction
- 13.2 Revision of the Offshore Constitutional Settlement 1979
- 13.3 Consolidation of the Offshore Regulatory and Enforcement Powers
- 13.4 An Australian Coast Guard
- 13.5 Conclusions

13.1 Introduction

It is difficult to produce a summary of the Australian offshore laws as there are so many of them and they all have aberrations, peculiarities and exceptions and, in some cases, there are even exceptions to the exceptions. To obtain such detail readers will need to go through the individual book chapters but some pertinent points may be made about each of the offshore law areas covered by the chapters. The object is to summarise the noteworthy characteristics of the laws arising from each chapter and so enable the reader to follow the basis for the recommendations for reform that are made in the following sections. This chapter has its focus, therefore, on suggestions for reform of the Australian offshore legal structure.

In Chapter 1 a short introduction is given to the British claims to offshore jurisdiction after the penal settlement was established in New South Wales in 1788 and legislative competence was gradually transferred to the Australian colonies. This explains the basis on which the subsequent law developed. When the colonies federated into one Commonwealth of Australia in 1901 the issue of the offshore jurisdiction lay dormant for many decades. In Chapter 2 the story is moved forward with mention of the need for national regulation of offshore petroleum and then that it was not until the High Court decision in the *Seas and Submerged Lands Act Case*¹ in 1975 that this was decided in favour of the Commonwealth Parliament's claim to jurisdiction for its laws from the low water mark or historic State boundaries.

This result was unsatisfactory to all parties so the Commonwealth and the States commenced negotiations and entered into the Offshore Constitutional Settlement 1979. This settlement restored a basic foundation of offshore jurisdiction to a regime something like the offshore jurisdiction that the States had claimed. This was that they had jurisdiction out to the outer limit of the territorial sea, then three nautical

¹ *New South Wales v Commonwealth* (1975) 135 CLR 337.

miles in width. This may have been a satisfactory political solution in 1979 but the present inconvenience to the country of this situation will be discussed shortly.

Chapter 3 addresses the current offshore petroleum, mining and installation laws, including those that apply in the Timor Sea agreements with Timor-Leste. The massive amount of legislation regulating the offshore petroleum industry beyond the three mile limit is daunting and there would be very few people who could claim to understand all aspects of it. Fortunately there are many who understand their specialised areas of it and thanks to them, and to the pragmatic approach of most of those involved, the industry and the government are able to function tolerably well. Not only is there exception piled on exception in these laws but there have been many legislative changes in recent years and it is disappointing to record that the manner of these changes by the Commonwealth government leaves a lot to be desired. After some five years of consultation the *Petroleum (Submerged Lands) Act 1967* was replaced with the large new *Offshore Petroleum Act 2006*, which came into force about mid-2008. Within a few months the government had brought in 440 pages of amendments to accommodate the offshore greenhouse gas storage proposals whereby some of the vast amount of greenhouse gas produced on the land would be injected under the seabed there to be stored. To cap the difficulty of absorbing a huge amendment to an already massive Act, renamed as the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*, the government renumbered the amended Act and then did not produce a consolidated renumbered Act for over six months after it came into force. The good sense and pragmatism of those who have to work under this legislation have been sorely tried.

The offshore petroleum position is complex enough even without alluding to the State legislation that covers the first three miles offshore. The States were meant to ensure that their legislation mirrored that of the Commonwealth. However, as the years passed there have emerged more and more discrepancies, which has led to a poor result.

There is very little offshore mining, other than petroleum and the legislation regulating it is simple. As to offshore installations, petroleum platforms are governed in the main by the petroleum legislation except for some pollution and security issues. Non-petroleum offshore installations are in the main tourist installations in the Great Barrier Reef. Here there is some complexity as these sea installations also require laws relating to customs, immigration, security, quarantine and criminal administration. These are not easy areas of law as numbers of different Acts apply and they are not cross-referenced one to the other for the most part.

The offshore criminal laws, addressed in Chapter 4, are somewhat simplified by an outbreak of common sense in that, after a most turbulent history while the Commonwealth and the States disengaged their offshore criminal laws from those of the United Kingdom, it was agreed at

the Offshore Constitutional Settlement 1979 to apply the criminal laws of the States offshore to the fullest extent of the Australian jurisdiction. The outer extent is now the outer limits of the EEZ or the continental shelf where it extends beyond the EEZ. On closer inspection, however, there are complexities. The inner adjacent zone of the States extends for 12 miles to seaward from the baselines, whereas all other laws of the States under the Offshore Constitutional Settlement 1979 only extend for three miles. Fortunately, this may not matter too much because in the outer adjacent zone the State laws are applied by the Commonwealth law, with the effect that the zones abut and run into each other to provide a seamless coverage. The result is that the same State laws apply offshore either of their own force or as applied laws of the Commonwealth.

But the complexities then emerge. Where there are offlying territories, the Jervis Bay criminal laws apply onshore and in its ports and other internal waters. However, once the ship leaves the port limits presumably the adjacent State criminal laws then apply and for ships travelling beyond the EEZ or outer continental shelf, the Jervis Bay criminal laws then apply again once they cross its outer limits. For the two States that have offlying islands – New South Wales and Lord Howe Island, and Tasmania and Macquarie Island – the State law would apply onshore, in the port and at sea until the outer limits of the EEZ or outer continental shelf. But Jervis Bay criminal law is not from Jervis Bay at all because under the *Jervis Bay Territory Acceptance Act 1915* the criminal law of the Australian Capital Territory applies in that territory. It may be seen, therefore, that the Australian offshore criminal laws have their fair share of uncertainties.

Chapter 5 addresses offshore defence laws and it will be seen that the main function of the armed forces, which is for the defence of Australia against an armed and aggressive enemy, has been distorted by a requirement for it to enforce a combination of police work and regulation of offshore control of immigration, fisheries, customs and quarantine. To ascertain exactly what laws apply to the defence personnel when operating offshore, it is necessary not only to trawl through the many naval, air force or army laws and regulations, depending on which arm of the service the relevant personnel are in, but also through the laws relating to fisheries, customs, quarantine, immigration and some of the offshore terrorism laws. This is, of course, not the most orderly form of governance for a defence force and it needs to be addressed.

Chapter 6 addresses the immigration laws that apply offshore, to the 'boat people' as they are known, including the refugees. Here the contemptible laws and administration of the Howard government years and its conduct in relation to the *Tampa* incident and its Pacific Solution, particularly as they were applied to those unfortunate refugees, are steadily being wound back, but their legacy lingers on. The more recent amendments in 2009 should see these offshore laws reformed so that incoming

boat people are processed according to law in a less harsh and more humane way. This would mean that these people should be taken into detention there to be sorted into their correct legal status. Those who are refugees should be supported and protected, those who are economic migrants should be treated on their merits and those who are criminals should feel the full force of the law. To achieve this, much of the "excised area" mentality that is still enshrined in the law needs to be reformed and the administration simplified. As may be seen in Chapter 6, the powers of enforcement in the offshore immigration area are spread through several different government agencies, which is not the best management for efficient governance and something which should be reformed and improved.

In Chapter 7 the fisheries laws again suffer from the three mile jurisdiction rule introduced by the Offshore Constitutional Settlement 1979 so that the States and the Northern Territory laws apply for three miles and then the Commonwealth laws apply. This is unnecessarily complex and it needs reform to simplify these laws. In relation to the Commonwealth laws alone, again the legacy of the Howard government needs to be wound back. The *Fisheries Management Act 1991* (Cth) needs reform in two important areas, both of which areas relate to the so-called automatic deprivation of property under the legislation. These aspects of the Act, as explained in Chapter 7, are unworkable and unjust and they should be repealed or, if that does not happen, the present court decisions should be distinguished or overruled.

The offshore laws relating to customs, quarantine and excise are dealt with in Chapter 8 and it may be seen from that discussion that the powers given to government officials to regulate and enforce these areas overlap with, and have some similarities to, the powers given to government officials relating to fisheries and immigration. This is not surprising as in each case the same officials are dealing with different incoming vessels and sea installations. When customs officials are dealing with hot pursuit, use of force, powers to board and search and powers of arrest, they are dealing with the powers also needed by immigration and fisheries officers. Excise and quarantine are, on the other hand, somewhat different although they, too, require these powers.

Chapter 9 deals with offshore laws relating to the Antarctic Territory and the Southern Ocean and the territories and islands located in it. The laws applicable in this region are almost unique, at least so far as the Australian laws are concerned, as the Antarctic is a special area in the Australian ethos. The protection and preservation of the marine environment in the Australian Antarctic Territory and the Southern Ocean is a very high priority in these laws and Australia's active involvement in the *Convention for the Conservation of Antarctic Marine Living Resources* illustrates this fact. Chapter 9 also deals with the laws of the islands in the Southern Ocean. Macquarie Island, south of Tasmania, is currently part

of Tasmania itself, which is an historical anomaly and it should be changed to a Commonwealth territory as Tasmania has little interest in or ability for its proper management. On the other hand, Heard Island and the McDonald Islands comprise a Commonwealth offshore territory, and the laws relating to this territory seem appropriate.

The theme of offshore islands is continued in Chapter 10, where the other offshore territories' laws are discussed. The Coral Sea Territory, to the east of the Great Barrier Reef, is a strange area of uninhabited islands and coral reefs so the Commonwealth laws applying there are largely to an ocean area. Norfolk Island, which is a territory, has its own unique laws, arising from its history and background. The nearby Lord Howe Island, on the other hand, is not a territory at all but is part of New South Wales. It is doubtful if New South Wales has any real interest in the proper governance of Lord Howe Island and probably it should be transferred to become a Commonwealth territory, but its (small) population would be the best decision makers on that issue. The other islands discussed in the chapter are in the Indian Ocean, to the west of Australia, and once again they have their different histories which have led to their different territorial administrations. The Cocos (Keeling) Islands and not-too-distant Christmas Island are Commonwealth Indian Ocean Territories, and each island group has its own separate administration, and this also involves some of the Western Australian laws and administration. The uninhabited Ashmore and Cartier Islands comprise another Commonwealth territory and this region of small islands, reefs and water is administered by a combination of Commonwealth and Northern Territory laws and services.

Chapter 11 discussed the offshore shipping laws and here the topic is so vast that a mere mention is made of the various legal structures that regulate offshore shipping, carriage of goods, salvage, admiralty law, towage and so on. These are mainly private laws, although marine pollution is a mixture of private and public law, so they are somewhat different to the public law mentioned in the other chapters. As mentioned in Chapter 11, the author has addressed these areas of law in other books and readers would need to refer to them for detail.

Finally, Chapter 12 deals with various important offshore geographical areas not otherwise covered. The Great Barrier Reef has a most complex legal arrangement which complexities have, once again, been increased by the provisions in the Offshore Constitutional Settlement 1979 that provide for the State, Queensland in this case, to have some jurisdiction and title for three miles offshore from the land. An exception is the law applicable to the Great Barrier Reef region itself where those activities covered by the *Great Barrier Reef Marine Park Act 1975* are covered from the low water mark, except for agreements on fisheries with Queensland, when Queensland law applies. Outside the Great Barrier Reef area and outside those activities covered by in the *Great*

Barrier Reef Marine Park Act 1975, the usual mixture of State and Commonwealth laws apply. The laws of the Torres Strait are, likewise, highly complex but in this case the main complexities arise from the Australian treaty with Papua New Guinea giving rise to the Torres Strait being a specially administered region. The laws relating to marine parks and other protected areas for selected offshore marine environments are also set out in Chapter 12 and it may be seen that, apart from the Great Barrier Reef, the States have jurisdiction over marine parks out to three miles and then the Commonwealth takes over. Chapter 12 concludes with a discussion on native title laws that apply offshore. These laws are having an impact in the offshore areas and they are still developing so the impact is likely to increase.

As mentioned early on in this book, the laws of the States and the Northern Territory are not able to be fitted into this work. They are extensive as they relate to seven parliaments all passing laws that have effect offshore. The interaction of these laws with those of the Commonwealth is complicated and marked with uncertainty in many situations.

Thus having summarised the Commonwealth laws set out in the 12 preceding chapters and mentioned the increased complexity of adding the numerous State and Northern Territory laws, it is now appropriate to take up one of the reasons for writing this book; namely, to suggest reforms to these areas of offshore law. There are three reasons; which are, first, to suggest that the Offshore Constitutional Settlement 1979 should be revised and the dividing line of the three miles offshore should be reviewed. A three mile width made some sense in 1979 but currently it has no logic or utility and creates complexity without benefit. Secondly, it is suggested that the enforcement of the offshore fisheries, immigration, customs, quarantine, security, petroleum and criminal laws be consolidated into the one Act. The government has announced that it will introduce a "Maritime Powers Bill" to address some aspects and this is to be welcomed. However, the announcement is very short on detail and it is to be hoped that the policy behind this will take into account the criticisms of the current situation made by others and including those made in this book. One criticism that has not been mentioned relates to the repeal of the automatic forfeiture provisions in the *Fisheries Management Act 1991*. Another not mentioned by the Attorney-General that needs attention is the complexity of the laws applicable to the Defence forces doing these civil policing tasks.

The third recommendation is that the consolidated offshore regulatory and enforcement laws should be administered by the one government service and be administered by the one government body, to be called, as one suitable name, the Australian Coast Guard. These three suggestions will now be dealt with in more detail in turn.

13.2 Revision of the Offshore Constitutional Settlement 1979

As has been illustrated in Chapter 2, the Offshore Constitutional Settlement 1979 was a political settlement amongst the Commonwealth and all of the States arising from the High Court decision in 1975 in the *Seas and Submerged Lands Act Case*.² The ratio of the High Court decision was that the Commonwealth Parliament had jurisdiction to seaward from the low water mark or the historic boundaries of the States at the time of federation on 1 January 1901. This fairly simple position was, however, complicated by the subsequent decision of the High Court in 1976, in *Pearce v Florencia*,³ which held that, provided the nexus was established between the State and the activity, people and vessel, where the State legislation was for its peace, order or good government then the State law had jurisdiction offshore, including beyond the three mile limit.

What the governments agreed in the Offshore Constitutional Settlement 1979, in effect, was that the position should be returned to a similar position that the States had maintained beforehand, which was that the State Parliaments had jurisdiction out to the limit of the territorial sea, which was then three miles wide. The settlement had nuances on this basic proposition and it should be noted that the Commonwealth still retained a basic jurisdiction but under its subsequent legislation all of the powers, rights and titles were granted by the Commonwealth to the States.⁴ There was a suitable and sensible logic behind the terms of the agreement in the Offshore Constitutional Settlement 1979, as the Commonwealth did not have the bureaucracy nor the wish to administer the many activities in which the States' citizens were engaged in waters close offshore. Also there was the benefit of a closer connection, for instance, between the States' regulators and the activities in the internal waters and the near offshore waters as the people, vessels, fish, pollution, etc all passed from one to the other. The choice of the then territorial sea width also had logic as it was a well-recognised sea boundary under the Australian laws and, importantly, under the then international law.

However, the sense of choosing the three mile offshore line was confused, some may say entirely lost, when Australia extended its territorial sea to 12 mile wide. This increased width was not the only change, as it was based on the new and widely accepted international agreement on the law of the seas, UNCLOS. This major international maritime convention has, over the years, gathered increasing force until it is now accepted as the codification of the laws of the sea for many purposes. As

² *New South Wales v Commonwealth (Seas and Submerged Lands Act Case)* (1975) 135 CLR 337.

³ (1976) 135 CLR 507.

⁴ *Coastal Waters (State Powers) Act 1980; Coastal Waters (State Title) Act 1980*.

has been set out in Chapter 2, UNCLOS established new offshore zones so that not only was a territorial sea of 12 nautical miles agreed, but so was a contiguous zone outside the wider zone, an EEZ and an outer continental shelf. These all gave new and different powers to the coastal state and the three mile width of the territorial sea quite disappeared from having any relevance.

Further, UNCLOS established straight baselines on a much wider scale than had been accepted in international law beforehand. The result is that the low water mark and historic boundaries, that marked the line limiting jurisdiction between the Commonwealth and the States, has been submerged into the baselines as the line of demarcation. This has been done, however, without any sufficient thought or discussion in Australia of the legal consequences. There are many areas where there is doubt about which Parliament has jurisdiction and it would require extensive litigation to resolve these.

Another area of uncertainty is the inter-tidal zone, which is the zone between the low water and the high water marks. This has not been addressed and in certain circumstances it creates confusion as to which parliament has jurisdiction. For instance, take an activity such as a ship coming ashore in the Great Barrier Reef and grounding and pollution resulting from it. The ship is under the *Great Barrier Reef Marine Park Act 1975* (Cth) when it is afloat but once it arrives on the beach it is then in the uncertain inter-tidal zone and any oil spills polluting the beaches and the sea cross jurisdictions. Further, if the vessel then lands people, stores, equipment etc they are landed in Queensland, and under the Queensland jurisdiction. Still further, any vessel operating close inshore but still afloat trying to salvage that grounded vessel would be operating under numerous laws. This is but one example of a common, if unfortunate, activity giving rise to jurisdictional uncertainty.

Another point is that since the Offshore Constitutional Settlement was made in 1979 the extent of offshore activity has increased substantially. Ships operate offshore in increasing numbers, fisheries are now much more extensive, protection of the marine environment is also more extensive and the amount of offshore petroleum activity has had almost exponential growth and importance, to name just a few changes.

Another change is that at the time of the Settlement in 1979 it was agreed that the Commonwealth and the States would have uniform legislation in many areas where the activities overlapped from one jurisdiction to the next. Particular areas for this that come to mind are petroleum and marine pollution. This started to happen but in the intervening years the divergence amongst these laws has steadily increased. The offshore petroleum code has not been followed by all of the parliaments and in the marine pollution field there are major divergences. In short, a voluntary cooperative approach in which each of the parliaments is requested to keep to uniform legislation has not worked. It would not

be rash to suggest that it would never be likely to work given the combative nature of politics between the Commonwealth and the States.

It is for these reasons that it is suggested that there should be a review of the terms of the Offshore Constitutional Settlement 1979. This review would best be done after an extensive inquiry by a panel of qualified persons. In particular, the inquiry would need to establish the impact of the present structure on the many activities and industries subject to them. These latter would include shipping, fisheries, immigration, defence, quarantine, offshore petroleum, criminal law, customs and quarantine. It would also need to look into the special offshore geographical areas, such as the Great Barrier Reef, Torres Strait, Southern Ocean and Antarctica, offshore territories, special fisheries areas and the Timor Sea Joint Petroleum Development Area. Reform of the law in these areas all needs to be investigated and debated by informed minds.

As a starting point it is suggested that the line of demarcation between the Commonwealth and the States should be moved from the present three nautical miles offshore to the present baselines. This would have the advantage of having a line of demarcation that was coincident with a well-recognised international one under UNCLOS. Also, from the domestic Australian point of view, it would be a line that would be carefully surveyed and published in suitable maps and charts as this has to be done to meet the UNCLOS requirements anyway. From the constitutional law point of view, moving to this line would mean that the complexities of interaction of the Commonwealth and State laws would be simplified.

The structure for the federal governance of these offshore laws also should be reviewed. As a starting point for improvement of governance and towards a uniformity in the laws of the Commonwealth and the States, it is suggested that there be established a joint council on which all of the States and self-governing Territories should be represented. The role of this council would be to settle on the principles for the governance of offshore jurisdiction from the baselines and it would then be for the Commonwealth Parliament to pass the legislation, effective outwards from the baselines. This would avoid the present position of having numerous offshore laws by seven different State and Northern Territory Parliaments that then interact with the Commonwealth laws. It is suggested that this council would also have jurisdiction to negate the "nexus" provisions presently available under the High Court decision in *Pearce v Florenca*. Under this suggestion the council would vote on relevant matters and the States and the Commonwealth would be bound by the outcome, except in particular Commonwealth matters such as defence where the Commonwealth's view would prevail. The administration of these activities would be the responsibility of the Commonwealth, but it would be open for the Commonwealth and any of the States to enter into agreements for cooperative arrangements.

13.3 Consolidation of Offshore Regulatory and Enforcement Powers

The second substantive suggestion is that steps should be taken, irrespective of steps in this first point, to simplify the many Commonwealth laws that overlap and interrelate in their offshore application.

It has been shown in Chapters 4 (Criminal Laws), 5 (Defence), 6 (Immigration), 7 (Fisheries) and 8 (Customs, Quarantine and Excise) that the regulatory and enforcement powers are spread through the separate Acts of the Parliament over the separate agencies that regulate and enforce the laws in these separate activities. As just one example, Chapter 6, section 6, deals with the powers of officials, as set out in the *Migration Act 1958*, to deal with detention, removal and deportation of illegal immigrants, including boarding at sea, hot pursuit and the use of armed force. These are powers that should be clear and easily understood, but similar but not identical powers are addressed in Chapter 7, section 4, where the provisions of the *Fisheries Management Act 1991* are discussed. But, in the main the actual offshore patrol boats are operated by the Navy and the Customs and Border Protection Service, whose personnel have the primary duties of regulation and enforcement even though fisheries and immigration officers are often carried in their vessels. It follows that similar, but again not identical, provisions had to be inserted in the *Defence Act 1903* (see Chapter 5) and the *Customs Act 1901* (see Chapter 8).

The result of these numerous similar, but not identical, provisions is that the Australian offshore laws for regulating and enforcing these activities are overlapping and unclear. It is a burden on the officers of these services and agencies to require them to operate under such poorly drafted laws. It is recommended, therefore, that there should be a consolidation of such laws as may sensibly be consolidated and that for the rest there be some simplification. The Attorney-General, in his media release and his speech of 15 September 2009 about a Maritime Powers Bill, said, apart from the matters that have just been addressed, that there was a proposal to include new aspects relating to implementation of relevant international treaties.⁵ It is respectfully suggested that this proposal will need a great deal of further planning and consultation if it is not to be just a further addition to the matrix of complicated legislation that exists already. The current proposal hints at border protection being the main driving force behind this reform, but of course the regulatory and enforcement powers addressing illegal fishing, violent criminal actions on offshore installations, evasion of customs or excise, are not really border protection matters and one aspect of the national interest should not be confused by conflating it with other aspects.

⁵ See the Memorandum Concerning the Proposed Maritime Powers Bill, inserted at the beginning of this book, which sets out more detail about the proposal and where it may be found.

Although these comments are not meant to be exhaustive, one can note that the proposal for this new Bill does not mention the defence powers, but they are essential ones to be addressed as the current Navy personnel, especially in the patrol boat squadrons, are primarily being used in policing roles. The naval officers and ratings deserve full protection and clear powers so they know where they stand. After all, as mentioned in Chapter 5, they may be called on to use their weapons in lethal force and they could be the ones charged with the most serious offences as a result. Another aspect is that the proposal makes no mention of repeal of the automatic forfeiture laws currently in the *Fisheries Management Act 1991*, Chapter 7, section 5. In any reform process these should be considered. A third aspect about this Bill is that the proposal currently hints that perhaps the defence powers for enforcement against piratical criminal actions in distant waters, as sanctioned by the UN Security Council resolutions, may need an explicit legislative basis. This no doubt is correct but it is far from sensible to include these provisions in the proposed Bill as they probably should be in the current *Defence Act 1903*, as they relate to the Australian naval forces, not customs, fisheries, immigration, etc and they are not closely connected to border protection.

It is suggested, therefore, that the policy underpinning legislative reform needs far more debate and thought, and that included in this should be one or more public inquiries in which all of the agencies who have an interest in any of these many aspects are invited to put their views. Finally, it may be said that the shape, manner and extent of this or these inquiries themselves need some considerable thought and debate.

13.4 An Australian Coast Guard

As part of the simplification and clarification of the offshore regulatory and enforcement governance, it is suggested that certain sections of the Commonwealth departments that currently regulate and enforce these offshore laws should be consolidated into the one department or agency. A convenient title for this new department would be the "Australian Coast Guard", although the title is not important so long as it is sufficiently descriptive of its functions. The precise functions of an Australian Coast Guard would need to be the subject of debate but a sensible way in which to approach it would be to start small and then slowly expand those functions as the Coast Guard service gained equipment, personnel and skills.

After all, Australia has already moved along this path to some extent. The Customs and Border Protection Service already operates a fleet of patrol vessels and its officers carry arms for self-protection. The Department of Agriculture, Fisheries and Forestry has some offshore vessels that are armed. The Department of Defence employs most of its patrol

vessels in carrying out essentially civil and criminal enforcement functions. Finally, the Customs and Border Protection Service and the Department of Defence form the joint body known as the Border Protection Command. These are all steps, especially the Border Protection Command, along the path to a coast guard service.

It is probably because of the force of this conclusion that others have also come to the view that an Australian Coast Guard is in the national interest. In a paper published on 22 August 2008 the Australian Strategic Policy Institute, Canberra, also recommended a move towards a coast guard out of the existing Border Protection Command.⁶ This would enhance and move towards the goal of simplifying Australia's offshore laws. Instead of the new body being responsible to several organisations, as is the case with the present situation, there would be the one body reporting to the one minister.⁷

Many other countries have coast guards, with the largest being that of the United States. Its commandant summarised its functions in terms that have some attraction for Australia. He wrote:

One of the Coast Guard's greatest strengths is of multi-mission character. It allows us to conduct a wide range of functions in the maritime domain, from marine safety, to law enforcement and national defense, to environmental protection and humanitarian response ... [T]hese duties ... are most efficiently and effectively accomplished by a single federal maritime force.⁸

There is a lot to be said for this view that a wide range of functions in the maritime domain are most efficiently and effectively accomplished by a single maritime force. The Canadian experience, which has many analogies for Australia, is that of a Coast Guard that gradually evolved from other services, which is a path that has much to commend it for Australia.

Of course there would be opposition from some persons in the various departments who would see some loss of function, prestige, influence or money by such a move. The Navy probably would not like to see some of its patrol vessel force taken from it as the patrol boats used on fisheries, immigration, customs and other such duties are useful in the development of seagoing skills and experience by Navy personnel. This is a powerful point, but it is suggested, however, that these skills and experience would not be lost to the national interest and could be called

⁶ D Wolner, *Policing Our Ocean Domain: Establishing an Australian Coast Guard* (Australian Strategic Policy Institute, Canberra, 2008).

⁷ (2008) 171 *Australian Maritime Digest* 3.

⁸ Admiral Thad Allen, Commandant, United States Coast Guard, *The Coast Guard Proceedings*, Journal of Safety and Security at Sea of the Marine Safety and Security Council, Summer 2008 issue, p 1, "Commandant's Perspective". It is available at <www.uscg.mil/proceedings>.

in aid in war or warlike operations should the occasion demand. The formation of an Australian Coast Guard is therefore suggested as being in the national interest and the gradual movement in this direction from the current Border Protection Command and the Customs and Border Protection Service has much to commend it.

13.5 Conclusions

The Author's Preface at the start of this book sets out three reasons for writing it, the second of which was to demonstrate the unnecessary complexity of the Australian offshore legal regime. It may be seen in the early part of this final chapter an attempt has been made to mention some of the more important aspects of the offshore laws pertaining to each chapter. Even this short summary makes it apparent that Australia's offshore laws have just expanded over the past years without rhyme or reason beyond meeting an immediate demand.

The result of this expansion is that these laws are unclear, overlapping and unnecessarily complex, making them difficult to understand and to enforce. The other two sections of this chapter then suggest approaches that may be taken to address the situation. The first is to review the Offshore Constitutional Settlement 1979 and to reform it so that its structure gives rise to a more efficient and more effective system of demarcation between the Commonwealth and the States. The second is to suggest that, irrespective of reform of the Offshore Constitutional Settlement 1979, the offshore regulatory and enforcement laws should be consolidated into the one Act and that their offshore enforcement should be by the one department, called here the Australian Coast Guard.

As to the other two reasons for writing this book; namely, to provide a reference for offshore laws for the benefit of practitioners, regulators, academics and students; and to stimulate interest in constitutional law teaching, discussion and scholarly writing, only time will tell but it is to be hoped that some success attends them.

Annexes

Annex 1	Offshore Constitutional Settlement: A Milestone in Co-operative Federalism	411
Annex 2	Offshore Constitutional Settlement: Selected Statements and Documents 1978-79	427

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Attorney-General's Department

**Offshore
constitutional
settlement
A milestone in
co-operative
federalism**

Australian Government Publishing Service
Canberra 1980

Source: Attorney-General's Web Site

The offshore constitutional settlement between the Commonwealth and the States

At the Premiers Conference on 29 June 1979, the Commonwealth and the States completed an agreement of great importance for the settlement of contentious and complex offshore constitutional issues. The agreement marked the solution of a fundamental problem that has bedevilled Commonwealth-State relations, and represents a major achievement of the policy of co-operative federalism.

International background

Particularly since the Proclamation by President Truman in 1945 of jurisdiction and control over the continental shelf adjacent to the United States, the international law of the sea, as it relates to offshore areas, has been one of the great growing points—one of the areas of major change—in the law of nations.

The factors inducing change in the substantive law were basically technological in character: rapid technological developments in the means of communication, in the methods of fishing and in the techniques of seabed mining and drilling. The technological revolutions of the 20th century brought under the influence of man's new capabilities great areas of the high seas and of the seabed beneath them. These developments have been spurred on by a sharp increase in the demand for resources, both biological and mineral, of the sea and the seabed.

Australian continental shelf

Australia's major national interests in the law of the sea are based on its geographical and economic position as a great island continent, relatively, though not completely, remote from other countries. In 1953 Australia by Proclamation declared its sovereign rights over the continental shelf contiguous to its coast, thus distinctly enlarging its asserted sovereign authority in the offshore area. This jurisdiction was in effect confirmed by the First United Nations Conference on the Law of the Sea held at Geneva in 1958, which drew up four Conventions including the Convention on the Continental Shelf, to which Australia is now a party.

The Second United Nations Conference in 1960 failed to secure agreement on two major issues left unsettled in 1958—the extent of

fisheries jurisdiction and the related question of the breadth of the territorial sea.

Australian 200 nautical mile fishing zone

The Third United Nations Conference on the Law of the Sea began in 1973 what has turned out to be a lengthy consideration of a broad range of related issues. The Ninth Session of the Conference began on 3 March 1980. An informal composite negotiating text has been drawn up and revised. It provides, among other things, for fisheries jurisdiction in a zone extending up to 200 nautical miles from the coastline. Consistently with this text, and relying on the emerging international law on this matter as evidenced by the practice of nations, Australia, with effect as from 1 November 1979, established its 200 nautical mile fishing zone, in which all fisheries activities must be licensed under Australian law.

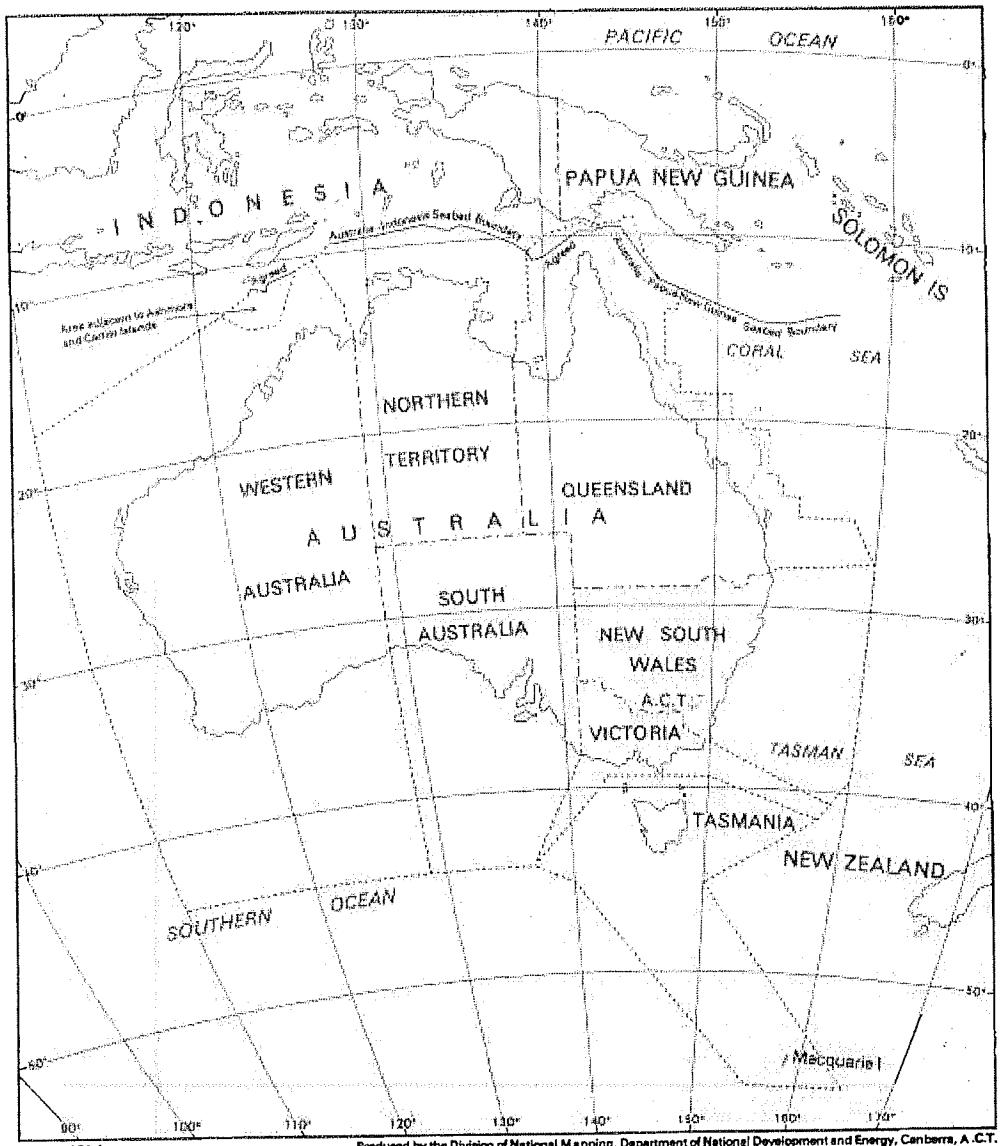
The enlargement of offshore rights also involves responsibilities on the part of the coastal nations concerned—one of the important matters that has concerned the Third United Nations Conference is the balance of these rights and responsibilities, including the issue of freedom of passage and transit through international straits. However, it will be amply evident, even from this brief survey, that the overall trend has been to enlarge the jurisdiction of nations in offshore areas over both the sea and the seabed.

Use of straight baselines and bay closing lines

Also, the 1958 Convention of the Territorial Sea and the Contiguous Zone, to which Australia is a party, permits substantial enlargement of 'internal waters' by the use on deeply indented or island-fringed coasts of 'straight baselines' for measuring the breadth of the territorial sea, and by the adoption of a 24-mile closing line for bays. The effect in particular areas can be to move some parts of the external boundary of Australia's territorial sea some tens of miles seawards.

Commonwealth State issues—Petroleum (Submerged Lands) Acts 1967

The international developments have raised acute issues in a number of federations as to the appropriate division of responsibilities in the offshore area. For Australia these issues crystallised first of all in the Commonwealth-State negotiations in the sixties in relation to the legislative basis for offshore petroleum mining. The course finally chosen was to seek to avoid raising questions concerning the respective constitutional powers of the Commonwealth and the States by agreeing in the 1967 Offshore Petroleum Agreement to the enactment by the Commonwealth and each State of a common petroleum mining code for the 'adjacent area' of each State (see the map opposite) to be administered by a 'Designated



NMP 80/001.1

Produced by the Division of National Mapping, Department of National Development and Energy, Canberra, A.C.T.



PETROLEUM (SUBMERGED LANDS) ACT 1967 (as amended) ADJACENT AREAS

NOTE:

1. The Act applies only in relation to exploration for, and exploitation of, the petroleum resources of such submerged lands included in the adjacent area as have the character either—
 - (a) of seabed or subsoil beneath territorial waters, or
 - (b) of continental shelf within the meaning of the Convention on the Continental Shelf signed at Geneva on 29 April 1958.
2. Adjustment of the Adjacent Area in the Torres Strait area will be necessary when the Torres Strait Treaty enters into force.

Authority'. In practice, the Designated Authority in respect of the 'adjacent area' of each State has been a State Minister, with consultation with the Commonwealth resting not on the legislation but on the Agreement.

However, in 1970 the Territorial Sea and Continental Shelf Bill was introduced into the Parliament in pursuance of the then Government's view that it would serve Australia's national and international interests to have the constitutional position resolved as soon as practicable by the Courts. That Bill was not proceeded with, but its reception served to indicate the highly controversial nature of the subject.

A further development was the 1971 report of the Senate Select Committee on Offshore Petroleum Resources, which concluded that, notwithstanding the advantages which the legislation and its underlying concepts had produced, the national interest was not served by leaving unresolved and uncertain the extent of State and Commonwealth authority in the seabed of the territorial sea and on the continental shelf.

Seas and Submerged Lands Act 1973 and the High Court's decision

The passage of the *Seas and Submerged Lands Act* 1973 followed, and the constitutional issues were resolved by the High Court in 1975 when it upheld—in *New South Wales v. Commonwealth* (1976) 135 CLR 337—the Act's assertion of sovereign rights on the part of the Crown in right of the Commonwealth, as against the States, over the continental shelf. Also, it upheld the Act's assertion of sovereignty on the part of the Crown in right of the Commonwealth over the territorial sea, and also over internal waters outside State limits as at 1901, including the seabed beneath the territorial sea and those waters. In effect, this meant that Commonwealth sovereignty extends, generally speaking, right into low-water mark.

Need for readjustment

The 1975 decision did not mean that States have no power to regulate offshore activities. The subsequent ruling of the High Court in *Pearce v. Florenca* (1976) 135 CLR 507 upheld the application of State fisheries laws in the territorial sea. However, a reordering and readjustment of powers and responsibilities—as between the Commonwealth and the States—were clearly required to take account of the 1975 decision. History, common sense and the sheer practicalities of life mark out the territorial sea, in particular, as a matter for local jurisdiction—that is to say, State jurisdiction—except on matters of overriding national or international importance. On the other hand, revision of existing petroleum mining arrangements is required to properly reflect the Commonwealth's paramount rights over the continental shelf.

Australia's experience in this regard is by no means unique. Similar questions arose earlier in the United States, and subsequently in Canada.

In their case—as in the case of Australia—the ruling by the Courts was that jurisdiction on the part of the central government extended to low-water mark. In the cases of these other federations, as in the case of our own, it has been found that the constitutional ruling is not the end of the matter and that adjustment is necessary.

A practical and co-operative solution

The resulting discussions with the States have now produced a solution agreed to by all States. The talks at both Ministerial and adviser level have focused in a practical way—and in a spirit of co-operative federalism that has taken full account of international, national and State interests—on what matters are appropriate for Commonwealth or, on the other hand, State administration, what matters are appropriate for joint administration, and how the various agreed arrangements should be implemented.

The appropriate Commonwealth-State consultative bodies have been fully involved, including the Australian Minerals and Energy Council, the Australian Fisheries Council, the Australian Environment Council and the Council of Nature Conservation Ministers.

Standing Committee of Commonwealth and State Attorneys-General

The legal aspects of the exercise have been the responsibility of the Standing Committee of Attorneys-General. It has devised innovative and flexible legislative measures to carry out the arrangements that have been agreed. These are now described.

Agreed arrangements

Extension of the legislative powers of the States in and in relation to coastal waters

The Commonwealth Parliament will pass legislation, based on section 51 (38) of the Constitution, to give each State the same powers with respect to the adjacent territorial sea (including the seabed) as it would have if the waters were within the limits of the State.

The legislation will also give each State powers outside the territorial sea in respect of port-type facilities, underground mining extending from land within a State, and fisheries. The power with respect to fisheries will apply to fisheries that, under an arrangement to which the Commonwealth is a party, are to be managed in accordance with the laws of the State concerned, under the offshore fisheries scheme described below.

The status of the territorial sea under international law is to be expressly preserved. Also, savings provisions are to be included:

- to safeguard existing State extra-territorial powers in the offshore area;
- to ensure that laws of the Commonwealth that apply in the territorial sea prevail over any inconsistent State law in accordance with the paramountcy given to Commonwealth laws under section 109 of the Constitution.

The intended use, for the first time since federation, of section 51 (38) of the Constitution is of considerable significance for federal relations as its exercise requires the request or concurrence of the Parliaments of the States concerned. All States have agreed to pass Acts requesting the Commonwealth legislation. A copy of the Victorian Bill is in the accompanying booklet, *Offshore Constitutional Settlement—Selected Statements and Documents 1978–79*.

Vesting in the States of the title to seabed beneath the territorial sea

The Commonwealth Parliament will pass legislation to vest in each State proprietary rights and title in respect of the seabed of the adjacent territorial sea.

This grant of proprietary rights and title will both support the extension of the powers of the States in the territorial sea and provide an assurance to the States that the arrangements relating to the territorial sea will have permanency and stability.

As in the case of the 'Powers' legislation, the status of the territorial sea under international law is to be expressly preserved. Also, it will be necessary to except from the grant any seabed owned or used by the Commonwealth or by a Commonwealth authority for a specific Commonwealth purpose at the time of the grant. In addition, the Commonwealth legislation will reserve the Commonwealth's right to use the seabed for such national purposes as:

- defence
- cables
- navigational aids
- quarantine

Amendment of the Seas and Submerged Lands Act 1973

Consequential amendments will be made to the *Seas and Submerged Lands Act* 1973 to ensure that State laws passed under the other legislation will not be invalidated by that Act.

The area involved

The above legislation—and also the petroleum and fisheries arrangements referred to below—will be limited to a territorial sea of 3 miles breadth, irrespective of whether Australia subsequently moves to a territorial sea of 12 miles.

On the other hand, the baselines from which the territorial sea will be measured will be drawn in a way that takes advantage of the international principles authorising the drawing of 'straight baselines' where the coast is deeply indented or fringed by islands, and of closing lines where bays are not more than 24 miles wide. Thus 'straight baselines' will be used to enclose the waters of Investigator Strait adjacent to South Australia. The 'internal waters' on the landward side of these lines will be included in the grants made by the legislation. The result will be to enlarge the area in which the States will enjoy the benefits of the legislation.

The baselines to be adopted are being prepared in close consultation with the States and will be promulgated in due course under the *Seas and Submerged Lands Act* 1973.

Offshore petroleum arrangements outside the 3 mile territorial sea

These will be regulated by Commonwealth legislation alone, consisting of an amended Commonwealth Petroleum (Submerged Lands) Act. Day-to-day administration will continue to be in the hands of the 'Designated Authority' appointed for the 'adjacent area' of each State—that is, the State Minister—and State officials. The existing mining code will be retained and existing permits and licences will not be affected.

However, the legislation will establish for the first time a statutory Joint Authority for each adjacent area consisting of the Commonwealth Minister and the State Minister (Commonwealth-Victoria Offshore Petroleum Joint Authority, and so on). The Joint Authorities will be concerned only with major matters arising under the legislation including:

- determination of the areas to be open for applications for permits;
- the grant and renewal of exploration permits and production licences;
- approval of instruments creating interests in permits or licences;
- determination of permit or licence conditions governing the level of work or expenditure.

In the event of disagreement within a Joint Authority the view of the Commonwealth Minister is to prevail.

Having regard to the remoteness of Western Australia and its other special circumstances, special conditions were agreed in its case. A copy of the agreement is in the accompanying booklet, *Offshore Constitutional Settlement—Selected Statements and Other Documents 1978–1979*. However, Commonwealth views based on the national interest are still to prevail in the Joint Authority, as in the case of other States.

Summing up, the new arrangements will ensure that:

- the national interest in offshore petroleum activities can be asserted;
- the valuable role of the States is continued;
- dislocation of ongoing projects is avoided.

The present arrangements for the sharing of royalties between the States and the Commonwealth will be retained.

Offshore petroleum arrangements inside the outer limit of the 3 mile territorial sea

This will be regulated by State legislation alone, administered by State authorities, in recognition of the fact that local matters within the territorial sea are primarily matters for the States. However, the common mining code will be retained as far as practicable, and existing permits and licences, and appropriate arrangements will be made for 'transitioning' existing permits to the extent that they fall within the outer limit of the territorial sea.

Offshore mining for other minerals

Arrangements for the mining of offshore minerals other than petroleum will be the same as for offshore petroleum.

Commonwealth and State legislation embodying a common mining code will be needed to implement the arrangements. Arrangements will also be made for sharing royalties.

Offshore fisheries

The arrangements existing to date involve a division of legislative responsibilities under which, generally speaking, State laws are applied inside 'territorial limits' consisting of the outer limit of the 3 mile territorial sea, and Commonwealth laws beyond. These arrangements inhibit a flexible functional approach under which responsibilities can be adjusted by reference to the requirements of particular fisheries. Fish do not respect the jurisdictional lines that man may draw.

The new arrangements will enable a single fishery to be regulated by the one set of laws, Commonwealth or State, as agreed between the Commonwealth and the State or States concerned, and they will provide for the establishment of Fisheries Joint Authorities:

- a *South-Eastern Fisheries Joint Authority* consisting of the Commonwealth Minister together with the appropriate Ministers of New South Wales, Victoria, South Australia and Tasmania;
- a *Northern Australian Fisheries Joint Authority* consisting of the Commonwealth Minister together with the appropriate Ministers of Queensland and the Northern Territory;
- a *Western Australian Fisheries Joint Authority* consisting of the Commonwealth Minister together with the appropriate Minister for Western Australia;
- a *Northern Territory Fisheries Joint Authority* consisting of the Commonwealth Minister and the appropriate Minister of the Northern Territory.

Flexibility is the keynote of the proposed legislation, and the Commonwealth will be able to make at any time an arrangement with a State or States for the establishment of further Fisheries Joint Authorities.

There will be complementary State legislation covering the area within the outer limit of the territorial sea.

In the event of disagreement within a Fisheries Joint Authority, the views of the Commonwealth Minister will prevail.

By agreement of the Governments concerned, a particular fishery may be assigned to the management of one of these Joint Authorities. Alternatively, it may be assigned to the administration of the Commonwealth alone or a State alone, if that is agreed.

These measures, devised in close collaboration between Commonwealth and State fisheries officers and legal advisers, have a practical objective—to provide a sound legal and administrative basis for a functional approach under which a particular fishery can be regulated by one authority under one set of laws, without regard to jurisdictional lines.

To give possible examples, the very important northern prawn fishery could be considered for management by the Northern Australian Fisheries Joint Authority; the Western Australia rock lobster fishery for management by that State; and the southern bluefin tuna fishery by the Commonwealth.

Under existing arrangements, foreign fishermen are regulated by Commonwealth law. This will continue to be the position. However, it has been agreed that the Commonwealth Minister is to be able to deem a boat brought to Australia from overseas for a limited period to participate in a joint venture under the control of an Australian company to be an 'Australian boat' for the purposes of the arrangements.

Historic shipwrecks

The *Historic Shipwrecks Act* 1976 as presently drafted does not apply in relation to waters adjacent to the coast of any State until a proclamation has been made declaring that the Act so applies. In practice, proclamations have only been made where the adjacent State requests it. The result to date is that the Act applies to the waters adjacent to Western Australia, Queensland and New South Wales, as well as to waters adjacent to the Northern Territory.

Under the offshore settlement agreed to at the Premiers Conference the Act is to be amended so that it will expressly provide that it will only be applicable, or continue to be applicable, to waters adjacent to a State or the Northern Territory with the consent of that State or Territory. However, an exception is made for the special case of old Dutch shipwrecks lying off the coast of Western Australia.

These shipwrecks are the subject of a 1972 agreement between the Commonwealth and the Netherlands. They are protected at present by the *Historic Shipwrecks Act* 1976 and are to continue to remain under the Commonwealth Act until satisfactory alternative arrangements are made with Western Australia. Western Australia has already proposed discussions for such arrangements. Its State authorities have a fine record in taking steps to protect these shipwrecks and the relics from them, notwithstanding the legal difficulties illustrated by the case of *Robinson v. Western Australian Museum* (1977) 138 CLR 283.

Great Barrier Reef Marine Park

The *Great Barrier Reef Marine Park Act* 1975 is to continue to apply to the whole of the Great Barrier Reef Region as defined in that Act, and the rights and title to be vested in the States in respect of the seabed of the territorial sea are to be subject to the operation of that Act.

In addition, the Commonwealth and Queensland have agreed to establish joint consultative arrangements for the management and preservation of the Region, which extends right into low-water mark along the Queensland coast and around Queensland islands in the area.

After consultation in accordance with these new arrangements, the Governor-General has since proclaimed the Capricornia Section as the first area to be declared to be part of the Great Barrier Reef Marine Park (*Commonwealth of Australia Gazette* of 21 October 1979).

Other marine parks

The general division of responsibility is that parks or reserves within the outer limit of the territorial sea would be established under State legislation and parks or reserves beyond would be established by Commonwealth legislation with management responsibilities determined after consultation between the State concerned and the Commonwealth.

Where an area proposed as a marine park or reserve lies across the boundary of the territorial sea, the State concerned would establish that portion within the outer limit of the territorial sea under State legislation and the Commonwealth would legislate for that portion seawards of the outer limit of the territorial sea. Such arrangements would be subject to agreement between the State concerned and the Commonwealth on policy, planning and management for the whole area.

The only departure envisaged from this general division of responsibilities is where the Commonwealth and the State concerned agree that a proposed park within the territorial sea has international significance but where the State does not wish to legislate itself. In that event, the Commonwealth would legislate.

The need for consultation between the States and the Commonwealth in the establishment of marine parks and reserves has been recognised.

Crimes at sea

The purpose of the agreed scheme of complementary Commonwealth-State legislation is to ensure that an appropriate body of Australian criminal laws—either State or Territory—is applicable to ships and to activities in offshore areas coming under Australian jurisdiction.

The legislation, much of which has already been passed, will deal with a situation that has required attention for some time.

Under the scheme State legislation will deal with offences in the territorial sea and offences committed on voyages between two ports in one State, or that began and ended at the same port in a State. The Commonwealth legislation deals with other cases, but in doing so it applies the criminal laws of a State or Territory with which the ship is connected by registration or otherwise. This should facilitate law enforcement and resolve, in a way that fits in with the federal system, the uncertainties and doubts that have existed.

The scheme will not affect the application of existing specific federal criminal offences, which will continue to be dealt with, as now, under the special Commonwealth legislation in question, for example the Customs Act. However, the application of State criminal laws under the scheme will help law enforcement generally on matters such as drug offences.

The Commonwealth legislation involved—the *Crimes at Sea Act* 1979—came into force on 1 November 1979, the date of the establishment of the Australian 200 nautical mile fishing zone. It applies to

offences committed on Australian ships which are on overseas, interstate or Territory voyages. The Act also applies to offences on Australian ships in foreign ports, offences by Australian citizens on foreign ships where they are not members of the crew, and offences in offshore areas outside the territorial sea in relation to matters within Australian jurisdiction.

In certain limited cases the Act can also be applied to offences committed on foreign ships. The consent of the Commonwealth Attorney-General is required and is only to be given if the consent of the foreign State is obtained. This special jurisdiction would only be resorted to where necessary to ensure that serious criminal offences did not go unpunished for lack of an applicable law.

The scheme contains innovative provisions for the removal of proceedings from a Court in one part of Australia to a Court in another part of Australia where that would be expedient to avoid hardship on the accused or to promote a speedy trial.

Agreement on shipping and navigation

The broad terms of the agreement, which deals primarily with the survey and issue of certificates to ships, the regulation of ships' crews, and the number and qualifications of those on board are:

- The States will be responsible for trading vessels except those proceeding on an interstate or an overseas voyage. For this purpose, 'trading vessels' are vessels, other than those in the categories listed below, that carry goods and passengers on a commercial basis. This category also includes tugs, barges, dredges and other marine service vessels.
- The Commonwealth will be responsible for trading vessels on an interstate or overseas voyage.
- The States will be responsible for all Australian commercial fishing vessels except those going on an overseas voyage. For this purpose a voyage of a Queensland based fishing vessel to Papua New Guinea would not be regarded as an overseas voyage. The safety standards of foreign fishing vessels in Australian waters will be a Commonwealth responsibility.
- The States will be responsible for all vessels whose operations are confined to rivers, lakes and other inland waterways. New South Wales will be responsible for all vessels operating on the River Murray upstream from the South Australian border.
- The States will be responsible for pleasure craft and for vessels used for pleasure on a hire and drive basis.
- The Commonwealth will be responsible for the navigation and marine aspects of offshore industry mobile units (mainly drilling vessels), but Navigation Act requirements may be displaced by

- directions or conditions of instruments issued under the Petroleum (Submerged Lands) legislation.
- The Commonwealth will be responsible for offshore industry vessels (mainly supply craft), other than those confined to one State and its adjacent area. Petroleum (Submerged Lands) Act requirements will be capable of displacing the Commonwealth's Navigation Act requirements as in the case of mobile units. The procedure for determining whether an offshore industry vessel is confined to one State will depend on the owner making a declaration as to the intended operations of the vessel over a prescribed period. Unless a declaration is made and is accepted by the Minister for Transport following consultation with his State counterpart, the vessel will be under State law.

Simultaneously with the negotiation of this agreement the Commonwealth and States have developed a Uniform Shipping Laws Code which was published in the *Commonwealth of Australia Gazette* on 28 December 1979. This Code will be used as the basis for uniform Commonwealth, State and Northern Territory legislation for the survey and manning of commercial vessels, including fishing vessels, and will minimise problems that would otherwise occur in the implementation of the agreement on shipping and navigation. This is particularly necessary as the present laws of the States vary considerably due to their separate historical development.

Increasingly the regulation of shipping and navigation is being developed at the international level and considerable importance is placed on the need for Australian requirements to reflect the latest international standards. This is being done progressively in close consultation with the States. In implementing particular maritime treaties it may be desirable to depart from the shipping and navigation arrangements outlined above and the agreement with the States provides for this.

An example is the Convention on the International Regulations for the Prevention of Collisions at Sea 1974 which is being ratified by Australia following the enactment of the *Navigation Amendment Act* 1979. The Act enables State law to apply the international regulations to all ships in the territorial sea and internal waters and provides the necessary Commonwealth law to apply the international regulations to ships outside the 3 mile limit.

Summing up, the arrangements lay the basis for a complete resolution of shipping and navigation problems that have existed in Australia since federation.

In a separate development from the shipping and navigation agreement, the Commonwealth is preparing a Shipping Registration Bill to replace the provisions of the Merchant Shipping Act 1894 under which ships are registered in Australia as 'British ships'. Internationally Australia is obliged to fix the conditions for the grant of its nationality to ships. Although this is essentially a Commonwealth responsibility the

Government has kept in close touch with the States in the Marine and Ports Council on this matter.

Ship-sourced marine pollution

The initial division of responsibilities between the Commonwealth and the States in the field of ship-sourced marine pollution came about in 1960 when the International Convention for the Prevention of Pollution of the Sea by Oil, 1954, was accepted by Australia. Effect was given to the Convention by the enactment of Commonwealth legislation which applied to Australian ships outside the territorial sea, and similar legislation passed by the States which applied to all ships within the territorial sea.

Part VIIA of the *Navigation Act* 1912 includes provisions for intervention by Commonwealth authorities in cases of pollution or threatened pollution by oil from ships. This Part also imposes civil liability on shipowners whose ships carry oil in bulk as cargo. Similar legislation exists in some of the States.

In the interests of co-operative federalism, it has been agreed that the arrangements that existed before the High Court decision in the *Seas and Submerged Lands* case in 1975 should be continued.

It has also been agreed that the Commonwealth should prepare legislation which will implement the provisions of the International Conventions relating to Intervention on the High Seas in cases of Oil Pollution Casualties, 1969, and Civil Liability for Oil Pollution Damage, 1969. In implementing the latter Convention, a saving clause is to be inserted to allow States to legislate to implement certain aspects of the Convention if they wish to do so.

Northern Territory

Following on the Government's action to bring the Northern Territory to the stage of responsible government with effect from 1 July 1978, representatives of the Northern Territory Government have participated in all offshore discussions. The Northern Territory is to be treated as a State for the purposes of the offshore constitutional settlement, and the legislation to implement the settlement will reflect this.

Jervis Bay Territory

The Commonwealth Government and the New South Wales Government are at an advanced stage of negotiating mutually acceptable arrangements.

Co-operative federalism at work

Continuing discussions

Discussions among the Commonwealth and the States are to continue with a view to dealing with other offshore matters that require attention, including:

- land-based marine pollution
- marine pollution through dumping
- protection of whales

When the Commonwealth and the States are each concerned with the same matter, they should channel that concern into the paths of co-operation. Past attitudes of confrontation with the States and of centralising Commonwealth power at their expense have resulted in a polarisation of positions in which all interests—national, State and international—have suffered in one way or another.

The offshore arrangements have laid the basis for a permanent, workable and beneficial solution of problems that have beset the nation for a decade or more.

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Attorney-General's Department

**Offshore
constitutional
settlement
Selected statements
and documents
1978-79**

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Selected statements and documents

1. Second Reading Speech by the Commonwealth Attorney-General, Senator the Hon. Peter Durack, Q.C., on the Crimes at Sea Bill, Senate <i>Hansard</i> , 22 August 1978, p. 241 ..	
2. 'Great Barrier Reef'—Statement by the Prime Minister, the Right Honourable Malcolm Fraser, C.H., 14 June 1979 ..	7
3. 'Commonwealth offshore responsibilities and the Great Barrier Reef'—Statement by the Commonwealth Attorney-General, Senator the Hon. Peter Durack, Q.C., 23 June 1979 ..	9
4. Special Agreement relating to the establishment of the Commonwealth-Western Australian Offshore Petroleum Joint Authority (Premiers Conference, 29 June 1979)	13
5. 'Offshore powers a milestone'—Statement by the Commonwealth Attorney-General, Senator the Hon. Peter Durack, Q.C., 19 July 1979	14
6. Second Reading Speech by the Victorian Attorney-General, the Hon. Haddon Storey, Q.C., M.L.C., on the Constitutional Powers (Coastal Waters) Bill 1979 (Vic.), <i>Hansard</i> (Victoria), 19 September 1979, pp. 2610-12	16
7. Constitutional Powers (Coastal Waters) Bill 1979—Victoria ..	19
8. Proclamation of the Capricornia Section of the Great Barrier Reef Marine Park, 21 October 1979	22
9. 'Australian laws to apply to offences at sea'—Statement by the Commonwealth Attorney-General, Senator the Hon. Peter Durack, Q.C., 26 October 1979	24
10. Letter by the Commonwealth Attorney-General, Senator the Hon. Peter Durack, Q.C., on Offshore Constitutional Responsibilities (historic shipwrecks and the proposed use of section 51 (38) of the Constitution, 19 November 1979) ..	26

Crimes at Sea Bill 1978

*Second Reading Speech by the Commonwealth Attorney-General,
Senator the Hon. Peter Durack, Q.C.*

Motion (by Senator Durack) agreed to:

That leave be given to introduce a Bill for an Act relating to offences committed at sea or in foreign ports or harbours, and matters connected therewith.

Bill presented, and read a first time.

Standing orders suspended.

Second Reading

Senator DURACK (Western Australia—Attorney-General) (3.14)—

I move:

That the Bill be now read a second time.

The desirability of reviewing the existing law relating to offences at sea was referred to by the Chief Justice of the High Court, Sir Garfield Barwick, in 1974 in the case of *The Queen v. Bull* (131 CLR 203, at page 235). He observed that it is inappropriate today that the power of a court in Australia to try extra-territorial offences should be derived from and be limited by Imperial legislation. In 1977 in the subsequent case of *Oteri v. The Queen* (51 ALJR 122) the Privy Council drew attention to a feature of the existing law in the following terms:

It may at first sight seem surprising that despite the passing of the Statute of Westminster, 1931, and the creation of separate Australian citizenship by the British Nationality Act 1948 (Imp.) . . . Parliament in the United Kingdom when it passes a statute which creates a new criminal offence in English law is also legislating for those Australian passengers who cross the Bass Strait by ship from Melbourne to Launceston.

The present Bill will correct that position, in situations coming within the Commonwealth's constitutional powers. Its purpose is to apply Australian criminal laws in those situations, the laws applied being those of a relevant State or Territory. To avoid misunderstanding I should add that the extra-territorial application of specific federal criminal laws, such as those relating to customs offences, will continue to be dealt with as now under the specific Commonwealth legislation in question, for example the Customs Act, and are not embraced by the present proposal.

The objective of the Bill deserves, and, I believe, will receive wide support. There is, however, an additional important reason why this legislation should go forward and to which I should draw attention.

The Bill now before the Senate represents the first fruits of the consultations and agreements between the Commonwealth and the States initiated by this Government to deal with the situation it faced following upon the decision of the High Court in the Seas and Submerged Lands case in late 1975 (135 CLR 337). Certain agreements in principle were reached at the Premiers Conference of 21 October 1977. At the Premiers Conference on 22 June this year a major step forward was taken to implement the principles agreed upon. In particular it was agreed that the powers of the States should be extended to the territorial sea including the seabed. Other matters dealt with included the establishment of joint Commonwealth-State authorities for offshore mining and fishing in which the Commonwealth has a proper role perhaps not fully recognised under existing arrangements.

I had occasion to observe at the time of the Premiers Conference that in the Seas and Submerged Lands case, the complete sovereign power and rights of the Commonwealth Parliament over offshore areas of Australia, that is from low-water mark outwards, was affirmed. The result of that was that the Commonwealth Parliament has the power to override all State legislation in the area. The object of this exercise which we have been engaged in since last year has been to endeavour, on the basis of federalism, to restore to the States powers, many of which were thrown in great doubt as a result of the High Court decision. What the States have been seeking is some permanent solution of the problem so that they will not be concerned all the time that—

- (a) their own laws will not be effective if they are applying offshore, and
- (b) probably more importantly, that the Commonwealth will not come in above them and pass laws which would as a result of section 109 of the Constitution override the exercise of State laws.

Legislation to implement these other decisions is being prepared. I believe that it is very important that the Bill now before the Senate, which represents the first item of the package, should be supported and passed as soon as possible.

It has been prepared in close consultation with the States and the Northern Territory, in the Standing Committee of Commonwealth and State Attorneys-General, as part of a complementary scheme of Commonwealth and State legislation on offences at sea. A model complementary State Bill has also been prepared for introduction into State parliaments and a similar Bill is to be introduced into the Northern Territory Legislative Assembly. For the purpose of the complementary scheme, the Northern Territory, which of course now has self-government, has been treated as a State.

I turn now to the Bill itself. Very briefly its effect is to apply the criminal laws of an appropriate State or Territory to offences on or from Australian ships on overseas, inter-State and Territory voyages, and in certain carefully circumscribed cases to offences on or from

foreign ships beyond the territorial sea. Also, the Commonwealth Bill will apply the criminal laws of the adjacent State or Territory to offences in offshore areas beyond the territorial sea that come under Australian jurisdiction, for example, on offshore installations better known as oil rigs. The complementary State Bill deals with offences on intra-State voyages and offences within the territorial sea.

For these purposes sub-clause 3 (1) of the Commonwealth Bill defines 'criminal laws' so as to include all laws that make provision for or in relation to offences. However, there are important qualifications to this general application of criminal laws. Clause 12 excludes from the criminal laws applied by the Bill laws incapable of applying at sea or laws expressly worded so as not to extend or apply at sea. Nevertheless this may leave some offences applicable which, it would be readily agreed, should not be so applied. It is proposed therefore by sub-clause 18 (2) that the regulation-making power in the Bill should authorise regulations providing that provisions or classes or provisions of the criminal laws in force in a State or Territory are not to apply by virtue of the Bill. A precedent for such an excepting power is contained in sub-section 4 (6) of the *Commonwealth Places (Application of Laws) Act* 1970.

Honourable senators will appreciate that, by reason of the requirements of international law, it is necessary, outside the territorial sea in particular, to observe a distinction between Australian ships and ships coming within the jurisdiction of other countries. For this purpose, a definition included in sub-clause 3 (1) refers to ships registered in Australia or an external Territory under the Imperial Merchant Shipping Act or under any Commonwealth Act replacing that Act. Paragraph (b) of the definition refers to any other ship that is Australia-based or owned or Territory-based or owned, not being a ship registered in a foreign country. The definition of 'foreign country' in sub-clause 3 (1) therefore refers to any country other than Australia or an external Territory. The distinction made in the Bill is, as mentioned, between Australian ships and other ships and so no special reference is needed to ships of other Commonwealth countries.

A particular provision that may intrigue honourable senators is contained in sub-clause 3 (4), which defines when a person ceases to be a 'survivor' for purposes of the application of criminal laws under the Bill under paragraphs 6 (1) (b), 7 (1) (b) and 8 (1) (b). A feature of the Bill is that it expressly covers the situation of shipwreck survivors. Those of us who have studied criminal law will well remember the case of *Dudley and Stephens*—(1884) 14 QBD 253—the harrowing facts of which related to the killing and eating of a cabin boy by the survivors of a wreck in order to survive. While such cases are thankfully very exceptional, the point is that situations of enormous stress can occur following a shipwreck and there should be no room for doubt about the applicability of criminal law in such situations.

Clause 4, which follows in part section 6 of the *Commonwealth*

Places (Application of Laws) Act 1970, authorises an arrangement with a State for the exercise or performance of a power, duty or function by an authority of the State under the provisions of the criminal laws in force in any State or Territory as applying by virtue of the Bill. This provision, along with clauses 5, 13 and 14, is designed to facilitate to the maximum the implementation of the Bill by the law enforcement authorities of the States.

The main substantive provisions of the Bill are to be found in clauses 6 to 11. Clauses 6 and 8 relate to offences on or from ships, including Australian ships wherever they might be at the time, even in a foreign port, while clauses 9 to 11 deal with offences in the offshore area and are directed to offences in which ships need not be involved, for example, offences on offshore installations. In view of the current trend in the Law of the Sea pointing to an increase in offshore jurisdiction both in area and content, particular care has been taken to prepare legislation that will be adequate to meet future developments when they occur.

I shall deal first with offences on or from ships. Clause 6 applies State or Territory criminal laws to acts committed by a person on or from an Australian ship in the course of a 'prescribed voyage' and to acts committed on or from Australian ships in foreign ports. The criminal laws so applied are those of a State or Territory with which the ship is connected by registration. If the ship is not so registered, other kinds of connection with a State or Territory are to be recognised under sub-clause 6 (2). A 'prescribed voyage' is defined in sub-clause 6 (3) so as to include—(a) a voyage from a State to a place in a foreign country, in another State, or in a Territory; (b) a voyage from the Northern Territory to a place in a foreign country, in a State, or in another Territory; and (c) any voyage from a Territory other than the Northern Territory or from a foreign country.

Clauses 7 and 8 deal with foreign ships. It is convenient to refer to clause 8 first. It applies State or Territory criminal laws to acts on or from foreign ships beyond the territorial sea of Australia or an external Territory by an Australian citizen who was not a member of the crew of the ship. The criminal laws applied are those of the State or Territory in which the person was domiciled at the time or he had his last place of residence in Australia or the external Territories. Section 381 of the *Navigation Act* 1912 already claims jurisdiction in such cases, and the Bill in this regard is therefore following a well-worn path.

Clause 7 is not limited to Australian citizens and applies in relation to acts committed on the high seas on or from a foreign ship in the course of a voyage to a place in Australia or an external Territory, or which is fishing or is licensed to fish in the Australian fishing zone. As will appear, the jurisdiction is carefully circumscribed, and I should add, is likely to be seldom used. Thus, the effect of sub-clause 7 (2) is that only the last leg of a voyage from overseas to Australia is included for purposes of the clause—for example, in a voyage Tokyo-Manila-Sydney, only the Manila-Sydney leg would be included—plus any leg of the

voyage around Australia; for example, Sydney-Melbourne. While sub-clause 7 (3) has the effect of applying to such acts the criminal laws of the State or Territory which the offender enters or to which he is brought, sub-clause 7 (4) makes it a defence that the act constituting the offence would not have constituted an offence under the law of the country of which the offender is a national.

In addition, the consent of the Attorney-General is required by sub-clause 7 (5), and under sub-clause 7 (6) this is to be given only if he is satisfied that the government of the foreign country under whose jurisdiction the ship comes—the flag state—has given its consent. However, the requirement of consent does not apply to piratical acts, since all countries have jurisdiction to try piratical acts on any ship.

The Government regards the carefully confined jurisdiction conferred by clause 7 as reasonable. It views it as a subordinate and seldom needed means of ensuring, as far as practicable, that crimes do not remain unpunished. The ability to extend local criminal laws to offences on foreign ships arriving in Australia follows a precedent set by New Zealand in 1961 and is justified by the need, having regard to the remoteness of Australia from other places, to be able to deal with situations of acute distress that can occur and that do, I might add, occur from time to time. The jurisdiction would apply, as I have already indicated, only if the offender enters or is brought into a State or Territory.

As I have mentioned, clauses 9, 10 and 11 of the Bill constitute a second group of provisions dealing with offences outside the territorial sea in offshore areas that are within Australian jurisdiction or may come within Australian jurisdiction in the future. They cover acts arising out of the exploration or exploitation of the resources of the Australian continental shelf and, looking to the future, arising out of other activities coming under Australian jurisdiction in any 200 mile economic zone that may be proclaimed by Australia. Clause 11 enables the application of criminal laws to other acts by Australian citizens or residents in offshore areas outside the territorial sea, for example, within the 200 mile zone. In all cases the criminal laws of the adjacent State or Territory are to be applied.

Clause 12 has already been mentioned. Clauses 13 to 16 deal with certain procedural and technical matters which are also referred to in the explanatory memorandum that is being circulated. Clause 17 provides in effect for a change in venue if the Judge of a Supreme Court of the State or Territory in question is satisfied that other proceedings have been instituted or are proposed, and that it is expedient that the proceedings be stayed. Matters to be taken into account include whether the continuation of the proceedings would impose any special hardship on the accused.

Mr President, the Government proposes that the Bill should not be proceeded with until there has been time for full examination and discussion. On the other hand, there is obviously a need to reorder the position on offences at sea as soon as possible, and in that regard for

this Parliament to deal with those cases that come under the Commonwealth's constitutional powers. I therefore commend the Bill to the Senate.

Debate (on motion by Senator Georges) adjourned.
22 August 1978

Great Barrier Reef

Statement by the Prime Minister, the Rt Hon. Malcolm Fraser, C.H.

The Prime Minister, Mr Malcolm Fraser, and the Premier, Mr Joh Bjelke-Petersen, conferred today on the future consultative arrangements for joint consideration of recommendations of the Great Barrier Reef Marine Park Authority. This Authority is established by the Commonwealth Great Barrier Reef Marine Park Act, which will continue unchanged.

The Great Barrier Reef Marine Park Authority is designed to provide for the progressive declarations and oversight of Marine Parks in the Region of the Great Barrier Reef. The boundaries of this Region will remain as defined in the Commonwealth legislation.

No provision has to date been made for both governments to co-ordinate policy at the ministerial level. Accordingly, it was agreed at today's meeting to establish a Ministerial Council comprising Commonwealth and State Ministers particularly representing marine park, conservation, science and tourism.

The Commonwealth Ministers will be Phillip Lynch, the Minister for Industry and Commerce, whose portfolio responsibilities include tourism—a major activity in the area of the Great Barrier Reef—and Senator Webster, the Minister for Science and the Environment, who is directly responsible for the Great Barrier Reef Marine Park Authority.

The Queensland Ministers will be Mr Newberry, the Minister for Culture, National Parks and Recreation, and Mr Hodges, the Minister for Maritime Services and Tourism.

Mr Fraser and Mr Bjelke-Petersen agreed that the first section of the Great Barrier Reef Marine Park—the Capricornia section—should be processed by the Ministerial Council as an immediate task to enable early proclamation to take place.

They also agreed that as the sections of the Great Barrier Reef Marine Park are proclaimed, the day-to-day management should be undertaken by officers of the Queensland National Parks and Wildlife Service, who, in discharging these responsibilities, will be subject to the Great Barrier Reef Marine Park Authority. The Authority will continue to have the responsibility for:

- recommending the declaration of Parks;
- developing zoning plans and plans of management of Parks; and
- arranging for research and investigation relevant to Marine Parks.

In relation to the Territorial sea, the Premier and the Prime Minister agreed that the arrangements with Queensland which will flow from the agreements of the June 1978 Premiers Conference will be on the same basis as arrangements to be entered into in respect of other States, but with full regard to the Great Barrier Reef Marine Park Act and to the Prime Minister's Parliamentary Statement of 4 June on Petroleum Exploration in the Great Barrier Reef.

Both the Premier and the Prime Minister confirmed that it was the policies of their respective governments to prohibit any drilling on the Reef or any drilling or mining which could damage the Reef.

Mr Bjelke-Petersen and Mr Fraser agreed that the program of short and longer term research into the Great Barrier Reef eco-system referred to in that Statement will be monitored by the Ministerial Council, and will be closely supervised by the Marine Park Authority.

By creating an appropriate consultative mechanism these arrangements will serve to ensure that the Authority functions within the framework of the joint policies of the Commonwealth and Queensland Governments as they further develop.

The two Governments will be consulting forthwith on implementation of these arrangements.

Both the Premier and the Prime Minister affirmed that the basic policy intention of both governments was to ensure that the Great Barrier Reef area be recognised and preserved as an important feature of Queensland's and Australia's heritage.

14 June 1979

Commonwealth offshore constitutional responsibilities and the Great Barrier Reef

*Statement by the Commonwealth Attorney-General,
Senator the Hon. Peter Durack, Q.C.*

With the agreement reached between the Commonwealth and Queensland last week, the issue of the control and management of the Great Barrier Reef which has clouded the whole topic of present and proposed offshore constitutional arrangements has now been resolved.

The Commonwealth and Queensland will now have a joint consultative mechanism for the management and preservation of the Great Barrier Reef Region, which extends right into low-water mark along the Queensland coast and around Queensland islands in the area.

It is important that the constitutional basis for these arrangements should be properly understood.

There is a practical need for the Commonwealth and a State, when they are each concerned with a matter, to channel that concern into the paths of co-operation rather than of confrontation. However, it is a fundamental rule of our Constitution that, where Commonwealth power extends to a matter that is also of interest to the States, the Commonwealth has the ultimate power.

The Commonwealth Government's position on the need to protect the Barrier Reef is clear. On 4 June the Prime Minister announced a number of decisions, including the preparation of a research program. Those decisions give an unequivocal commitment not to permit any drilling or mining anywhere that could possibly damage the Reef.

The Commonwealth's decisions announced on 4 June adopt the stricter restrictions on drilling proposed by Sir Gordon Wallace, the Chairman of the Royal Commissions into petroleum drilling in the area of the Reef. That inquiry was jointly initiated by the Commonwealth and Queensland and reported in November 1974.

The Commonwealth's interest in preserving the Reef was confirmed in 1975 when the Parliament passed the Great Barrier Reef Marine Park Act with the support of all parties. The national Parliament took the view that the Reef did not simply belong to one State but to the people of Australia who had an obligation to see that it was preserved for the future generations of all nations.

In the complex negotiations between the Commonwealth and the States to find solutions of the vexed questions of offshore jurisdiction,

the Great Barrier Reef Region presented an obviously difficult problem. Both the Commonwealth and Queensland Governments recognised this, and the need to make special arrangements. The consultations with Queensland culminated in the agreement reached between the Prime Minister and Mr Bjelke-Petersen at Emerald last week.

Commonwealth Act unchanged

Those arrangements involve acceptance that the Great Barrier Reef Marine Park Act will continue unchanged. The Great Barrier Reef Region as defined by it will continue unchanged, as will the Great Barrier Reef Marine Park Authority established by it.

The Great Barrier Reef Marine Park Authority is designed to provide for the progressive declarations and oversight of Marine Parks in the Region of the Great Barrier Reef. The Authority is concerned therefore not only with specific areas that have been actually declared to be part of the Marine Park. In addition the Authority has a statutory responsibility, in effect, to oversee the well-being of the whole Reef.

Co-operation

The Commonwealth Act gives recognition to the practical necessity for co-operation with the Queensland Government. One of the members of the Authority is to be nominated by the Queensland Government. The other two are Commonwealth nominees. The Act specifically states that the Authority can perform any of its functions in co-operation with Queensland, and also provides that the Commonwealth Government may make arrangements with the Queensland Government for the performance of functions by Queensland officers.

The joint arrangements the Prime Minister has now secured with Queensland, under which day-to-day management will be by Queensland officials, will utilise these provisions of the Act.

These provisions are now to be reinforced by a consultative Ministerial Council comprising Commonwealth and State Ministers representing marine parks, conservation, science and tourism. The first section of the Great Barrier Reef Marine Park recommended by the Authority—the Capricornia Section—is to be processed by the Ministerial Council as an immediate task to enable early proclamation to take place. The ultimate power to declare areas to be part of the Marine Park is with, and will remain with, the Commonwealth.

In the debates in the Senate four years ago on the Great Barrier Reef Marine Park Act, I said: 'It is perfectly obvious that it is not a practical proposition for the Commonwealth Government or an authority of that Government to exercise powers within an area of this kind without having to co-operate at almost every point with the Government of the State which is adjacent to the area and which controls a large number of islands which are within the area'.

The joint arrangements with Queensland can only enhance the development and protection of the Great Barrier Reef.

Constitutional questions

In federations such as ours, there are difficult and intricate problems in matters of offshore jurisdiction. After a decade of Commonwealth-State disputes on the matter involving major litigation in the High Court, the point needs little elaboration.

Australia's experience in this is by no means unique. Similar questions arose in the United States and subsequently in Canada. In their cases, as in the case of Australia, the ruling of the highest constitutional tribunal was in favour of the central government. In their cases, as in our own case, it was found that the constitutional ruling was not the end of the matter.

Thus the High Court's decision in the *Seas and Submerged Lands* case in late 1975 in the event confirmed full jurisdiction on the part of the Commonwealth Parliament right up to low-water mark. However the decision also threw doubts on the adequacy of existing State extra-territorial powers in the territorial sea on a number of topics which history, common sense and the sheer practicalities of the matter mark out for State administration rather than Commonwealth administration, in the absence of overriding national or international considerations.

Port facilities are one example. The enforcement of the general criminal law in the territorial sea is another. The Commonwealth Crimes at Sea Act, which will come into operation in the near future, recognises that generally it is for the States to deal with crimes in the territorial sea.

Agreement in principle was reached at the Premiers Conference in 1977 with all States that the territorial sea should therefore be the responsibility of the States. The Conference stipulated that this was not to affect the Commonwealth's international responsibilities and marine parks were not dealt with. Implementation of the 1977 Agreement was considered at the 1978 Premiers Conference which agreed to an extension of State powers to the territorial sea, supported by appropriate amendments of the Seas and Submerged Lands Act and the vesting of appropriate rights in the States in respect of the seabed in the territorial sea.

Commonwealth responsibility

It would be a mistake however to see the proposed implementation of these arrangements as representing an abdication by the Commonwealth Government of its own national and international responsibilities in relation to the territorial sea. Thus, the arrangements agreed with Queensland recognise that the implementation of the 1978 Premiers Conference with respect to the territorial sea will be subject to the Great Barrier Reef Marine Park Act and the decisions on the Reef announced by the Prime Minister on 4 June.

There may be some who would prefer an abdication by the Commonwealth of these responsibilities. However that is no part of our proposals. I repeat what I have said in the Senate:

The discussions with the States are on the basis of the exercise by this Parliament—not anybody else—of its constitutional power. We are not talking about giving away the ultimate constitutional power of this Parliament.

23 June 1979

Commonwealth-Western Australian Offshore Petroleum Joint Authority

Special Agreement relating to its establishment, Premiers Conference

1. Present Commonwealth legislation would be amended to provide for the establishment of a Joint Authority consisting of the State Minister and the Commonwealth Minister. Under these arrangements applications will be made to the State Minister. The day-to-day administration will remain with the State.

2. Having regard to the special position of Western Australia, special provisions are agreed in the case of the Western Australian Joint Authority as follows:

- (a) Headquarters of the Joint Authority will be located at Perth.
- (b) In the event of disagreement, the Commonwealth has power to veto decisions proposed by the State where the decision would endanger or prejudice the national interest.
- (c) If the Commonwealth Minister proposes to recommend the exercise of the power of veto, he shall communicate this proposal to the State Minister as soon as practicable but within 30 days and he shall specify in what respect the national interest would be endangered or prejudiced.
- (d) Should the State Premier wish to do so, he may make representations to the Prime Minister who after consideration by the Cabinet shall be responsible for resolution of the issue.
- (e) Distribution of functions would be the same as for other States but subject to the above.

29 June 1979

Offshore powers a milestone

*Statement by the Commonwealth Attorney-General,
Senator the Hon. Peter Durack, Q.C.*

The Attorney-General, Senator Peter Durack, Q.C., issued the following statement today to the *Australian*.

Your newspaper and its legal writer, Trish Evans, are to be congratulated on focusing attention on the important decisions made at the Premiers Conference on a new offshore settlement between the Commonwealth and the States (the *Australian*, 16 July).

As I pointed out in a recent statement from which your legal writer quoted, in federations such as ours there are difficult and intricate problems in matters of offshore jurisdiction. Australia's experience in this is by no means unique as similar questions arose in the United States and subsequently in Canada. In their cases, as in the case of Australia, the constitutional ruling by the courts was that full jurisdiction on the part of the central government extended right up to low-water mark.

The offshore constitutional settlement that has now been agreed upon aims to balance this decision. It will ensure that the States will have adequate powers to deal with matters in the territorial sea. History, common sense and the sheer practicalities make these matters for State administration rather than central control, in the absence of overriding national or international considerations.

As part of the constitutional settlement the Commonwealth Parliament on the request of all the States is to pass a Powers Bill extending State powers in the 3 mile territorial sea. As your legal writer correctly observes this legislation will be passed under a previously unused power contained in section 51 (38) of the Australian Constitution. This section enables Commonwealth and State Parliaments if they concur to produce legislative results that could only have been accomplished by the United Kingdom Parliament at the time of the establishment of the Australian Constitution.

Your legal writer finds this proposal 'fraught with problems'. I think that a little reflection on the alternatives and the difficulties they would present—a national referendum or an approach to the United Kingdom Parliament—indicates that resort to section 51 (38) is the most practicable course.

It is certainly true that section 51 (38) has never been used before and therefore the outcome of any challenge cannot be known with

certainty. Sir Robert Megarry at the recent Australian Legal Convention quoted some words of Lord Denning on doing things for the first time:

What is the argument on the other side? Only this, that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before, we shall never get anywhere. The law will stand still whilst the rest of the world goes on: and that will be bad for both.

Be that as it may, the legal basis for the implementation of the constitutional settlement, so far as the territorial sea is concerned, will also rest on other foundations. The full extent of existing State extra-territorial powers is perhaps unclear, but the High Court has made it abundantly clear that the States do possess significant extra-territorial powers in their own right. In 1976 in *Pearce v. Florencia* the Court specifically upheld Western Australian laws regulating fishing in the territorial sea.

In addition, however, the Commonwealth proposes under the constitutional settlement to give the States title to the seabed in the 3 mile territorial sea, while preserving Commonwealth use of the seabed for certain specified national purposes.

The important step of conferring seabed title on the States, which was taken also in the United States, will not only assist the implementation of the settlement but will also provide a reasonable guarantee that the settlement will not lightly or ever be overturned.

The offshore settlement is a practical and workable solution of a problem which has bedevilled Commonwealth-State relations for a decade. This solution, including the proposed use of section 51 (38) which has been agreed on by all State Premiers, constitutes a milestone in Commonwealth-State co-operation under our Federation.

Canberra
19 July 1979

Constitutional Powers (Coastal Waters) Bill 1979—Victoria

*Second Reading Speech by the Victorian Attorney-General,
the Hon. Haddon Storey, Q.C., M.L.C.*

The Bill stems from a High Court case in which all States challenged the validity of the Commonwealth Seas and Submerged Lands Act. The High Court decided by a majority that the boundaries of the States stopped at the low-water mark and that the territorial sea was not part of the State.

Before the seas and submerged lands case there had been what the High Court called 'a common misconception' that the territorial sea adjacent to each State was part of the State territory. Upon this basis there was Colonial and, after Federation, State legislation governing activities in the territorial sea as, until the High Court's decision, it had been considered to be the property of and under the control of the States. The States had previously believed that such resources as there were in the territorial seas belonged to the States.

The High Court held that this was not the position and furthermore that the Commonwealth has legislative power in respect of what lay beyond the low-water mark under its external affairs power, excluding internal waters. The States and the Commonwealth considered the decision to be very inconvenient—for example, the Commonwealth did not have the facilities or the wish to exercise responsibility over the territorial sea.

Accordingly the Commonwealth agreed that the States should be put, so far as possible, in the position they believed they were in before the High Court case.

At the October 1977 Premiers Conference, it was agreed that the territorial sea should be the responsibility of the States and that, in order to overcome problems caused by the High Court's decision on the validity of the Seas and Submerged Lands Act, the limits of the powers of the States should be extended to embrace the territorial sea.

These problems are:

- (i) The uncertainty of operation of State laws in the territorial sea—As a consequence of the High Court's ruling that the coastal boundaries of the States end at low-water mark, there arose the necessity for the legislature to ensure that the civil

and criminal law applies in the territorial sea by clearly enunciating an intention that it should so operate. There is a presumption, however, that the legislature intends laws to operate within the territorial limits of the State.

- (ii) Uncertainty as to State extra-territorial legislative competence in the territorial sea—Only those State laws which satisfy the necessary criterion of being for the peace, order and good government of the State may validly operate in the offshore area. This requirement of nexus does not exist in relation to State laws which operate within State territory.
- (iii) Possible invalidity of State laws with respect to such matters as seabed mining, marine parks, marine pollution and ports and harbours and sea protection works beyond State limits and so on—These laws may be invalid for inconsistency with the Seas and Submerged Lands Act and/or lack of nexus with the State. Doubts as to the validity of these laws would be removed if State territory included the territorial sea.
- (iv) Practical legal problems which arise from the difficulty in determining the precise location of State maritime limits—It is difficult, if not impossible, to determine the closing lines of State internal waters in some parts of the coastline, for example Portland and Port Fairy, because the High Court has not yet seen fit to expound the relevant legal principles. Elucidation is likely to be on a case-by-case basis. Furthermore, the location of low-water mark on the coast is also a matter of difficulty and uncertainty. By taking the State boundary to the outer limit of the territorial sea, these legal problems will be considerably reduced.
- (v) The potential problems arising from the Commonwealth's new found legislative power beyond low-water mark—The High Court decision confirmed to the Commonwealth an external affairs power which is larger than had been previously thought. The Commonwealth may now have the potential to pass laws to operate beyond low-water mark on any subject. If this potential were realised the valid operation of many State laws would be excluded by virtue of section 109 of the Constitution. An extension of State limits to embrace the territorial sea would result in the Commonwealth being precluded from enacting legislation under the external affairs power in the relevant area, except for the purpose of implementing a convention.

Various methods were considered to give effect to the Premiers Conference decision, but the one that seemed to have general acceptance was an exercise under section 51 (xxxviii) of the Constitution whereby the States could request the Commonwealth to pass legislation giving to the States the same legislative powers in respect of the territorial sea

as they have on the land mass. Section 51 (xxxviii) authorises the Commonwealth to make laws with respect to 'The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australia'. This means, of course, that the territorial sea would be still subject to the possible exercise of Commonwealth legislation under section 51 of the Constitution as is the land mass at present.

The Bill has been drawn under the auspices of the Standing Committee of Attorneys-General at the request of the Premiers Conference and has been endorsed by both those bodies.

The Bill is to be coupled with the Commonwealth titles legislation under which the Commonwealth, in exercise of its external affairs power and its sovereignty over the territorial sea, is to grant title to the States over the territorial sea. That measure is regarded as a safeguard as any subsequent expropriation will be subject to the payment of compensation under the Constitution.

The Prime Minister is most anxious to introduce Commonwealth legislation during this spring sessional period of the Commonwealth Parliament and can do so only when all States have passed the necessary request and consent legislation. The Standing Committee of Attorneys-General, at its July 1979 meeting, agreed that the Bill should be presented to State Parliaments as soon as possible.

The opportunity is also taken in the Bill to confirm the extra-territorial legislative competence of the States beyond coastal waters in respect of subterranean mining from land within the limits of a State, port type facilities and fisheries. This measure represents a milestone in Commonwealth State co-operation. For the benefit of honorable members, I have circulated some clause notes with the Bill. I commend the Bill to the House.

19 September 1979

Constitutional Powers (Coastal Waters) Bill 1979—Victoria

A BILL

for

An Act to request the Parliament of the Commonwealth to enact an Act to extend the legislative Powers of the States in and in relation to Coastal Waters.

WHEREAS it has been agreed between the Government of the Commonwealth and the Governments of the States of Australia that the legislative powers of the States in and in relation to Coastal Waters should be extended by an Act of the Parliament of the Commonwealth enacted at the request of the Parliaments of the States in pursuance of paragraph (xxxviii.) of section 51 of the Constitution of the Commonwealth of Australia:

Be it therefore enacted by the Queen's Most Excellent Majesty by and with the advice and consent of the Legislative Council and 10 the Legislative Assembly of Victoria in this present Parliament assembled and by the authority of the same as follows (that is to say):

1. (1) This Act may be cited as the *Constitutional Powers (Coastal Waters) Act 1979*.
15 (2) This Act shall come into operation on the day upon which it receives the Royal Assent.

2. The Parliament requests the enactment by the Parliament of the Commonwealth of an Act in, or substantially in, the terms set out in the Schedule.

1—[13]—850/9.10.1979—2413/79

Request for
enactment of
Commonwealth
Act.

SCHEDULE

SCHEDULE**AN ACT**

To extend the legislative powers of the States in and in relation to coastal waters.

Preamble.

WHEREAS, in pursuance of paragraph (xxxviii.) of section 51 of the Constitution of the Commonwealth, the Parliaments of all the States have requested the Parliament of the Commonwealth to enact an Act in, or substantially in, the terms of this Act:

Be it therefore enacted by the Queen, and the Senate and House of Representatives of the Commonwealth of Australia, as follows:

Short title.

1. This Act may be cited as the *Coastal Waters (State Powers) Act 1979*.

Commencement.

2. This Act shall come into operation on a date to be fixed by Proclamation.

Interpretation.

3. (1) In this Act—

“adjacent area in respect of the State” means, in relation to each State, the area the boundary of which is described under the heading referring to that State in Schedule 2 to the *Petroleum (Submerged Lands) Act 1967* as in force immediately before the commencement of this Act;

“coastal waters of the State” means, in relation to each State—

(a) the part or parts of the territorial sea of Australia that is or are within the adjacent area in respect of the State, other than any part referred to in sub-section 4 (2); and

(b) any sea that is on the landward side of any part of the territorial sea of Australia and is within the adjacent area in respect of the State but is not within the limits of the State or of a Territory.

(2) The *Acts Interpretation Act 1901*, in the form in which it was in force, as amended, immediately before the day on which this Act received the Royal Assent, applies to the interpretation of this Act.

Extent of territorial sea and coastal waters.

4. (1) For the purposes of this Act, the limits of the territorial sea of Australia shall be the limits existing from time to time, ascertained consistently with the *Seas and Submerged Lands Act 1973* and instruments under that Act and with any agreement (whether made before or after the commencement of this Act) for the time being in force between Australia and another country with respect to the outer limit of a particular part of that territorial sea.

(2) If at any time the breadth of the territorial sea of Australia is determined or declared to be greater than 3 nautical miles, references in this Act to the coastal waters of the State do not include, in relation to any State, any part of the territorial sea of Australia that would not be within the limits of that territorial sea if the breadth of that territorial sea had continued to be 3 nautical miles.

Legislative powers of States.

5. The legislative powers exercisable from time to time under the constitution of each State extend to the making of—

(a) all such laws of the State as could be made by virtue of those powers if the coastal waters of the State, as extending from time to time, were within the limits of the State, including laws applying in or in relation to the sea-bed and subsoil beneath, and the airspace above, the coastal waters of the State;

SCHEDULE

SCHEDULE—*continued*

- (b) laws of the State having effect in or in relation to waters within the adjacent area in respect of the State but beyond the outer limits of the coastal waters of the State, including laws applying in or in relation to the sea-bed and subsoil beneath, and the airspace above, the first-mentioned waters, being laws with respect to—
- (i) subterranean mining from land within the limits of the State; or
 - (ii) ports, harbours and other shipping facilities, including installations, and dredging and other works, relating thereto, and other coastal works; and
- (c) laws of the State with respect to fisheries in Australian waters beyond the outer limits of the coastal waters of the State, being laws applying to or in relation to those fisheries only to the extent to which those fisheries are, under an arrangement to which the Commonwealth and the State are parties, to be managed in accordance with the laws of the State.

6. Nothing in this Act affects the status of the territorial sea of Australia under international law or the rights and duties of the Commonwealth in relation to ensuring the observance of international law, including the provisions of international agreements binding on the Commonwealth and, in particular, the provisions of the Convention on the Territorial Sea and the Contiguous Zone relating to the right of innocent passage of ships.

International
status of
territorial sea.

7. Nothing in this Act shall be taken to—

Savings.

- (a) extend the limits of any State;
- (b) derogate from any power existing, apart from this Act, to make laws of a State having extra-territorial effect; or
- (c) give any force or effect to a provision of a law of a State to the extent of any inconsistency with a law of the Commonwealth or with the Constitution of the Commonwealth of Australia or the Commonwealth of Australia Constitution Act.

Capricornia Section of the Great Barrier Reef Marine Park

Commonwealth of Australia Gazette, No. S 212, 21 October 1979.

PROCLAMATION

Commonwealth of
Australia
ZELMAN COWEN
Governor-General

By His Excellency the
Governor-General of
the Commonwealth of
Australia

WHEREAS it is provided by sub-section (1) of section 31 of the *Great Barrier Reef Marine Park Act 1975* that, subject to sub-section (5) of that section, the Governor-General may, by Proclamation, declare an area specified in the Proclamation, being an area within the Great Barrier Reef Region, to be a part of the Great Barrier Reef Marine Park and assign a name or other designation to that area:

AND WHEREAS it is provided by sub-section (5) of that section that the Governor-General shall not make a Proclamation under that section except after consideration by the Federal Executive Council of a report by the Great Barrier Reef Marine Park Authority in relation to the matter dealt with by the Proclamation:

AND WHEREAS the Federal Executive Council has considered a report by the Great Barrier Reef Marine Park Authority in relation to the declaration of so much of the area specified in the Schedule as is within the Great Barrier Reef Region to be a part of the Great Barrier Reef Marine Park:

NOW THEREFORE I, Sir Zelman Cowen, the Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, hereby—

- (a) declare so much of the area specified in the Schedule as is within the Great Barrier Reef Region to be a part of the Great Barrier Reef Marine Park;
- (b) assign the name 'Great Barrier Reef Marine Park—Capricornia Section' to the area so declared (hereinafter referred to as the 'declared area');
- (c) specify the depth of 1000 metres below the seabed beneath any sea within the declared area as the depth below that seabed to which the sub-soil beneath that seabed shall be taken to be in the Great Barrier Reef Marine Park;

- (d) specify the depth of 1000 metres below the surface of any land within the declared area as the depth below that surface to which the sub-soil beneath that land shall be taken to be in the Great Barrier Reef Marine Park; and
- (e) specify the height of 915 metres above the surface of the declared area as the height above that surface to which the airspace above that area shall be taken to be in the Great Barrier Reef Marine Park.

SCHEDULE

Description of Declared Area

The boundary of which-

- (a) commences at a point of Latitude 22° 30' South, Longitude 151° 30' East;
- (b) runs thence south-easterly along the geodesic to a point of Latitude 23° 10' South, Longitude 152° 10' East;
- (c) runs thence south-easterly along the geodesic to a point of Latitude 24° 15' South, Longitude 153° 05' East;
- (d) runs thence west along the parallel of Latitude 24° 15' South to its intersection with meridian of Longitude 152° 40' East;
- (e) runs thence north-westerly along the geodesic to a point of Latitude 23° 45' South, Longitude 151° 55' East;
- (f) runs thence west along the parallel of Latitude 23° 45' South to its intersection with meridian of Longitude 151° 30' East; and
- (g) runs thence north along the last-mentioned meridian to the point of commencement.

(L.S.) GIVEN under my Hand and the Great Seal of Australia on the seventeenth day of October 1979.

By His Excellency's Command,

J. J. WEBSTER

Minister of State for Science and the Environment

GOD SAVE THE QUEEN!

Australian laws to apply to offences at sea

*Statement by the Commonwealth Attorney-General,
Senator the Hon. Peter Durack, Q.C.*

The Attorney-General, Senator Peter Durack, Q.C., announced in Townsville today that the Federal Crimes at Sea Act would come into operation next Thursday, 1 November.

Its application will coincide with the commencement of the 200 mile offshore fishing zone around Australia.

Senator Durack said the Crimes at Sea Act would ensure that Australian criminal laws—mainly State laws—would apply to Australian ships and to offshore areas coming within Federal authority on a sound and up-to-date legal footing.

The new Act would correct a position that had required attention for some time. The Privy Council pointed out in 1977 that Australian passengers who crossed the Bass Strait by ship from Melbourne to Launceston were still governed by English criminal law. This was a relic of the Admiralty jurisdiction inherited from England, he said.

The Crimes at Sea Act resulted from consultations with the States in the Standing Committee of Attorneys-General. The approach adopted was a 'federal' one under which the law of an appropriate State or Territory would be applied to offences at sea coming under Australian jurisdiction.

The Attorney-General said that under the scheme arrived at with the States, it was primarily a matter for the States to legislate for offences committed on voyages between two ports in one State, or where a particular voyage began and ended at the same port in a State.

An Australian ship engaged in an interstate voyage would be subject to the law of the State where the ship was registered. The Attorney-General said this should facilitate law enforcement and would resolve in a practical way the uncertainties and doubts that had existed. He said: 'It is a practical solution that fits in with our federal system'.

The Act did affect the application of existing specific federal criminal laws. 'Specific federal offences will continue to be dealt with, as now, under the special Commonwealth legislation in question, for example the Customs Act. However, the application of State criminal laws by the Act will help law enforcement generally on matters such as drug offences', he said.

Explaining the overall scope of the Act, Senator Durack said that from 1 November it would apply to offences committed on or from Australian

ships which were on overseas, interstate or on Territory voyages. For these purposes the Northern Territory was treated as if it were a State.

The Act would also apply to offences on Australian ships in foreign ports and to offences by Australian citizens on foreign ships where they are not members of the crew.

The Attorney-General said that in certain limited cases the Act could also be supplied to offences committed on or from foreign ships. The consent of the Commonwealth Attorney-General was required and was only to be given if the consent of the foreign State was obtained. This special jurisdiction would only be resorted to where necessary to ensure that serious criminal offences did not go scot-free for lack of an applicable law.

Provision was also made in the Act for the applications of the criminal laws of an appropriate State or Territory in relation to other activities coming under Australian jurisdiction outside the territorial sea. For example, activities on petroleum rigs of the Australian Continental Shelf would, as at present, continue to be subject to the law of the adjacent State or Territory.

Provision could also be made in relation to any offences by Australian citizens or residents in adjacent areas outside the territorial sea, but it was not proposed to use this power at present.

Senator Durack said the Act contained innovative provisions which allowed for the removal of proceedings from a Court in one part of Australia to a Court in another part of Australia where that would be expedient to avoid hardship on the accused or to promote a speedy trial.

'Care has been taken to fashion a system of criminal administration that will function smoothly, fairly and expeditiously.' He said that it was a significant example of corporative federalism and acknowledged the co-operation of the States in the matter.

Townsville

26 October 1979

Offshore Constitutional Responsibilities— Historic Shipwrecks and the proposed use of section 51 (38) of the Constitution

*Letter by the Commonwealth Attorney-General,
Senator the Hon. Peter Durack, Q.C.
(published in 54 ALJ 49)*

Dear Sir,

Your September number (53 ALJ 605) drew attention to the important decisions made at the Premiers' Conference on 29 June 1979 for a practicable and workable distribution of offshore constitutional responsibilities between the Commonwealth and the States. The note gives an excellent summary of the decisions (now in the course of being implemented), and I want to comment on only two things.

The reference to the *Historic Shipwrecks Act* 1976 is possibly capable of giving a misleading impression of what is proposed in that regard. To understand the proposal, it is necessary to appreciate the present position. The Historic Shipwrecks Act as presently drafted does not apply in relation to waters adjacent to the coast of any State until a proclamation has been made declaring that the Act so applies. In practice, proclamations have only been made where the adjacent State requested it. The result to date is that the Act applies to the waters adjacent to Western Australia, Queensland and New South Wales. The Act applies automatically to waters adjacent to the Territories. The present position is therefore that the Act is applicable to historic shipwrecks in the waters around most, but not all, of the Australian coast.

Under the offshore settlement agreed to at the Premiers' Conference the Act is to be amended so that it will expressly state that it will only be applied, or continue to be applied, to the waters adjacent to a State with the consent of that State. However, this general principal, now to be spelt out in the Act, is qualified in relation to old Dutch shipwrecks off Western Australia. These shipwrecks are the subject of a special agreement between the Commonwealth and the Netherlands. They are covered by the Historic Shipwrecks Act at the moment, and are to continue to remain under the Commonwealth Act until satisfactory alternative arrangements are made with Western Australia. Western Australia has already proposed discussions for such arrangements. Its State authorities of course have a fine record in taking steps to protect

these shipwrecks and the relics from them, notwithstanding the legal difficulties illustrated by *Robinson v. Western Australia Museum* (1977) 51 ALJR 806 referred to in your note.

'Reservations' are expressed in your note concerning the proposed use of section 51 (38) of the Constitution to extend State powers in the 3 mile territorial sea and to give the States powers, in addition, in respect of port-type facilities, underground mining and fisheries outside the territorial sea limits. (The proposed extra-territorial power with respect to fisheries, it should be noted, applies only to those fisheries that are, under an arrangement to which the Commonwealth and the States are parties, to be managed in accordance with the laws of the State concerned.)

It is true that section 51 (38) is an untested power. However, it appears to enable Commonwealth and State Parliaments, acting in unison, to exercise all the powers that at the establishment of the Constitution could be exercised only by the British Parliament. Sir Samuel Griffith had this to say at the 1891 Convention (*Debates*, p. 524) on the provision that now appears as section 51 (38):

We are aware, sir, that there are many things now upon which the legislatures and governments of the several Australian colonies may agree, and upon which they may desire to see a law established; but we are obliged, if we want that law made, to go to the Parliament of the United Kingdom, and ask them to be good enough to make the law for us; and when it is made we will obey it. I contend, for myself, as I have had an opportunity of saying before, that after the federal parliament is established anything which the legislatures of Australia want done in the way of legislation should be done within Australia, and the Parliament of the Commonwealth should have that power.

Yours sincerely,
PETER DURACK

General Editor
Australian Law Journal
19 November 1979

Index

(References are to sections of the book not page numbers)

Aboriginal Land Trust: 7.7.9

Adjacent areas: 4.2, 4.3, 4.7.6

Admiralty law

- aircraft threats: 5.6.8
- cooperation with police: 5.9
- constitutional framework: 5.2
- criminal jurisdiction: 4.1, 4.3
- customs powers: 5.5.3
- extent of offshore area: 5.4
- fisheries powers: 5.5.2
- immigration powers: 5.5.5
- introduction: 5.5.1
- military commissions: 5.10
- offshore installations powers: 5.5.6
- ordinary border protection powers: 5.5
- quarantine powers: 5.5.4
- rules of engagement: 5.7
- structure and administration: 5.2.3
- superior orders defence: 5.8
- use of force: 5.7

Antarctic Territory *see* Australian Antarctic Territory

Applied laws: 3.4.2.3

Areas to be avoided: 3.4.4

Ashmore and Cartier Islands Territory

- Fisheries Agreement with Indonesia: 7.2.2, 10.8.3
- legislation: 10.8.1
- offshore laws: 10.8.2

Atkinson, Premier HA: 9.4.1

Australian Antarctic Division: 9.4.1, 9.4.2

Australian Antarctic Territory

- Antarctic Treaty 1959: 9.2.3
- Conventions on: 9.2.4, 9.2.5
- continental shelf of: 9.6
- environmental protection: 9.2.4, 9.2.5, 9.2.6, 9.3.3, 9.3.4, 9.3.5, 9.3.6, 9.3.6
- exploration: 9.2.1
- legislation: 9.3.1, 9.3.2
- marine living resources: 9.2.5

Australian Antarctic Territory (cont)

maritime claims: 9.2.7
outer continental shelf claim: 9.6
seals – conservation of: 9.2.4
territorial claims: 9.2.2
treaties: 9.2.3, 9.2.4, p2.5, 9.2.6
whaling: 9.7

Australian Coastguard: 11.15, 13.3

Australian Customs and Border Protection Service: 7.3, 8.12
also see Customs

Australian Fisheries Management Authority: 7.3, 7.4.5, 7.6, 8.12

Australian Fishing Zone: 7.2.1, 9.3.4

Australian Industrial Relations Commission: 2.7

Australian Law Reform Commission: 4.3

Australian Maritime Safety Authority: 11.4.2, 11.11, 11.13, 11.14, 12.2.2

Australian Quarantine and Inspection Service: 7.3, 8.10.1, 8.12

Australian Strategic Policy Institute: 13.3

Australian Transport Safety Bureau: 11.8.2

BHP: 2.2

Bogen, Peter: 9.5.1

British Settlement in 1788: 1.2, 4.2

Border Protection Command: 7.3, 8.8, 8.12, 13.3

Bronitt, Simon: 5.6.7, 5.7

Burton, Joseph: 9.4.1

Bush, President George W: 5.10

Carriage of Goods by Sea: 11.6

Christmas Island Territory *see* Indian Ocean Territories and Cocos (Keeling) Islands Territory

Coastal Waters: 3.4.2.1

Coast Guard-proposal for: 13.3

Clunies-Ross, Governor John: 10.4.2

Cocos (Keeling) Islands Territory and Christmas Island Territory

administration and governance: 10.7.4
geographical location: 10.7.1
history: 10.7.2
judiciary: 10.7.5
legislation: 10.7.3
location: 10.7.1
offshore laws: 10.7.6

INDEX

Collisions: 11.8.1, 11.8.2

Colombos, John: 7.7.1.1

Colonial period

 British settlement in 1788: 4.2
 early courts: 1.2.2
 Constitution: 1.3
 Federation: 1.3, 2.1
 First Charter of Justice: 1.2
 fisheries: 1.2.6.3
 legislative independence: 2.5
 Letters Patent: 1.2
 offshore jurisdiction: 1.2.6
 territorial limits: 1.2.3

Comite Maritime International: 11.2

Commission for the Conservation of Antarctic Marine Living Resources: 9.2.3

Commission on the Limits of the Continental Shelf: 2.8, 9.2.7, 9.6

Commonwealth defence power

also see Defence
 call out power: 5.2.2
 defence and the Constitution: 5.2.1
 executive power and the Constitution: 5.2.3
 introduction: 5.2

Commonwealth external affairs power

 analysis and early cases: 2.6, 2.7
 cases 1975-1979: 2.4
 continental shelf: 2.3
 territorial sea: 1.3

Commonwealth Meteorological Service: 9.4.1

ConocoPhillips: 3.7.4

Continental shelf-extended: 9.6

Cook, Captains James: 9.2.1, 10.2.1

Cooperative Scheme for Crimes at Sea

also see Criminal law
 exceptions to the adjacent areas: 4.7.6
 Inner Adjacent Area: 4.7.2
 introduction: 4.7
 Jervis Bay Territory laws: 4.7.5
 Outer Adjacent Area: 4.7.3

Coral Sea Islands Territory

 legislation: 10.2.1
 offshore laws: 10.2.2

Counter-terrorism measures

Australian offshore area powers: 5.6.1, 5.6.3
designated area powers: 5.6.6
expedited activation: 5.6.2
general security areas powers: 5.6.5
operations: 5.6
powers: 5.6.7
special powers: 5.6.4
terrorism and offshore jurisdiction: 4.8

Criminal law

adjacent area: 4.2, 4.3, 4.7.6
Australian Commission for Law Enforcement
Australian Crime Commission: 4.4
Australian Federal Police: 4.9
Ball's Case: 4.3.1
British settlement in 1788: 4.2
Case-Pong Su ship: 4.10.1
cooperative scheme *see* Cooperative Scheme for Crimes at Sea
crimes at sea: 4.4, 4.5, 4.6, 4.7
Criminal Admiralty Jurisdiction and Prize – ALRC 1990 report: 4.3
Integrity Commission: 4.4
introduction: 4.1
Jervis Bay laws applied: 4.7.5
Joint Petroleum Development Area: 4.7.4
leading cases: 4.3, 4.10
Offshore Constitutional Settlement 1979: 4.5
Oteri's Case: 4.3.2
police offshore powers: 4.9
Pong Su ship case: 10.4.1
terrorism and offshore jurisdiction: 4.8
Uniform Scheme for Crimes at Sea 1979: 4.5

Customs and trade

prohibited exports: 8.4.2
prohibited imports – *also see* Narcotics: 8.4.1
sea and resource installations: 8.3

Customs Marine Unit vessels: 8.8.1

Customs

also see Australian Customs and Border Protection Service, Quarantine and Excise
arrest: 8.8.2.6
boarding and search: 8.8.2.4
Border Protection Command: 8.12
cases: 8.13
chase for boarding: 8.8.2
Customs Act 1901: 8.2
detention: 8.8.2.5
forfeiture: 8.9, forfeiture case 8.13.3

INDEX

goods-at what point imported: 8.13.1
hot pursuit: 8.8.2.2
narcotics: 8.5, prohibited drug case 8.13.4
powers: 8.8.2, 8.8.3
request to board: 8.8.2.1
sea installations: 8.3
trade: 8.8.4
use of force: 8.8.2.3

Darling, Lieutenant-General Ralph: 9.4.1

Defence laws offshore

ADF and aircraft threats: 5.6.8
ADF and customs powers: 5.5.3
ADF and fisheries powers: 5.5.2
ADF and immigration powers: 5.5.5
ADF and offshore Installations powers: 5.5.6
ADF and quarantine powers: 5.5.4
border protection powers: 5.5
call out and the constitution: 5.2.2
cooperation with police: 5.9
constitutional framework: 5.2
counter-terrorism operations: 5.6
counter-terrorism activation: 5.6.1
counter-terrorism in the offshore area: 5.6.3
counter-terrorism special powers: 5.6.4
counter-terrorism powers in general security areas: 5.6.5
counter-terrorism powers in designated areas: 5.6.5
defence and the constitution: 5.2.1
defence of superior orders: 5.8
executive power and the constitution: 5.2.3
extent of offshore area; 5.4
military commissions: 5.10
piracy: 5.11
restrictions on the use of force: 5.7
salvage claims: 5.12

de Kerguelen-Trémarec, Yves-Joseph: 9.2.1

Dodds, Klaus: 9.2.2

Enderby, Charles: 9.5.1

Esso Exploration Australia Inc: 2.2

Evans, Senator Chris: 6.6

Excise duties: 8.11, 8.13

Exclusive Economic Zone: 2.8, 7.2.1, 9.2.3, 9.2.7, 9.3.2, 9.3.5, 9.4.2, 9.6, 9.7,
10.2.5, 10.4.5, 10.5.2, 10.6.2, 11.3, 11.12.1, 11.13, 12.2.1, 12.4.1

Federal Council: 1.2.6.1

Federation: 1.3, 2.1

Fisheries law

Australian Antarctic Territory: 7.2.5
also see under Australian Antarctic Territory
Australian Fisheries zone (AFZ): 7.2
cases: 7.7
Chen Long case: 7.7.6
civil and criminal proceedings: 7.4.5, 7.7.1
constitutional settlement-offshore: 2.5
defence and police powers: 7.4.7
East Timor and JPDA: 7.2.3
Fisheries Management Act 1991: 7.4
forfeiture *also see* Ship arrest: 7.5, 7.7.1, 7.7.7
Indonesian boundary and agreements: 7.2.2
Indonesian fisheries agreement: 10.8.3
inter-tidal zones: 7.7.9
introduction: 7.1
leading cases: 7.7
management: 7.4
mother ships: 7.7.7
offences: 7.4.6
Offshore Constitutional Settlement: 2.5
pursuit powers: 7.4.3
search powers: 7.4.2
Tauruman case: 7.7.3
Torres Strait: 7.2.4 *also see* Torres Strait
unreported and unregulated fishing: 7.3
use of force: 7.4.4
Viarsa 1 litigation: 7.7.2
Volga litigation: 7.7.1
whaling: 7.7.3, 7.7.4, 9.2.1, 9.7
zones and boundaries: 7.2

Fishing Industry Policy Council: 7.6

Food and Agriculture Organization: 7.3

Great Barrier Reef Marine Park

characteristics: 12.2.1.1
criminal laws: 12.2.2.2
environment protection: 12.2.1, 12.2.2.5
fisheries laws: 12.2.2.3, 12.2.3.4
Great Barrier Reef Marine Park Act 1975: 12.2.2.1
installations: 12.2.2.6
legislation establishing: 12.2.2.1
managing authority: 12.2
marine environmental protection: 12.2.2.4
pilotage: 12.2.2.7
Queensland state laws: 12.2.3
ship reporting: 12.2.2.8

Hamilton, A: 9.4.1

INDEX

- Hasselborough, Captain Frederick:** 9.4.1
- Headland, Robert:** 9.2.1
- Heard Island and McDonald Islands**
legislation: 9.5.2, 10.7
territorial claims: 9.5.1, 10.7
- Heard, Captain John:** 9.5.1
- Hematite Petroleum Pty Ltd:** 2.2
- Immigration law**
boarding at sea: 6.4.1.2
cases: 6.9
constitutional issues: 6.3, 6.4.3, 6.9.6
contiguous zone: 6.3.2
detention: 6.4.1.1, 6.4.3, 6.6, 6.9.6
excised offshore places: 6.3.5
extradition: 6.8.2
health: 6.4.5
international agreements: 6.7
introduction: 6.1
Migration Zone: 6.3.3
officials' powers: 6.4.1, 6.4.2
offshore migration offences: 6.4.4
passports: 6.8.3
reasonable suspicion: 6.9.3
reforms: 6.6
refugees: 6.3.4
review and appeal processes: 6.5, 6.9.5
Tampa incident: 6.3.5, 6.9.1
territorial sea: 6.3.1, 11.12.1
Torres Strait and its protected zone: 6.3.6
use of force: 6.4.1.4
- Indian Ocean Territories:** 10.7
- Indonesian fisheries agreement:** 7.2.2, 10.8.3
- Institute of Cetacean Research, Japan:** 9.7
- International Maritime Organisation:** 4.6, 11.2, 11.8.1, 11.11, 12.2.1, 12.3.4
- International Union for the Conservation of Nature:** 12.4.3
- International Whaling Commission:** 9.7
also see Whaling
- Jervois, Governor William:** 9.4.1
- Joint Petroleum Development Area (JPDA)**
criminal issues: 4.7.4
fisheries: 7.2.3
Timor Leste: 3.7
Timor Sea Treaty 2002: 3.7.2
Treaty on Certain Maritime Arrangements 2006 (CMATS): 3.7.4

Keeling, Captain William: 10.4.2

Kemp, Peter: 9.5.1

Knutsford, Lord: 9.4.1

Kyodo Sepaku Kaisha Ltd: 9.7

Law of the Sea

International Court of Justice: 3.7.1, 9.7

International Tribunal for the Law of the Sea: 3.7.4, 7.5.3, 7.7.1.6, 7.7.8,
9.7

principles: 2.3

Lazarev, Mikhail: 9.1

Lord Howe Island: 10.4

Macquarie Island

legislation: 9.4.2

sovereign status: 9.4.1

Macquarie, Governor Lachlan: 9.4.1

Marine insurance: 11.7

Marine parks *see* Offshore marine parks

Marine pollution

intervention in marine casualties: 11.11

rollback provisions: 2.6

ship-sourced pollution: 2.5, 9.3.6, 11.13,

Maritime offshore jurisdiction

colonial period: 1.2

customary international law: 1.2

introduction: 1.1

Maritime Powers Bill

Criminal law: 4.8, 4.11

customs, quarantine and excise: 8.8, 8.14

defence: 5.13

fisheries: 7.4.1, 7.8

immigration offshore: 6.4, 6.10

inquiry needed: 13.3

Proposal for Bill by Minister: Memorandum (front of book)

suggestions for inclusion by author: 13.3

terrorism: 3.4.5, 4.8, 4.11

Timor Sea Treaty 2002; 3.7.2

Maritime Safety Queensland: 12.2.3

Maritime Union of Australia: 2.7

Masters and pilots (customs): 8.6

Mawson, Douglas: 9.2.1, 9.2.2, 9.4.1

McDonald, Captain: 9.5.1

INDEX

Minerals offshore: 3.5

Narcotics

- customs powers: 8.5.3
- history: 8.5.1
- modern policy: 8.5.2

Native title *see* Offshore native title

Norfolk Island Territory: 10.3

- administration: 10.3.2
- history: 10.3.1
- judiciary: 10.3.3
- offshore laws: 10.3.4

O'Higgins, Bernardo: 9.2.2

Offshore Constitutional Settlement

- adjacent waters: 4.7.2, 4.7.3
- Background: 2.1
- coastal waters: 3.4.2.1
- crimes at sea: 2.5, 4.5, 4.5.1
- internal waters: 5.9
- fisheries: 2.5
- Great Barrier Reef: 12.2
- jurisdiction overlap: 8.14
- marine reserves: 12.4.6
- Petroleum Agreement: 2.2, 3.2, 3.8
- proposals for reform: 13.2
- revision-needed for: 13.2
- Premiers Conference 1979: 2.1, 2.5
- Standing Committee of Commonwealth and Senate Select Committee: 2.3
- State Attorneys-General: 2.2
- territorial sea limit: 2.1
- Uniform Scheme for Crimes at Sea: 4.5.1

Offshore marine parks

- also see* Great Barrier Reef Marine Park
- biosphere reserves: 12.4.5.4
- Commonwealth reserves: 12.4.3
- habitat protection: 12.4.5
- heritage-world: 12.4.5.1
- heritage-Commonwealth and national: 12.4.5.2
- historic shipwrecks: 12.4.5.3
- international conservation obligations: 12.4.2
- marine protected areas: 12.4.4
- New South Wales marine reserves: 12.4.6.2
- Northern Territory marine reserves: 12.4.6.7
- protected areas: 12.4.4
- Queensland marine reserves: 12.4.6.1
- South Australian marine reserves: 12.4.6.5

Offshore marine parks (*cont*)

Tasmanian marine reserves: 12.4.6.4
Victorian marine reserves: 12.4.6.3
Western Australian marine reserves: 12.4.6.6

Offshore minerals: 3.5

Offshore native title: 12.5

Offshore petroleum and mining

Administrative Appeals Tribunal: 3.6
Common Mining Code: 3.2
courts' jurisdictions: 3.4.3
designated authority: 3.4.8.2
Greater Sunrise gas project: 3.7.4
greenhouse gas storage amendments: 3.4.7
introduction: 3.4.1
joint authority: 3.4.8.1
Joint Petroleum Development Area: 3.6, 3.7 3.8, 4.7.4, 8.3
minerals: 3.5
National Offshore Petroleum Safety Authority: 3.4.6
National Oil and Gas Safety Advisory Committee: 3.4.6
occupational health and safety: 3.4.6
offshore areas and coastal waters: 3.4.2
Petroleum agreement: 2.2, 3.2, *also see* Offshore Constitutional Settlement
Petroleum Mining Code: 3.7.2
safety zones and areas to be avoided: 3.4.4
sea installations: 3.6
submerged lands: 3.3
terrorism: 3.4.5
Timor-Leste-Australia Commission: 3.7.4
Timor Sea areas: 3.7.6

Offshore territories

Ashmore and Cartier islands: 10.8
Christmas island: 10.7
Coral islands territory: 10.2
Cocos (Keeling) islands: 10.7
Heard islands and McDonald islands: 9.5, 10.6
Indian Ocean Territories: 10.7
Lord Howe island: 10.4
Macquarie island: 9.4, 10.5
Norfolk islands territory: 10.3

Offshore waters of a State: 3.4.2.2

Offshore zones

archipelagic waters: 2.8
Australian fisheries zone: 2.8
coastal waters: 2.8
contiguous zone: 2.8, 6.2.3

INDEX

- high seas: 2.8
- internal waters: 2.8
- outer continental shelf: 2.8
- territorial sea: 6.3.1
- Osaka Gas Co:** 3.7.4
- Particularly Sensitive Sea Areas**
 - also see* Offshore marine parks
 - Great Barrier Reef Marine Park: 12.2
 - Torres Strait: 12.3.3
- Petroleum agreement:** 2.2, 3.8
 - also see* Offshore petroleum and mining
- Pilotage and towage**
 - pilotage: 11.12.1
 - towage: 11.12.2
- Piracy**
 - definition: 5.11
 - introduction: 4.1
- Police offshore powers:** 4.9
- Pong Sue ship case:** 4.10.1
- Port State Control:** 11.14
- Quarantine**
 - also see* Australian Quarantine Inspection Service
 - Jurisdiction: 8.10.1
 - persons and goods: 8.10.4
 - powers: 8.10.5
 - Quarantine Act 1908: 8.10.1
 - vessels and installations: 8.10.3
- Queensland Coastal Contingency Action Plan:** 12.2.1
- REEFPLAN:** 12.2.1
- REEFREP:** 12.2.2, 12.2.3, 12.2.4
- REEFVTS:** 12.2.3, 12.2.4
- Reform of offshore constitutional settlement:** 13.2, 13.3
- Royal Australian Air Force:** 6.4.2
- Royal Australian Navy:** 6.4.2
- Royal Dutch/Shell Group:** 3.7.4
- Rudd, Prime Minister Kevin:** 6.4.3, 6.6
- Salvage**
 - also see* Admiralty law
 - historic shipwrecks: 11.10.2, 12.4.5.3
 - legislation: 11.10.3, 11.10.4
 - shipwrecks and salvage: 11.9
 - treatingies: 11.10.2
 - underwater cultural heritage: 11.10.1, 11.10.5

Safety zones: 3.4.4

Salvage

claims: 5.12

Scientific Committee on Antarctic Research: 9.2.3, 9.2.4

Scott, Captain Robert: 9.4.1

Scott, JH: 9.4.1

Shackleton, Sir Ernest: 9.4.1

Ship arrest

also see Admiralty law: 11.5
forfeiture (fisheries): 7.5.2, 7.5.3, 7.7.7
validity: 6.9.2

Ship registration

also see Admiralty law
nationality: 11.4.3
ownership: 11.4.1
registration: 11.4.2

Shipping law

also see Admiralty law
arrest of ships: 11.5
carriage of goods by sea: 11.6
collisions: 11.8
groundings: 11.8.2
international conventions: 11.2
marine casualty intervention powers: 11.11
marine insurance: 11.7
marine pollution: 11.13
Navigation Act 1912: 11.3
pilotage: 11.12.1
port state control: 11.14
salvage: 11.9
ship ownership: 11.4.1
ship nationality: 11.4.3
ship registration: 11.4.2
shipwreck: 11.9, 11.10
towage: 11.12.2
underwater cultural heritage: 11.10

Stephens, Dale: 5.6.7, 5.7

Stewart Royal Commission: 8.5.1

Southern Oceans *see* Australian Antarctic Territory, Macquarie island, Heard and Macdonald islands, Whaling

Tasmanian Parks and Wildlife Service: 9.4.1

Terrorism *see* Counter-terrorism measures

INDEX

Timor sea agreements

- background: 3.7.1
- JPDA: 3.7
- Petroleum (Timor Sea Treaty) Act 2003: 3.7.3
- Timor Sea Treaty 2002: 3.7.2
- Treaty of Certain Maritime Arrangements (CMATS) 2006: 3.7.4

Torres Strait

- compulsory pilotage: 12.3.4
- fisheries regulation: 12.3.2
- also see* Fisheries law
- particularly sensitive sea area: 12.3.3
- pilotage: 12.3.4
- protected zone: 7.2.1, 7.2.4, 12.3.2
- regional authority: 12.3.2
- shipping: 12.3.4
- Torres Strait treaty: 12.3.1

United Nations Educational, Scientific and Cultural Organisation:

- 12.4.4.4

von Bellinghausen, Fabian Gottlieb: 9.1

von Bellinghausen, Thaddeus: 9.4.1

Watts, Sir Arthur: 9.2.3

Whaling: 7.7.3, 9.7, 9.2.1

Wilkes, Charles: 9.4.1

Woodside Petroleum: 3.7.4

World Heritage Area

- also see* Offshore marine parks
- Commonwealth and national heritage: 12.4.5.2
- Great Barrier Reef: 12.2, 12.2.6, 12.4.5.1
- introduction: 9.4.2

Yacht obligations

- documentary reports: 8.7.1
- electronic reports: 8.7.2

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