

AUSTRALIA'S OFFSHORE LEGAL JURISDICTION: PART 2 – CURRENT SITUATION

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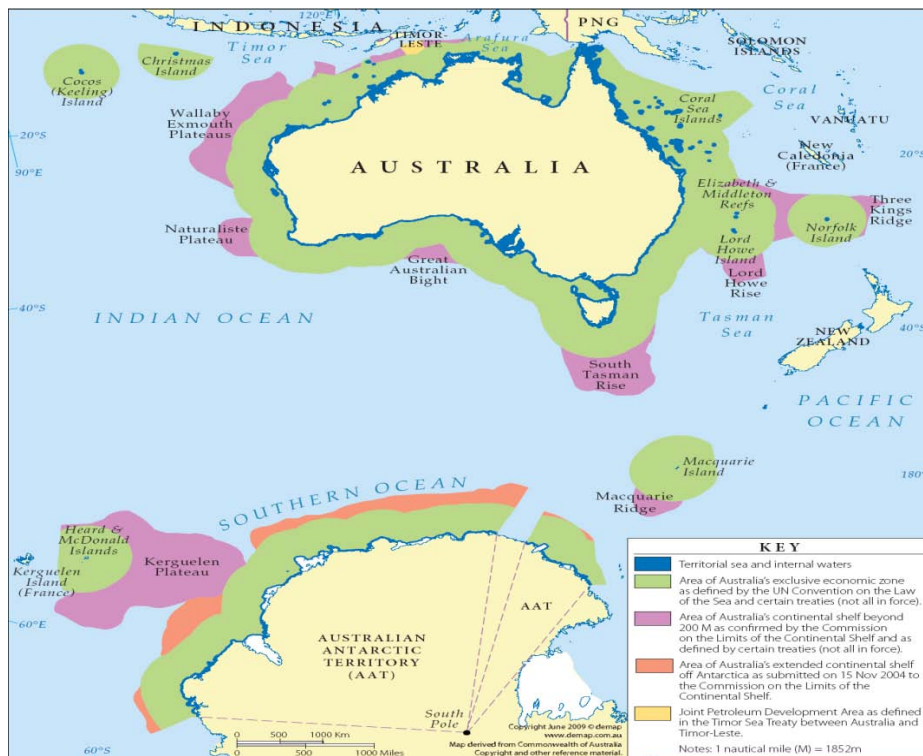
1 Introduction

Part 1 of these two articles set out the genesis of the Australian offshore laws and proceeded through their history and development, including the *Offshore Constitutional Settlement 1979* (OCS 1979). Part 1 went into the detail of Australian laws as they developed, but this Part in the main addresses more general aspects and is concerned with the current state of the laws. It commences by describing the international zones that apply offshore and which govern the jurisdiction and laws of every coastal State. It then details how the Australian laws actually deal with the various offshore areas and, after describing how the laws deal with particular offshore activities, it draws some conclusions.

2 Offshore Maritime Zones under UNCLOS

Some understanding of the basic offshore zones is relevant to the issues at hand because the extent of sovereignty or jurisdiction offshore varies with the zones. A coastal state like Australia has sovereignty or jurisdiction over its land and its waters close inshore, but this right to regulate offshore activities and foreign people reduces as the distance offshore increases until one reaches the high seas where the right is minimal. Comprehension of the numerous Australian Acts that apply offshore starts, therefore, with international maritime law and laws of the sea.

The simple one zone system of a territorial sea in earlier times has developed into a more complex system. These zones have effectively been codified by UNCLOS,¹ to which Australia has given legislative effect.² A diagram setting out the zones is set out under:



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¹ *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 14 November 1994) ('UNCLOS').

² *Seas and Submerged Lands Act 1973* (Cth) ('*Seas and Submerged Lands Act*').

The zones offshore are measured from the **baselines**. In customary international law and the codification in the earlier 1958 convention,³ there was a formula for each coastal state to establish its own baselines. For present purposes, the codification set out in UNCLOS is sufficient and it provides that 'the normal baseline ... is the low-water line along the coast'.⁴ In the case of atolls and islands with fringing reefs, which are common for much of the Australian northern coastline, the baselines run along the outer low-water line of the reefs.⁵ Where there are indents in the coastline or fringing off-lying islands, 'straight baselines' may be drawn from one point to the appropriate next point. The detail can be complicated but the principles are set out in a series of provisions in UNCLOS, which addresses these features, as well as ports, roadsteads and low-tide elevations (i.e. elevations that are covered at high water).⁶

Baselines must be placed on suitable large-scale charts and published for all to ascertain.⁷ This Australia has done. Geoscience Australia, the national agency for research and geospatial information, has the responsibility for surveying, ascertaining and publishing this information, along with the Australian Hydrograph Service, which Service is in charge of marine surveys and charts. How the baselines may be established in evidence in court was decided by the High Court in *Li Chia Hsing v Rankin*,⁸ where a fisherman charged with offending Commonwealth fishing laws challenged the distance his boat was offshore at the time of the offence, including whether the baselines could be established by just measuring distances on a maritime chart. The court held that these were just questions of fact and baselines could be established by a chart or by evidence of the actual position of the low-water mark on the coast itself.

The **Internal Waters** are the waters on the landward side of the baselines and Australia proclaims its sovereignty over these waters under the *Seas and Submerged Lands Act 1973* (Cth),⁹ as provided for in UNCLOS.¹⁰ UNCLOS establishes that a coastal state has sovereignty over its internal waters, as to which see shortly. There are some Commonwealth internal waters,¹¹ but most of the Australian waters to the landward side of the baselines lie within the jurisdiction of the States and the Northern Territory.¹²

The **Territorial Sea** runs from the baselines out for 12 nautical miles (referred to simply as 'miles' in this paper). Under s 7 of the *Seas and Submerged Lands Act*, the Governor-General is given power to declare the outer limits of the whole or any part of the territorial sea. Pursuant to this power, in 1990 the Commonwealth extended the outer limit of the territorial sea from three to 12 miles,¹³ but, as already mentioned, this did not extend the jurisdiction of the States beyond the three mile limit agreed under OCS 1979.

The **Contiguous Zone** is the zone of sea contiguous to the outer limit of the territorial sea and its limit may not exceed 24 miles from the baselines,¹⁴ which means that it extends 12 miles beyond the territorial sea. Under UNCLOS, a coastal state may control the contiguous zone as may be necessary to prevent infringement of its 'customs, fiscal, immigration and sanitary laws' and may punish offences that may be committed in its territory or territorial sea.¹⁵ The rationale behind this is to allow the coastal state to prevent persons of criminal intent hovering just outside its territorial sea. Of course, the power is limited to the four aspects mentioned above. The Commonwealth has given legislative effect to this jurisdiction in the *Seas and Submerged Lands Act*¹⁶ and it declared its contiguous zone in 1999.¹⁷

The **Exclusive Economic Zone** (EEZ) runs from the baselines out for 200 miles.¹⁸ The Commonwealth

³ *Convention on the Territorial Sea and Contiguous Zone*, opened for signature 29 April 1958, 516 UNTS 205 (entered into force 10 September 1964).

⁴ UNCLOS art 5.

⁵ UNCLOS art 6.

⁶ UNCLOS arts 7-15.

⁷ UNCLOS art 16.

⁸ (1978) 141 CLR 182.

⁹ *Seas and Submerged Lands Act* s 10.

¹⁰ UNCLOS art 8.

¹¹ Such as the southern end of Jervis Bay.

¹² *Seas and Submerged Lands Act* s 14. Waters in dams, inland rivers and lagoons are 'inland waters' and are not directly relevant to this discussion.

¹³ Commonwealth, *Gazette*, No S 297, 13 November 1990; Note 2 to *Seas and Submerged Lands Act*.

¹⁴ UNCLOS art 33(2).

¹⁵ UNCLOS art 33(1).

¹⁶ The Commonwealth has 'declared and enacted that Australia has a contiguous zone': *Seas and Submerged Lands Act* s 13A.

¹⁷ Commonwealth, *Gazette*, No S 148, 14 April 1999; Note 2 to *Seas and Submerged Lands Act*.

¹⁸ UNCLOS pt V.

proclaimed its sovereign rights and jurisdiction in the EEZ in the *Seas and Submerged Lands Act*.¹⁹ In the EEZ, the coastal state has sovereign rights over exploring, exploiting, conserving and managing the natural resources, whether living or non-living. This jurisdiction covers the seabed and subsoil, the water column and the airspace.²⁰ For commercial purposes, this translates mainly into the right to exploit fisheries and offshore oil and gas. The coastal state also has jurisdiction, but not sovereignty, over artificial islands, installations, marine scientific research and protection and preservation of the marine environment.²¹ The resources in the EEZ are very important commercial assets to many coastal states, with Australia being foremost amongst them. The continental shelf lies under much of the Australian EEZ but as the rights in the EEZ include all of the natural resources, those rights are already covered so it is the *outer* continental shelf that then becomes important.

The **Outer Continental Shelf** was first established as a maritime zone under the 1958 *Continental Shelf Convention*²² and the concept was continued and clarified in UNCLOS. The continental shelf is in fact a geographical concept of a submarine area that is a natural prolongation of the land out under the sea. While the EEZ jurisdiction gives all of the rights that the coastal states may wish over the seabed, subsoil, water column and air space in the EEZ, the outer continental shelf only gives the coastal states rights to the natural resources *in the seabed and subsoil*. Article 76 of UNCLOS sets out the limits of the outer continental shelf. This is too complex a formula to go into here but in no case may the coastal state's claim extend beyond 350 miles from the baselines.²³ It is emphasised that the rights in the outer continental shelf only relate to the seabed and sub-soil and not the water column as many miss this major difference.²⁴ There is a formula for payment of some of the benefits of exploitation of these resources to developing states.²⁵ As for the other zones, the *Seas and Submerged Lands Act* proclaims Australia's rights in the outer continental shelf.²⁶ 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 (CLCS) to receive, comment and make recommendations on coastal states' claims.²⁷ The CLCS received a claim from Australia, amongst others,²⁸ and most of Australia's claim was approved in 2009. (Australia's claims offshore from the Australian Antarctic Territory remain in contention).

Archipelagic waters were not recognised in international law until the terms of UNCLOS were agreed and the archipelagic states finally had their status established and recognised. The concept applies to states with many islands and allows the baselines to be drawn around the outer edge of islands as a group instead of the individual islands separately. These baselines may be run from the outermost points of the islands, reefs and mainland across the intervening waters and the whole area may be enclosed in straight baselines. UNCLOS Part IV sets out the complex formula for establishing the archipelagic baselines. The usual zones are measured outward from the baselines in the usual way. Express provision is made within the archipelagic waters for shipping lanes which go beyond the mere innocent passage provisions for the territorial sea and in which ships have a right to transit. Australia has not claimed an archipelagic status for its many off-lying islands but many of the states in the Asia Pacific region, such as Indonesia, the Philippines and most of the Pacific Island nations have done so. The concept can also apply to heavily indented coastlines, such as that of Norway, where its baselines are drawn outside its outer islands in the North Sea.

The **High Seas** are not expressly defined in UNCLOS but basically they are those seas not included in the EEZ of any state.²⁹ Whilst there are general obligations to protect and preserve the marine environment on the high seas, the rights of coastal states are very limited and, with some exceptions, the only right to regulate or interfere with ships on the high seas lies with the flag states. UNCLOS provides for freedom of navigation, overflight,

¹⁹ *Seas and Submerged Lands Act* s 10A.

²⁰ UNCLOS art 56.

²¹ UNCLOS art 56(1)(b).

²² *Convention on the Continental Shelf*, opened for signature 29 April 1958, 499 UNTS 311 (entered into force 10 June 1964).

²³ UNCLOS pt VI.

²⁴ UNCLOS art 77(1).

²⁵ UNCLOS art 82. There is a similar sharing of resources extracted from 'The Area', which is the deep sea bed area beyond national jurisdiction of any state: see UNCLOS pt XI.

²⁶ *Seas and Submerged Lands Act* s 11.

²⁷ UNCLOS art 76, annex II; Statement of Understanding adopted on 29 August 1980 under the Third United Nations Conference on the Law of the Sea (UNCLOS III). See generally the UN Division of Ocean Affairs and Law of the Sea website:

<<http://www.un.org/Depts/los/index.htm>>.

²⁸ The CLCS website has full details. See <http://www.un.org/Depts/los/clcs_new/clcs_home.htm>. Australia lodged its claim on 15 November 2004.

²⁹ UNCLOS pt VII, especially art 86.

fishing, etc on the high seas,³⁰ but this is subject to the rights and obligations of other states under international law. Australia's *Seas and Submerged Lands Act* does not, therefore, make any claim to any rights in the high seas although it has rights there over Australian flagged ships and Australian nationals.

Mention has been made about the coastal states' rights of 'sovereignty' and 'jurisdiction' and these rights are provided for in UNCLOS and are given domestic effect in the oft-mentioned *Seas and Submerged Lands Act*.³¹ In summary, the Commonwealth is entitled to and does claim:

- (a) its 'sovereignty' over the internal waters and territorial sea (12 miles);³²
- (b) rights of 'control' over the contiguous zone (24 miles);³³
- (c) its 'sovereign rights' over the EEZ (200 miles) with regard to exploring and exploiting natural resources;³⁴ and
- (d) its 'sovereign rights' over the continental shelf beyond the EEZ for the purpose of exploring and exploiting the natural resources in the seabed and subsoil (but not the water column or the airspace).³⁵

This completes the description of the offshore zones but there is a need to distinguish the international law about offshore zones from the Australian domestic law. In international law and practice, a sovereign state only recognises and deals with other sovereign states. The details of the internal organisation and power structure within those states are not relevant. This is simple for unitary states as only the one legal entity exists, but in federations, such as Australia, the USA and Canada, the situation is more complex. Whilst the internal States that comprise the federal whole have status within the federation they have none in international law.³⁶

It is appropriate now to turn to the main Acts that apply offshore to see how the Commonwealth has legislated to regulate activities in these zones.

4 Offshore Marine Areas under Australian Law

The main Act that sets out the terminology and areas offshore for Australian domestic law is the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) (*OPGGSA 2006*). Other Acts, both Commonwealth and State, are structured to follow these terms and marine areas. There are instances of some State Acts not implementing them, or doing so incompletely or inaccurately, but the Commonwealth law is reasonably clear and it is the controlling legislation. Hence, only its terms will be described here. The history and development of the *OPGGSA 2006* will be mentioned in more detail shortly and only the offshore area terminology is dealt with here. The *OPGGSA 2006* expressly mentions the OCS 1979, its terms and effects,³⁷ and it 'explains' the effect of the latter and sets out the main legislation that arises from it. This was discussed in Part 1 of these articles.

The *OPGGSA 2006*, in its forerunner, the *Offshore Petroleum Act 2006* (Cth), changed the offshore area terminology from that used in the *Petroleum (Submerged Lands) Act 1967* (Cth) and the two main changes were to introduce the terms 'coastal waters' and 'offshore areas'.

Under the *OPGGSA 2006* the term 'coastal waters' means the area from the limits of the State out to the three mile limit and it also includes any waters between the outer limits of a State and the baselines.³⁸ In the

³⁰ UNCLOS art 87.

³¹ The zonal phrases quoted are taken from the long title to the *Seas and Submerged Lands Act*, as amended, which reflect the terms in UNCLOS. The Preamble to the Act expands on these claims and the body of the Act sets out the detail about them.

³² UNCLOS art 2. As earlier mentioned, this sovereignty over the internal waters and the territorial sea includes the seabed, the subsoil and the airspace.

³³ UNCLOS art 33.

³⁴ UNCLOS art 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).

³⁵ UNCLOS arts 77(1) and 78.

³⁶ 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* s 10. It also claims sovereignty over the territorial sea: s 6.

³⁷ *Offshore Petroleum and Greenhouse Gas Storage Act 2006* s 5 (*OPGGSA 2006*).

³⁸ *OPGGSA 2006* s 7 provides:

Petroleum (Submerged Lands) Act, the earlier Act, the term was not defined. This was left to the OCS 1979 legislation and in particular the *Coastal Waters (State Powers) Act 1980* (Cth), which defined the 'coastal waters of the State' in terms of the territorial sea, but only out to three miles, not within the 'adjacent area'.³⁹ One should note that the *Acts Interpretation Act 1901* (Cth), in the form in which it was in force, as amended, immediately before the day on which *Coastal Waters (State Powers) Act 1980* received the Royal Assent, applies to the interpretation of the latter Act.⁴⁰ None of these Acts have been amended since the *OPGGSA 2006* took effect, so the current situation is that in order to cover the full definition of the term 'coastal waters' one needs to make reference to the *OPGGSA 2006*, the *Coastal Waters (State Powers) Act* and also the *Acts Interpretation Act*.

On the other hand, the term 'offshore area' covers the waters seaward from the outer limit of the 'coastal waters' of the adjacent State to the outer limit of the EEZ, or to the outer continental shelf⁴¹ where the area exists beyond the EEZ. Legislatively, the offshore area is defined in the *OPGGSA 2006* in two steps. Section 7 states that it is that area defined separately for each of the States and off-lying Australian island territories,⁴² and s 8 defines the actual areas for each of those States and Territories.

In s 8 there are complexities in relation to some aspects of the definition of 'offshore area' but a summary should suffice:

- (a) For NSW, Victoria, SA and Tasmania, it is fairly simple as it is the area from the coastal waters to the outer limits of the continental shelf where there is one; otherwise it is to the limits of the EEZ.⁴³
- (b) For Queensland the offshore area is as in (a) and it includes the Coral Sea, but excludes the Great Barrier Reef.
- (c) For WA and the NT, the offshore area is as in (a) but it excludes the Joint Petroleum Development Area (JPDA) in the Timor Sea.⁴⁴
- (d) For the Territory of Ashmore and Cartier Islands it is as in (a) but - and here it has an interesting concept - the offshore area also includes the land of those islands and this land is defined 'as if [it] were: (a) beneath the sea; and (b) part of the seabed and subsoil'. Of course, there is no habitation or structure on

'coastal waters', in relation to a State or the Northern Territory, means so much of the scheduled area for the State or Territory as consists of: (a) the territorial sea; and (b) any waters that are: (i) on the landward side of the territorial sea; and (ii) not within the limits of the State or Territory. For this purpose, assume that the breadth of the territorial sea of Australia had never been determined or declared to be greater than 3 nautical miles, but had continued to be 3 nautical miles.

An example of waters on the landward side of the territorial sea but not within the limits of a State is set out in a map in the *OPGGSA 2006* s 6, where it shows some relevant South Australian waters.

³⁹ *Coastal Waters (State Powers) Act 1980* (Cth) s 3 provides:

'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 subsection 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.

Note that s 4(2) defines the territorial sea in terms of only a three mile width. Also note that the *Coastal Waters (State Titles) Act 1980* (Cth) follows and implements these definitions.

⁴⁰ *Coastal Waters (State Powers) Act 1980* (Cth) s 4. Commonwealth laws apply in the coastal seas by force of s 15B of the *Acts Interpretation Act 1901* (Cth).

⁴¹ The 'continental shelf' is defined in the *Seas and Submerged Lands Act*.

⁴² *OPGGSA 2006* s 7:

'offshore area' means: (a) the offshore area of New South Wales; or (b) the offshore area of Victoria; or (c) the offshore area of Queensland; or (d) the offshore area of Western Australia; or (e) the offshore area of South Australia; or (f) the offshore area of Tasmania; or (g) the Principal Northern Territory offshore area; or (h) the Eastern Greater Sunrise offshore area; or (i) the offshore area of Norfolk Island; or (j) the offshore area of the Territory of Christmas Island; or (k) the offshore area of the Territory of Cocos (Keeling) Islands; Or (l) the offshore area of the Territory of Ashmore and Cartier Islands; or (m) the offshore area of the Territory of Heard Island and McDonald Islands; and, when used in the expression *the offshore area*, means whichever of the areas referred to in paragraph (a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (l) or (m) is applicable. Note 1: The *offshore area* of a State or Territory is defined by section 8. Note 2: The offshore area of a State or Territory corresponds to the term *adjacent area* under the repealed *Petroleum (Submerged Lands) Act 1967*.

⁴³ *OPGGSA 2006* s 8 is too lengthy to repeat in full, but an example is the definition for the more simple areas, which are those offshore from NSW, Victoria, SA and Tasmania:

1. The offshore area of (a) New South Wales; or (b) Victoria; or (c) South Australia; or (d) Tasmania is so much of the scheduled area for that State as comprises waters of the sea that are: (a) beyond the outer limits of the coastal waters of that State; and (b) within the outer limits of the continental shelf.

⁴⁴ The Joint Petroleum Development Area is part of the agreement between Australia and Timor Leste for exploration and exploitation of the petroleum under the Timor Sea and has its own legal regime built into it which is given effect in Australian domestic law in the *Petroleum (Timor Sea Treaty) Act 2003* (Cth).

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these low-lying sandy islands but treating the islands as if the land were beneath the sea is certainly creative drafting. This area does not, however, include the JPDA.⁴⁵

- (e) For Norfolk Island, the Territory of Heard and McDonald Islands and the Territory of Christmas Island, it is different again. For these islands, the offshore area is from the mean low water mark of the coastline to the outer limit of the super-adjacent waters of the continental shelf adjacent to the respective islands.
- (f) For the Territory of Cocos (Keeling) Islands, the offshore area is as in (e), but it is defined separately for the north atoll (North Keeling Island) and for the remaining islands.⁴⁶

What is now the 'offshore area' was formerly the 'adjacent area' under the *Petroleum (Submerged Lands) Act*, which has its own complications, as to which see below in the criminal law section.

As has been mentioned already, the States have a three mile-zone offshore in which their laws apply under the OCS 1979, but a slightly different legislative arrangement had to be made for the Commonwealth offshore territories and major islands. They are not States, nor are they Territories with their own parliaments, so their three mile offshore areas were, and are, Commonwealth waters. Therefore, the Commonwealth laws for these Territories run from the land directly and without a break offshore over the waters and not from the three mile limit.

The jurisdiction of the relevant waters and areas includes the space above, the water column, the seabed and the sub-soil below such areas⁴⁷ and covers all individuals and all companies carrying on business in the area. Details of these areas are set out in ss 6 to 9 of the *OPGGSA 2006*, including the simplified map shown below.

Another aspect of the *OPGGSA 2006* areas is that each offshore petroleum well, installation or item of equipment is surrounded by a 500 metre safety zone and the Designated Authority regulates what vessels may enter this area. This 500 metre safety zone is provided for in UNCLOS⁴⁸ to try and eliminate, or at least reduce, collisions and similar accidents occurring between ships and offshore rigs and the *OPGGSA 2006* gives domestic legislative effect to this provision.⁴⁹

This Act also provides for 'areas to be avoided' and sets out an area off the east coast of Victoria somewhat north of Wilsons Promontory⁵⁰ as the only Australian area under this category, at least so far. If 'serious circumstances' arise, the authorised persons have enhanced powers and may act immediately in these areas.⁵¹ Interestingly as these areas mainly operate in the same areas as international law does, the pipeline provisions in the *OPGGSA 2006* are the only provisions expressly made subject to Australia's obligations under international law.⁵²

Having set out the geographical areas to which the *OPGGSA 2006* applies, it is now appropriate to set out what laws apply in those 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 NT and those laws apply in their own right under the OCS 1979.⁵³ They do not need the *OPGGSA 2006* legislation validating them in their coastal waters.

⁴⁵ *OPGGSA 2006* s 8(3).

⁴⁶ Macquarie Island is not included as it is part of Tasmania and Lord Howe Island is not included as it is part of NSW. See M White, *Australian Offshore Laws* (Federation Press, 2009) ch 10.

⁴⁷ *OPGGSA 2006* s 9.

⁴⁸ See UNCLOS art 60, which gives jurisdiction to the coastal state to construct and regulate offshore island, installations and structures. The coastal state may establish safety zones around them to 'ensure the safety both of navigation and of artificial islands, installations and structure'. The zones are not to exceed 500 metres: arts 60(4), (5).

⁴⁹ *OPGGSA 2006* pt 6.6.

⁵⁰ *OPGGSA 2006* ss 697-704 and sch 2.

⁵¹ *OPGGSA 2006* s 623.

⁵² *OPGGSA 2006* s 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 on maritime boundary agreements with Indonesia, PNG and New Zealand: ss 37-43. Further, in relation to the references to international law, 'natural resources' are defined to have the meaning given under Article 77(4) of UNCLOS: *OPGGSA 2006* s 7, i.e. mineral and other non-living resources of the seabed and subsoil as well as living organisms and other resources.

⁵³ The Acts by the various States and the NT that give effect to offshore jurisdiction, as mentioned in Part 1 of these articles, are: *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); and *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); *Coastal and Other Waters (Application of State Laws) Act 1982* (SA); and *Off-Shore Waters (Application of Territory Laws) Act* (NT). These Acts gave effect to all laws, civil and criminal, except where other legislation was to the contrary. They are each slightly different.

Those that apply in the offshore areas, meaning the area seaward from the three mile limit, are the Commonwealth and the State and Territory laws. However, the State and Territory laws that apply in the offshore area are applied as laws of the Commonwealth, with some exceptions (see below) and the applicable laws are the general body of laws, written and unwritten, of the relevant State or Territory, and are termed the 'applied provisions'.⁵⁴ 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 or offshore pipelines.⁵⁵ Pursuant to the *Seas and Submerged Lands Act*, 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 in relation to marine pollution, which was discussed in the earlier article. Thus, the States may exercise jurisdiction over the sea out to the three mile limit if they so choose. Of course if it is specifically agreed, or if the State establishes a nexus between the legislation, the State and the activity (and the legislation is not struck down by operation of s 109 of the *Constitution*),⁵⁶ the State still will have jurisdiction. Exceptions to State laws applying in the coastal waters include the situation where a State or Territory law is inconsistent with a Commonwealth law, and where the State or Territory laws concern occupational health and safety⁵⁷ and substantive criminal law (which come under the *Crimes at Sea Act 2000* (Cth), which will be described later).⁵⁸

Before leaving this topic of offshore areas under domestic Australian law, the **Australian Fisheries Zone** (AFZ) should be mentioned. It is probably sufficient for present purposes to state that the AFZ is defined under the *Fisheries Management Act 1991* (Cth) in similar terms to those covering the waters comprising the Australian EEZ.⁵⁹ The result is that, with some exceptions, Australian laws about fishing in the AFZ apply in the Australian EEZ.

There are a number of other qualifications and exceptions to what laws apply in the offshore areas and to whom and how,⁶⁰ but they are too detailed to be addressed here. It may be observed, however, that the resulting matrix of these offshore laws is very complex.

5 Offshore Petroleum and Greenhouse Gas Storage Act 2006 (Cth)

Turning now from the offshore zones and areas to the legislation covering offshore activities, it is convenient to start with offshore oil and gas. The main Act is the *OPGGSA 2006*. It may be observed that both before and after the OCS 1979, the *Petroleum (Submerged Lands) Act* served well enough for many years and a thriving offshore petroleum industry was established. The *Petroleum (Submerged Lands) Act* was amended from time to time, including in 1994 when amendments replaced the references to the 1958 conventions by those to UNCLOS,⁶¹ and then the petroleum legislation was debated, renamed and finally repealed and replaced by the *Offshore Petroleum Act 2006* (Cth) (*OPA 2006*).⁶² There were numerous changes in the operational aspects in the *OPA 2006* from the *Petroleum (Submerged Lands) Act* but only minor policy changes regarding its geographical jurisdiction. The *OPA 2006* was said to be introduced to provide a more 'user friendly' Act, to reduce compliance costs for industry and to simplify administration for the government.⁶³ The management regime for offshore petroleum exploration, production, processing and conveyance was unchanged from that in the *Petroleum (Submerged Lands) Act*. As with the latter Act, the *OPA 2006* covered petroleum in liquid, gaseous or solid state,⁶⁴ so it covered offshore gas and gas pipelines as well as liquid petroleum.

However, the *OPA 2006* was the subject of a massive amendment in 2008 as a result of the decision by the Commonwealth government to facilitate storage of greenhouse gases under the sea offshore, which was to

⁵⁴ *OPGGSA 2006* s 80(2).

⁵⁵ *OPGGSA 2006* s 80(5).

⁵⁶ The nexus was established by the High Court decision in *Pearce v Florenca* (1976) 135 CLR 507, as discussed in Part 1 of these articles.

⁵⁷ *OPGGSA 2006* s 89. Sections 637-757 contain provisions about Commonwealth occupational health and safety that apply offshore in the petroleum areas; see also the schedules on this aspect.

⁵⁸ *OPGGSA 2006* s 84; but see also ss 87 and 88.

⁵⁹ *Fisheries Management Act 1991* (Cth) s 4.

⁶⁰ See generally *OPGGSA 2006* ss 82-89.

⁶¹ The *Maritime Legislation Amendment Act 1994* (Cth) replaced the references to the 1958 *Convention on the Territorial Sea and Contiguous Zone* and the *Convention on the Continental Shelf* with references to comparable provisions in UNCLOS.

⁶² Accompanying legislation passed with the *OPA 2006* were the *Offshore Petroleum (Annual Fees) Act 2006* (Cth), *Offshore Petroleum (Registration Fees) Act 2006* (Cth), *Offshore Petroleum (Repeals and Consequential Amendments) Act 2006* (Cth) and *OHS and SRC Legislation Amendment Act 2006* (Cth).

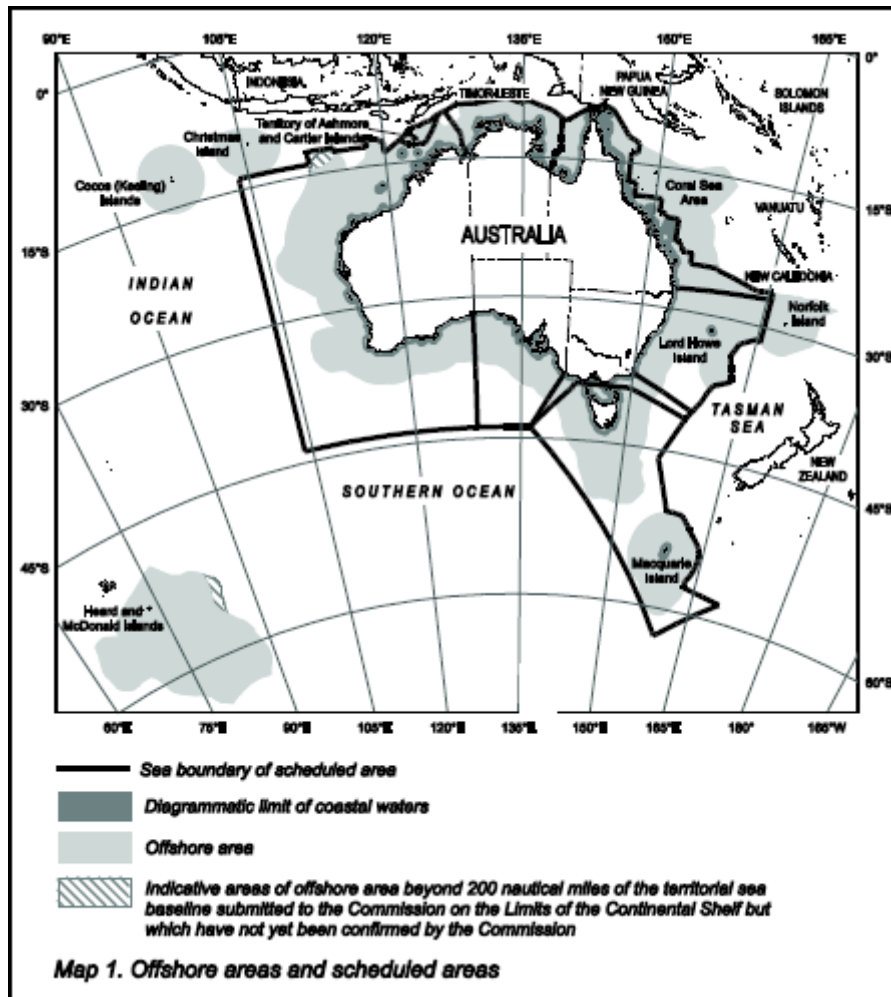
⁶³ See Explanatory Memorandum, *Offshore Petroleum Bill 2005* (Cth) 2.

⁶⁴ *Offshore Petroleum Act 2006* s 6.

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implement its environment protection policies.⁶⁵ The amended Act was the *OPGGSA 2006* and its bulk is such that it covers 1000 pages for the main Act alone without counting the supporting Acts or the huge volume of regulations. From the point of view of the geographical jurisdiction over which the Act applies, however, there is no change from the *OPA 2006*.

The map below gives a good pictorial presentation of Australia's coastal waters, the offshore areas and the areas claimed as part of the outer continental shelf that have not been approved by the Commission on the Continental Shelf under UNCLOS.



In relation to the jurisdiction of courts for matters arising from the Commonwealth legislation (the applied law), the State courts are vested 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 NT laws, as applied offshore through the *OPGGSA 2006*.⁶⁶ The Commonwealth courts have general jurisdiction over Commonwealth legislation, which includes the *OPGGSA 2006*⁶⁷ and, of course, the State and NT courts have jurisdiction for matters arising under their own respective legislation.

A complexity of the offshore jurisdiction is that a special regime for occupational health and safety (OHS) is established under *OPGGSA 2006* in offshore waters.⁶⁸ In relation to the coastal waters (i.e. within the three

⁶⁵ For a discussion on the international background to these amendments, see Yvette Carr, 'International Legal Issues Relating to the Facilitation of Sub-Seabed CO₂ Sequestration Projects in Australia' (2007) *Australian International Law Journal* 137.

⁶⁶ *OPGGSA 2006* ss 91, 92, 437, 438. Section 93 validates acts done in or by a court or a regulator that, because of some other circumstance or legislation is, in fact, not valid, provided it could have otherwise have been within power under the applied provisions.

⁶⁷ *Federal Court Act 1976* (Cth) s 19; *Judiciary Act 1903* (Cth) s 39B.

⁶⁸ *OPGGSA 2006* pt 6.8, sch 3.

mile limit), the Commonwealth OHS laws do not apply if the adjacent State or NT laws 'substantially correspond' to the listed Commonwealth ones. One should note that the ordinary Commonwealth and State maritime legislation applies to petroleum facilities if they are in mobile form, but once they are bedded in they are no longer defined as 'ships' so those Acts no longer apply.⁶⁹

Further, in relation to the offshore OHS regime, one notes that the *OPGGSA 2006* provides for a National Offshore Petroleum Safety Authority with its main function being to promote and to regulate the occupational health and safety of persons engaged in offshore petroleum operations.⁷⁰ The Authority is a body corporate, which is advised on safety by its Board and may refer matters to the National Oil and Gas Safety Advisory Committee (NOGSAC).⁷¹ The Act makes provision for States to be referred powers under this regime by appropriate State legislation.⁷² It may be mentioned that the major oil spill from the Montara Wellhead platform on 21 August 2009 has led to a major inquiry and significant amendments to the *OPGGSA 2006*, including to safety of the platforms, but those issues are too lengthy for development in this article.⁷³

Only a few aspects of this massive Act have been noted but it may be seen that the offshore laws relating to petroleum and greenhouse gas storage activities have an intricate inter-relationship with Commonwealth, State and NT laws.

6 Offshore Criminal Laws

Moving to offshore criminal law, it is convenient to mention the origins of the present situation. It was settled from an early time that the common law only applied over the land in England and it was 'the Admiral' who had jurisdiction to deal with crimes at sea. This also empowered the individual captains to deal with certain crimes, such as those committed onboard their ships, or crimes at large, such as piracy. When it came to foreign ships the situation was more complex but English jurisdiction was gradually established mainly when crimes occurred close to English shores (i.e. in the territorial sea or inland waters), on an English ship or on a foreign ship where an English person was involved. Over several centuries the jurisdiction of 'the Admiral' became more developed and maritime law gradually divided into civil admiralty law and criminal admiralty law.⁷⁴

This law came to Australia with the settlement of the British penal colony in 1788. The Vice-Admiralty court was established and it administered its relevant legislation, including the *Offences at Sea Act 1799* (UK).⁷⁵ The first, second and third Charters of Justice all came and were put in place in NSW. The Colonies were then established in places other than NSW before federation converted them into States and they applied the law of the land on the land and, in a somewhat random fashion, offshore as well.

One must digress from the Commonwealth-State criminal laws for a moment to mention that after Federation in 1901 it was necessary for the Commonwealth parliament to make provision for offences against Commonwealth laws themselves as, of course, the ordinary State criminal laws did not apply to them. This was done in 1914 in the *Crimes Act 1914* (Cth), which in a much amended form is still in force to cover that same area of criminal law jurisdiction.

This unsatisfactory offshore criminal law situation continued until the High Court case of *R v Bull*⁷⁶ in 1974 showed up the many shortcomings of the Australian criminal jurisdiction, which were then made ludicrously obvious in 1976 in *Oteri v R*⁷⁷ when the Privy Council confirmed that the British law applied to Australians

⁶⁹ Hence the *Navigation Act 1912* (Cth) and the *Occupational Health and Safety (Maritime Industry) Act 1993* (Cth) do not apply.

⁷⁰ *OPGGSA 2006* pt 6.9.

⁷¹ *OPGGSA 2006* ss 651 onwards.

⁷² *OPGGSA 2006* s 650.

⁷³ Commonwealth, Montara Commission of Inquiry, *Report of the Montara Commission of Inquiry* (2010) Department of Resources, Energy and Tourism <<http://www.ret.gov.au/Department/Documents/MIR/Montara-Report.pdf>>. See also Australian Government, *Draft Government Response to the Report of the Montara Commission of Inquiry* (2010) Department of Resources, Energy and Tourism <<http://www.ret.gov.au/Department/Documents/MIR/response-to-montara-inquiry-report.pdf>>; *Offshore Petroleum and Greenhouse Gas Storage Legislation Amendment Act 2009* (Cth); *Offshore Petroleum and Greenhouse Gas Storage Legislation (Miscellaneous Measures) Act 2010* (Cth).

⁷⁴ In the author's view, of the many books on the early Admiralty law one of the most useful is Selden Society, *Hale and Fleetwood on Admiralty Jurisdiction* (Selden Society, 1992) vol 108.

⁷⁵ Some detail on these aspects 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, 2nd ed, 2000) ch 1.

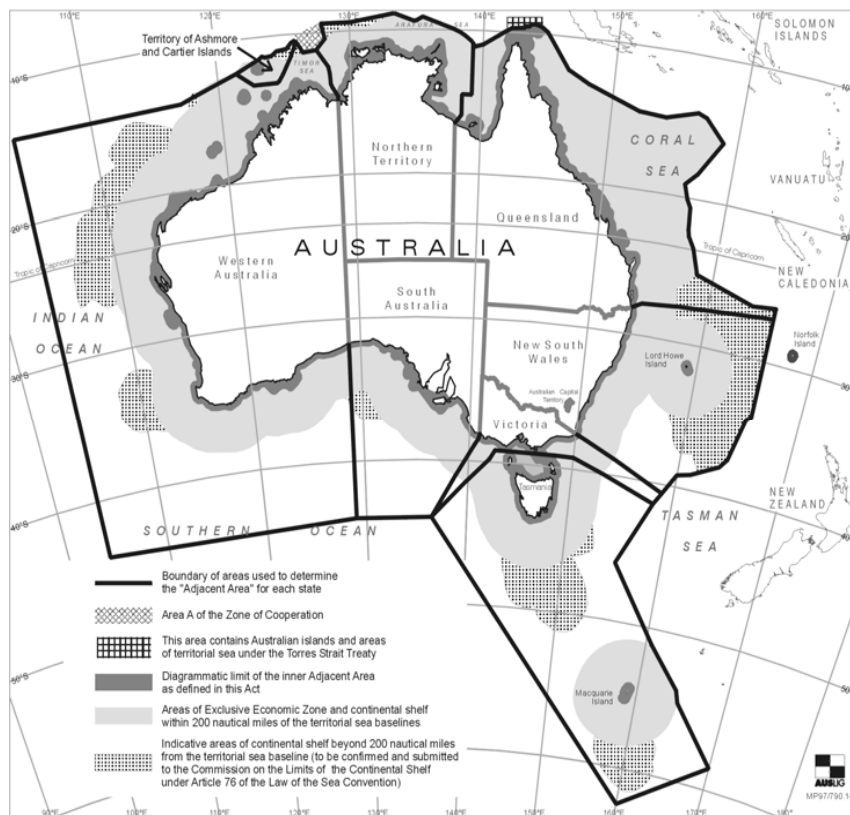
⁷⁶ (1974) 131 CLR 203.

⁷⁷ [1976] 1 WLR 1272.

committing crimes in Australian vessels off Australian shores.⁷⁸ This anomaly was addressed in the OCS 1979, which provided for the States to have jurisdiction for crimes in the first three miles offshore and over intra-state vessels and for the Commonwealth laws otherwise to apply. This agreement led to the passage of the *Crimes at Sea Act 1979* (Cth) and to all of the States⁷⁹ passing mirror legislation.⁸⁰

This arrangement of the States' criminal law applying for three miles offshore (and to intra-State vessels) had shortcomings and it was not a simple and effective criminal law structure. The Commonwealth Attorney-General and the relevant Ministers of the States and the Northern Territory therefore entered into an agreement for a new cooperative scheme. The Commonwealth repealed the *Crimes at Sea Act 1979* (Cth) and enacted in its place the *Crimes at Sea Act 2000* (Cth). The 2000 Act legislated for the cooperative scheme between the States and Commonwealth relating to the application of criminal law of the States extra-territorially in offshore areas adjacent to the respective State coasts out to the limits of the continental shelf.⁸¹ This is illustrated by the map below:

Offshore Areas Covered by the *Crimes at Sea Act 2000* (Cth)



Source: *Crimes at Sea Act 2000* (Cth) app 1.

The Preamble to the 2000 Act summarised the arrangement in that the criminal law of each State would apply in the area adjacent to the respective States for a distance of 12 miles from the baseline by force of law of the State;

⁷⁸ The facts related to charges of theft from lobster pots some 22 miles offshore from the WA coast onboard a fishing vessel owned by Australian residents who lived in Fremantle, WA. It was held that the vessel was a 'British' ship, as Australia did not then have its own shipping registration legislation, and that English law applied to British ships and through the *Admiralty Offences (Colonial) Act 1849* (Imp) and the *Courts (Colonial) Jurisdiction Act 1874* (Imp) the WA District Court had jurisdiction.

⁷⁹ For convenience, readers are reminded that, in the main, the word 'States' also encompasses the NT.

⁸⁰ *Crimes (Offences at Sea) Act 1978* (Vic), *Crimes (Offences at Sea) Act 1979* (Tas), *Crimes (Offences at Sea) Act 1980* (NSW); *Crimes (Offences at Sea) Act 1980* (SA), *Criminal Law (Offences at Sea) Act 1978* (NT). Queensland simply amended its *Criminal Code*, s 14A, to extend the Queensland criminal jurisdiction to 200 miles. For a case on this see *R v Olney* [1996] 1 Qd R 187. The Western Australian *Criminal Code* similarly applied to offences committed at sea by reference to a connection with the State. The *Code* extended 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 upon the State and Territory criminal courts. For discussion of these issues, see M Davies and A Dickey, *Shipping Law* (Lawbook, 3rd ed, 2004) 62-63.

⁸¹ *Crimes at Sea Act 2000* (Cth) Preamble.

beyond that, for 200 miles from the baseline or the outer limit of the continental shelf (whichever was the greater) by force of law of the Commonwealth.⁸²

This cooperative federalism was a move towards simplification of the criminal laws, but there are numerous exceptions and qualifications in relation to the jurisdiction and the offences to which this scheme applies. One of these relates to the actual geographical areas that come under the scheme. The States and the NT are included but, in this case, so is the criminal law of Jervis Bay (which is in fact the criminal law of the Australian Capital Territory). Another example is the terminology used. Although the *Petroleum (Submerged Lands) Act*, and with it the term 'adjacent area', had been previously repealed, this scheme still retains the term but defines it to include the whole of the applicable area.⁸³ As discussed above, the phrases under the *OPGGSA 2006* are 'coastal waters' and 'offshore area' so keeping this term just for this Act does complicate terminology a little. This criminal law 'adjacent area' is divided into the 'inner' and the 'outer' adjacent area with the boundary being at the 12 mile offshore line.⁸⁴

The adjacent area for NSW, Victoria, SA and Tasmania is the same, in effect, as the combined area of the coastal waters and the offshore areas, as set out in the *OPGGSA 2006*.⁸⁵ Queensland's adjacent area includes the area just mentioned together with the Coral Sea area (except for its territorial sea) and the territorial sea of certain Queensland islands.⁸⁶ The Western Australia adjacent area is in similar terms off its own shores as those used for NSW but it does not include the area in the Joint Petroleum Development Area in the Timor Sea⁸⁷ as the Act provides for a separate joint scheme with East Timor in that area.⁸⁸ The Northern Territory's adjacent area is again in similar terms off its own shores as those for NSW, except that it includes the areas adjacent to the Territory of Ashmore and Cartier Islands, but excludes their territorial seas (12 miles) and the JPDA.⁸⁹

A major addition to complexity is made by the provision that the laws of the States and Territories apply offshore of their own right for 12 miles, the width of the territorial sea, as opposed to three miles agreed in the OCS 1979 and as applied in the *OPGGSA 2006* and most other relevant legislation. Another one is that the term 'territorial' sea is extended to a 12 mile width but, as mentioned above, in much other similar joint Commonwealth-State legislation the phrase is expressly limited to a three mile width. Also, only the 'substantive' laws of the States are applied under this Act, so the grey area of what criminal law offences are substantive and what are not will become an issue from time to time.

Moving on to other legislation dealing with offshore criminal jurisdiction, one Act worth noting is the *Maritime Transport and Offshore Facilities Security Act 2003* (Cth) (*Security Act*), which is the central piece of legislation in response to the threat of terrorism in ports, ships and offshore platforms.⁹⁰ The Act creates some crimes applicable in Australian trading and passenger ships, foreign ships travelling in a port in Australia, Australian ports, port facilities and port operators. It does not apply to defence vessels, Commonwealth or foreign vessels on non-commercial voyages, or fishing and recreational vessels.

The scheme created by this *Security Act* requires the managers of the ports, ships and offshore facilities to establish a bureaucratic structure of people and positions and provision must be made for training. Different maritime security levels are established and different measures are to be implemented when the various security risk levels are in force.⁹¹ The Act provides for the implementation of maritime⁹² and offshore⁹³ security plans, establishes maritime security zones,⁹⁴ and imposes obligations on foreign and Australian ships and offshore

⁸² *Crimes at Sea Act 2000* (Cth) Preamble [2].

⁸³ *Crimes at Sea Act 2000* (Cth) s 4, sch 1 cl 14.

⁸⁴ *Crimes at Sea Act 2000* (Cth) s 4, sch 1 cl 1.

⁸⁵ *Crimes at Sea Act 2000* (Cth) sch 1 cl 14(1).

⁸⁶ *Crimes at Sea Act 2000* (Cth) sch 1 cl 14(2)(c). The criminal jurisdiction over the Great Barrier Reef (GBR) needs some clarification.

Prima facie the GBR is comprised of water and islands, where the islands are part of the State of Queensland with a few minor exceptions relating to lighthouses and the like. The criminal law of Queensland applies on these islands by reason of its own force. Also, prima facie, this Queensland law applies for the first three miles offshore from these islands by reason of the OCS 1979. Under the *Crimes at Sea Act 2000* (Cth) it is not totally clear that the Queensland criminal law also applies by force of that Act to the other waters in the GBR. On the other hand, basically the *Great Barrier Reef Marine Park Act 1975* (Cth) has jurisdiction in the whole of the GBR area over the activities covered by the Act, many provisions of which create criminal offences.

⁸⁷ *Crimes at Sea Act 2000* (Cth) sch 1 cl 14(3).

⁸⁸ *Crimes at Sea Act 2000* (Cth) pt 3A.

⁸⁹ *Crimes at Sea Act 2000* (Cth) sch 1 cl 14(4).

⁹⁰ The *Crimes Act 1914* (Cth), pt 1AA, div 3A and the *Defence Act 1903* (Cth) also have provisions relating to counter-terrorism; see generally White, above n 46, chs 4, 5.

⁹¹ *Maritime Transport and Offshore Facilities Security Act 2003* (Cth) pt 2 (*Security Act*).

⁹² *Security Act* pt 3.

⁹³ *Security Act* pt 5A.

⁹⁴ *Security Act* pt 6.

service vessels.⁹⁵ Unlawful interference is an offence and 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 or 'ISSCs'), is created for the various managements in the various companies operating ports, ships and offshore platforms to establish and regulate. Most of its provisions are required under the International Ship and Port Security Code, which is directed at achieving efficient practical measures to make shipping and port facilities safer from terrorist activity, and which is mandatory under the *SOLAS Convention*⁹⁶ to which Australia subscribes.

The geographical jurisdiction of the *Security Act* extends to all external Australian territories⁹⁷ and to the geographical areas established under the *Criminal Code* (Cth) 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 consequence must occur inside Australia, or finally, that the offence be committed by an Australian citizen, resident or company.⁹⁸

Continuing with the offshore laws on security, it may be helpful to mention that one result of the Italian cruise ship *Achille Lauro* being hijacked in 1985 in the Mediterranean was that the International Maritime Organization organised an international convention in 1988 to address crimes at sea for political purposes.⁹⁹ This resulted in the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* (the *SUA Convention*), which is widely supported.¹⁰⁰ Apart from requiring member states to make laws dealing with terrorism on and to ships, including their passengers and crews, it also requires all state parties to support and cooperate with each other in combating terrorist activities. However, the *SUA Convention* only applied to ships and did not include offshore fixed platforms as they are not 'ships'.¹⁰¹ Provision was made, therefore, to deal with terrorist acts on offshore platforms in a 1988 Protocol to the *SUA Convention*.¹⁰²

Australia gave legislative force to the *SUA Convention* and Protocol in the *Crimes (Ships and Fixed Platforms) Act 1992* (Cth). The offences under the Act include, amongst other things, seizing or destroying ships, platforms, navigational facilities or doing or offering violence to persons on them. The Act provides for cooperation amongst those states that are parties to the *SUA Convention* and its Protocol, which includes Australia, 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 extends to acts, matters and things outside Australia and to all persons whatever their nationality.¹⁰³ In relation to the offences concerning a ship, the ship must be on an international voyage or in another country's territorial sea and have an Australian element¹⁰⁴ (which may involve an Australian ship or an offender who is an Australian national).¹⁰⁵

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 that the offender be an Australian national. Alternatively, the offence must have a Protocol State element, which means that the platform must be in the territorial sea or on the continental shelf, or involve a national of a state that is a party to the Protocol.¹⁰⁶

This, then, is the criminal jurisdiction that applies in offshore Australia. The ordinary criminal law of each State and self-governing Territory applies offshore in part by its own force and in part by reason of the

⁹⁵ *Security Act* pts 4, 5, 5A, 5C.

⁹⁶ *International Convention for the Safety of Life at Sea*, opened for signature 1 November 1974, 1184 UNTS 3 (entered into force 25 May 1980).

⁹⁷ *Security Act* s 5.

⁹⁸ *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).

⁹⁹ Crimes at sea for private purposes are usually related to piracy, for which there has been several centuries of law making. The current international convention that addresses piracy is UNCLOS, especially articles 101-107.

¹⁰⁰ *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, opened for signature 10 March 1988, 1678 UNTS 221 (entered into force 1 March 1992). The figure keeps rising but the current figure may be ascertained from the IMO website, under 'Status of Conventions', which sets out the detail about the number of countries that have ratified the IMO conventions: see <<http://www.imo.org>>.

¹⁰¹ Offshore mobile platforms when in mobile mode are 'ships' and come under the laws relating to ships, but when in fixed mode they are not ships and come under the laws relating to fixed platforms.

¹⁰² *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*, opened for signature 10 March 1988, 1678 UNTS 304 (entered into force 1 March 1992).

¹⁰³ *Crimes (Ships and Fixed Platforms) Act 1992* (Cth) s 5 ('*Ships and Fixed Platforms Act*').

¹⁰⁴ *Ships and Fixed Platforms Act* s 18.

¹⁰⁵ *Ships and Fixed Platforms Act* s 18(3).

¹⁰⁶ *Ships and Fixed Platforms Act* ss 29(3)-(4).

Commonwealth giving it force, but there are many anomalies and exceptions. The terms of its application are not smooth and its interaction with other Australian laws is unclear.

Moving on from crime to other jurisdictions, there is a whole raft of other offshore legislation that should be noted. There is no space to deal with them all, and not even space to deal fully with those that have been selected as the main ones but, as these two articles are trying to convey the overall picture, they need to be mentioned and this is done by mentioning topics rather than individual Acts.

7 Shipping

Australia is a significant shipper nation, with a large tonnage exported each year. Australia is also a small but lively shipping nation as it has active fisheries, tourist and offshore oil and gas service fleets.¹⁰⁷ These activities need to be regulated and this is currently achieved with a plethora of Acts. An outline of these Acts can be obtained from the main Australian texts on the subject,¹⁰⁸ but the major Act regulating many aspects of shipping is the *Navigation Act 1912* (Cth). This Act applies to vessels that do not come under the States' regulatory legislation, such as recreational vessels and those on intra-state voyages.¹⁰⁹ The *Navigation Act* is a massive piece of legislation and has many complex provisions because it regulates so many aspects of ship operations, crewing, certification, and safety. It is the Australian derivative of the British *Merchant Shipping Acts* that did, and still do to some extent, regulate the British shipping industry.

The *Navigation Act* is long overdue for serious reform and there have been numerous reports delivered to a number of past Commonwealth Transport Ministers on which no action was taken. At the time of writing (April 2011) the current Minister for Transport, Mr Anthony Albanese, is taking action as he has said in 2009 would be taken¹¹⁰ and consultation is now being conducted by the officers of the Department of Infrastructure, Transport, Regional Development and Local Government and the Australian Maritime Safety Authority.¹¹¹ Reform of this complex Act is not going to be easy and one of the difficult areas will be the Commonwealth-State jurisdictions and the complexities arising from the OCS 1979. The officials charged with the responsibility have the almost impossible task, in my opinion, of achieving a sound result unless the OCS 1979 is reviewed and simplified. A number of Acts have this problem and the *Navigation Act* is one of the major ones.

Of course the *Navigation Act* is only one Act and when dealing with shipping one needs to have in mind the legislation relating to the arrest of ships, carriage of goods by sea, marine insurance and maritime securities, shipping operations, safety of life at sea, safe navigation, entry into ports, port state control,¹¹² and ship and port state security.

8 Offshore Native Title

Native Title applies over the sea as well as over the land. The right of Aboriginal people to claim native title was established by *Mabo v Queensland (No 2)*¹¹³ in 1992. Legislation was introduced by the *Native Title Act 1994* (Cth) which codified the law on the topic and made extensive provisions for regulation of claims through tribunals and courts. The native title rights over land were reviewed and extended in *Wik People v Queensland*.¹¹⁴ The result was that Aboriginal people could successfully claim their ancient rights of hunting,

¹⁰⁷ Due to the neglect of successive Commonwealth governments of the shipping industry over a long time the Australian shipping tonnage has gone from small to smaller, which is contrary to the national interest.

¹⁰⁸ M White (ed), *Australian Maritime Law* (Federation Press, 2nd ed, 2000); M Davies and A Dickey, *Shipping Law* (Lawbook, 3rd ed, 2004); D Cremean, *Admiralty Jurisdiction: Law and Practice in Australia, New Zealand, Singapore and Hong Kong* (Federation Press, 3rd ed, 2008).

¹⁰⁹ *Navigation Act 1912* (Cth) s 2 provides:

Application of Act. (1) Except in so far as the application of this section is expressly excluded by a provision of this Act, this Act does not apply in relation to: (a) a trading ship proceeding on a voyage other than an overseas voyage or an inter-State voyage; (b) an Australian fishing vessel proceeding on a voyage other than an overseas voyage; (ba) a fishing fleet support vessel proceeding on a voyage other than an overseas voyage; (c) an inland waterways vessel; or (d) a pleasure craft; or in relation to its owner, master or crew ...'

¹¹⁰ Hon Anthony Albanese, Minister for Infrastructure, Transport, Regional Development and Local Government, untitled (Speech delivered at the NATSHIP 2009 Conference, Sydney, 5 June 2009) <http://www.ministers.infrastructure.gov.au/aa/speeches/2009/AS08_2009.htm>.

¹¹¹ See Department of Infrastructure, Transport, Regional Development and Local Government, *Navigation Act Discussion Paper* <<http://www.infrastructure.gov.au/maritime/paper>> and Australian Maritime Safety Authority, *Maritime Safety Regulation* <http://www.amsa.gov.au/Maritime_Reform>.

¹¹² 'Port State Control' is the generic term used for the administration by coastal states of the ships that enter its port to ensure they are safe and well-handled. This regulatory system applies numerous international conventions under the powers given in the coastal state laws. In Australia's case many of these powers are given under the *Navigation Act 1912* (Cth).

¹¹³ (1992) 175 CLR 1.

¹¹⁴ (1996) 187 CLR 1.

fishing, and ceremony on tribal land with which their people had previously had connection, provided they had maintained some connection and the land had not been totally alienated. These rights were then extended over the sea in 2001 in *Commonwealth v Yarmirr*.¹¹⁵ This and subsequent cases established that native title owners, provided they could establish the evidence to justify their earlier customs, had claims to fishing, turtle and dugong hunting and similar claims over the sea and sea bed from their land to about the distance of line of sight. These rights, however, are not exclusive and have to give way to innocent passage¹¹⁶ and similar rights under international maritime law. Also and importantly, they do not extend to exploitation for commercial purposes.

9 Fisheries

Fisheries are important to the Australian economy. The offshore fisheries are mainly regulated by the Commonwealth under the *Fisheries Management Act 1991* (Cth),¹¹⁷ which regulates the offshore industry. Included in the regulation are Commonwealth fisheries officers' rights of inspection, detention, etc over Australian and foreign vessels offshore out to the limits of the EEZ. In the three mile limit, the 'coastal waters', the States have their own laws and regulatory structures. Fisheries jurisdiction is another example of where the choice of a three-mile limit brings complications due to overlapping Commonwealth and State legal obligations imposed on this industry and its personnel. It is a large area of law and it can only be mentioned here so that readers are aware of it being an offshore activity with its own jurisdictional issues.¹¹⁸

10 Defence

Defence of the country from its enemies is the prime responsibility of the Australian Defence Forces (ADF) and its command structure lies under the Governor-General as the nominal head and then the relevant minister and chiefs of the ADF.¹¹⁹ The members of the ADF, however, have been given responsibilities that go well beyond the defence of the country. They are given wide responsibilities and powers in relation to inspection, enforcement, interception and detention covering fisheries, immigration, customs, offshore platforms, general border protection, illegal immigration and quarantine. The main defence powers applying under offshore laws are to be found in the *Naval Defence Act 1910* (Cth) but there many other Acts that add corollary powers and that impinge on this milieu. However, they are too numerous to mention in any detail. Fortunately, they are well covered elsewhere.¹²⁰

11 Marine Pollution

Protection of the marine environment from marine pollution is necessary and there are many laws relating to it. Most of them give effect to the international conventions on the subject, many of which are from the International Maritime Organization. These offshore laws are extensive and the Commonwealth has enacted much legislation. The situation is rendered complex by the States also enacting similar legislation that operates in the coastal waters. This situation is set out elsewhere¹²¹ and there is no space to explore it here. One complicating aspect is the 'roll back' provision in marine pollution laws, described in the first of these two articles. The area of marine pollution is yet another illustration of both Commonwealth and State laws overlapping even though they concern the same topic.

12 Shipwrecks, Salvage, Safe Refuge

The safety of shipping is vital to Australia's national interest and the people, ships and goods that pass and re-pass along its coast are the subject of much regulation. From time to time, however, there are shipping casualties

¹¹⁵ (2001) 208 CLR 1.

¹¹⁶ Innocent passage is the right of foreign-flagged ships to pass through a coastal state's territorial sea in the course of its ordinary 'innocent' voyage: see UNCLOS pt II s 3.

¹¹⁷ For an article calling for some reform of the automatic forfeiture provisions of the *Fisheries Management Act 1991* (Cth), see M White and R Gibson 'Fisheries and Automatic Forfeiture of Vessels: Draconian Commonwealth Laws' (2010) 84 *Australian Law Journal* 319.

¹¹⁸ Useful books on Australian fisheries are W Gullett, *Fisheries Law In Australia* (LexisNexis Butterworths, 2008); R Baird, *Aspects of Illegal, Unreported and Unregulated Fishing in the Southern Ocean* (Springer, 2006); and D McPhee, *Fisheries Management in Australia* (Federation Press, 2008). For a book devoted to the pursuit and prosecution of the Fisheries Vessel *Viarsa* by the Australian Fisheries vessel *Southern Supporter*, see B Knecht, *Hooked: A True Story of Pirates, Poaching and the Perfect Fish* (Allen & Unwin, 2006).

¹¹⁹ *Constitution* s 68; *Defence Act 1903* (Cth) pt II.

¹²⁰ See C Moore, *ADF on the Beat: A Legal Analysis of Offshore Enforcement by the Australian Defence Force* (CMP, 2004). Acts identified by Moore that give defence officers enforcement powers over civilian activities include the *Fisheries Management Act 1991* (Cth), *Torres Strait Fisheries Act 1984* (Cth), *Environment Protection and Biodiversity Conservation Act 1999* (Cth), *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), *Customs Act 1901* (Cth), *Quarantine Act 1908* (Cth), *Migration Act 1958* (Cth) and *Crimes Act 1914* (Cth).

¹²¹ M White, *Australasian Marine Pollution Laws* (Federation Press, 2nd ed, 2007). See also White, above n 46, ch 5.

that require regulation and laws and these are important.¹²² They regulate the wrecks of ships if some disastrous accident happens to cause their loss or damage and salvage laws are in place to regulate the rescue of ships and goods after a shipping casualty so that the rescuer can be rewarded. There are also in place structures and guidelines for dealing with stricken ships that seek refuge in Australian ports but which may well pose a threat to any port or harbour into which they are permitted. They all have their complexities, as do the laws that apply to underwater cultural heritage such as ancient shipwrecks.¹²³ Many of the States have their own legislation covering these areas so there is, once again, an overlap between Commonwealth and State legislation over the one topic. These have historic origins and have unique aspects which increase their complexity.

This completes the description of the Australian laws that regulate offshore activities. A deeper and wider review may have been called for but the purpose of these articles, which is to demonstrate the complexity of offshore laws and the part the OCS 1979 plays, is sufficiently met by what has been written. It is now appropriate to draw some conclusions from both of these articles and then make some recommendations for reform of the offshore constitutional position.

13 Conclusions

In the first article it was demonstrated that the first serious regulation of offshore activities came from the need to have an orderly approach to the exploration and exploitation of offshore oil and gas. This gave rise to a cooperative agreement amongst the Commonwealth and the States in the *Offshore Petroleum Agreement 1967*, under which the States' laws applied to the width of the then territorial sea (three miles) and the Commonwealth laws thereafter. Each agreed to pass legislation that mirrored the others and the administration costs and the revenue benefits were to be shared. This legislation was passed and it worked tolerably well for some years but the laws of the various Parliaments then started to drift apart and tensions grew between the States and the Commonwealth.

These tensions became greater over the years and were magnified by the increasing activity of the Commonwealth in ratifying various international conventions and playing a larger role in the international community. When the Commonwealth claimed the offshore jurisdiction from the low water mark in the *Seas and Submerged Lands Act* the States litigated it in the High Court, but the Court upheld the Commonwealth's claim. This decision was important to the Commonwealth from an international point of view but it was not convenient to it from the domestic point of view, so further negotiations amongst the Commonwealth and the States ensued, resulting in the *Offshore Constitutional Settlement 1979*. Under this settlement, jurisdiction was granted to the States (and later to the Northern Territory) for their title, laws and powers to apply out to three miles offshore. However, over the years the three mile limit boundary has become irrelevant as the width of the Australian territorial sea has changed to 12 miles. There is now no logical base for the separation of the jurisdictional powers between the State and the Commonwealth parliaments to be three miles offshore.

Another aspect that has changed over the years is the extent of the Commonwealth powers under the Australian *Constitution* as decided by the High Court. Both before and after the OCS 1979, the High Court was making major decisions that developed Australian offshore law. These included decisions about where the historic boundaries lay offshore for South Australia, ownership of offlying islands in the Torres Strait, the legality and reach of native title claims offshore and, of course, the extensive jurisdiction of the external affairs power and the corporation power under the *Constitution*. The result is that there is very little activity offshore over which the Commonwealth does not now have jurisdiction. The High Court has also upheld the validity of the States' laws extending offshore if the nexus is established between the law and the activity and people involved, but that does not detract from its fundamental jurisdiction offshore. There is a respectable argument, therefore, that the Commonwealth does not need the OCS 1979 and could 'go it alone' to legislate offshore to regulate all of the activities which have been discussed in these two articles. Only time will tell.

Australia's offshore laws are underpinned by various offshore zones, most of which are codified in UNCLOS, and they extend from the internal waters out to the outer continental shelf. The offshore areas also underpin various domestic Acts and these areas give effect to the OCS 1979. The activities offshore that attract their

¹²² See White, above n 108, chs 8-11. Some of the topics here mentioned, including the need for reform of the OCS 1979, are also discussed in White, above n 46.

¹²³ This is discussed in White, above n 108, ch 9. The 2001 UNESCO *Convention on the Protection of Underwater Cultural Heritage*, opened for signature 2 November 2001, 41 ILM 40 (not yet in force) applies to wrecks and other cultural items underwater that are 100 years old or more although the *Historic Shipwrecks Act 1976* (Cth) ss 4A(1), 5(1) apply to wrecks of 75 years of age or more that have been Gazetted as such.

Australia's Offshore Legal Jurisdiction – Current Situation

own, and in many cases separate but overlapping laws, include offshore energy, criminal laws, shipping, fisheries, defence, marine pollution regulation, salvage and wreck.

These two articles have endeavoured to cover the history and development of many of these areas of law and in all cases they have endeavoured to describe, or at least indicate, the extent and complexity of the Australian offshore laws. They have not provided a critical analysis, as that is for another day, beyond indicating that the result is that Australia's offshore laws are overly complex and in need of revision, starting with the OCS 1979.