Chapter Ten
Australia's International Legal Obligations: Maritime Zones and Christmas Island

Dr Dominic Katter

> "Once it was said that the law followed the flag. Now, international law is everywhere. Its influence *increases*".[1]

Introduction

Territories and boundaries are part of our everyday lives. History texts contain many examples of disputes over land boundaries. Maritime boundaries are more elusive. The demarcation and delineation of maritime territorial claims (and non-claims) and zones of national jurisdiction must be acceptable, not only to the negotiating states, but also to the international community, in that the seas are fundamental to trade.

Traditionally, nations claimed a limited jurisdiction over the maritime environment adjacent to their coastlines. A consequence of jurisdictional extensions by sovereign nations has been increasing conflict between domestic and international law. In an attempt to clarify the domestic jurisdiction, international bodies have actively and systematically co-ordinated the formulation of new laws of the sea, promoting change within international maritime law.

Purpose

This paper focuses on the alleged conflict between recently introduced Australian domestic legislation and international legal principles. Recent Australian domestic legislation has excluded certain maritime zones surrounding islands from the Australian "Migration Zone" under the *Migration Act* 1958. This paper attempts to evaluate these legislative changes in the context of international law obligations, in particular the 1982 *United Nations Convention on the Law of the Sea* (*UNCLOS III*). The finite question that this research investigates is whether a "bar" or *refoule* on so-called "asylum seekers" being able to apply for visas under the *Migration Act* breaches Australian international law obligations.

Legislative amendments

Over the last few years, numerous amendments have been made to Commonwealth legislation regarding migration, fisheries and Customs. In March and April, 1999 a number of boats carrying persons without immigration clearance attempted to reach Australia, undetected, by landing on the coast of the mainland and upon territorial islands to the North-West. In response, the Commonwealth established a "Coastal Surveillance Task Force". This newly created body recommended comprehensive amendments to the off-shore enforcement of Commonwealth laws. Significantly, new legislation, the *Border Protection Legislation Amendment Act* 1999, was introduced. That legislation incorporated amendments to the *Customs Act* 1901, the *Migration Act* 1958 and the *Fisheries Management Act* 1991.

The Explanatory Memorandum to the Bill noted that the amendments provided for:

1. The boarding and searching of ships and aircraft, in certain circumstances, in Australia's territorial sea, Australia's contiguous zone, the high seas, and (in the case of the *Customs Act*) Australia's Exclusive Economic Zone (EEZ);
2. "Hot pursuit" of ships whose master has not complied with a request to board; and
3. "Hot pursuit" of "motherships" (that is, ships reasonably suspected of being used in direct support of, or in preparation for, a contravention of specified legislation involving another ship) in certain circumstances.

Relevantly, the Commonwealth stated that it intended any extra-territorial operation of the legislation to be determined by reference to international law, including treaties and customary international law.[2] These "border protection" amendments applied predominantly to the territorial sea and the contiguous zone. The amendments also extended the policing powers available for relevant offences within the EEZ and high seas.[3] Additionally, the legislation sought to make the preparation of an offence unlawful. Further, the *Migration Act*[4] provided the basis for the commencement of a "hot pursuit" of a foreign vessel, which is preparing to commit a migration offence (external to the contiguous zone) and has failed to comply with a direction to allow Commonwealth officers to board.

The matter of illegal immigration became a national issue as a result of the "*MV Tampa* incident" in August and September, 2001. The Norwegian registered *M V Tampa* took on board persons from the vessel *Palapa*. The *Tampa*, under the command of Captain Rinnan, commenced voyage towards Indonesia, but then changed course for Australia. The Commonwealth of Australia prevented the persons from the *Palapa*, who were now on board the *Tampa*, from coming ashore on Christmas Island.

Subsequently, further amendments were made to the border protection laws. The *Border Protection (Validation of Enforcement Powers) Act* 2001 attempted to "put beyond doubt the legal basis for actions taken against foreign ships" within Australian sovereign territory and to "confine judicial review of an enforcement action". The *Customs Act* 1901 was also amended by the amendments regarding border protection. Additionally, subordinate legislation made the *Fisheries Management Act* 1991 and the *Migration Act* 1958 prescribed Acts in accordance with the provisions of the *Customs Act*. Section 184A(5) of the *Customs Act* created circumstances in which an officer of the Australian Defence Force may request to board a foreign vessel. The *Migration Act* replicated the provisions of the *Customs Act* in ss 245B(5) and 245C(1).

Under these further amendments to the *Migration Act*, certain Australian island territories were designated as "excised offshore places".[5] Any unauthorised person who arrives in an excised territory is not able to apply for an Australian visa unless the Minister exercises discretionary power. Anyone who enters the migration zone, including Australian citizens, must present themselves for immigration clearance.[6] These "excised offshore places" are: Ashmore and Cartier Islands in the Timor Sea (from 8 September, 2001); Christmas Island in the Indian Ocean (from 8 September, 2001); Cocos (Keeling) Island in the Indian Ocean (from 17 September, 2001); and offshore resource and other installations (from 27 September, 2001). The *Migration Act*, however, does

not extend to the territories of Norfolk Island, Heard and Macdonald Islands and the Australian Antarctic Territory. Places included in this definition continue to be part of Australia, and Australian citizens (and lawful non-citizens) can move to and from those areas as they move between any parts of Australia.

Therefore, the "migration zone" includes the land area of all the States and Territories of Australia and the waters of proclaimed ports within those States and Territories. The provisions of the *Migration Act* continue to apply within those "excised offshore places". The purpose of the migration zone is to define the area of Australia where a non-citizen must hold a visa in order to legally enter and remain in Australia.[7]

The question then is whether these legislative amendments are a valid exercise of coastal state jurisdiction in accordance with international law.

International law

International law can be defined as "the body of law which participating nations recognise as binding them in their conduct towards each other". Notably, international law does not generally deal with the actions of individuals. The *Statute of the International Court of Justice* establishes a court to determine legal disputes between states. Article 38 of that Statute identifies primary sources of international law.[8] These primary sources can be separated into three sub-groups:

1. International agreements to which the disputing states are a party;
2. Customary international law; and
3. General principles of law recognised by nations,[9] often referred to as *opinio juris*. Normally this involves consideration of the domestic laws of a state and identifying if the state laws have universal recognition.

International law is basically a system of rules and principles that aims to govern the relations between sovereign states. This paper discusses these primary sources of international law in the context of the amendments made to the *Migration Act*.

Multilateral treaties

The Commonwealth of Australia, using its recognised prerogative powers, has entered into several multilateral treaties, qualifying the international law of the sea as it relates to the maritime areas surrounding Australian territory. Treaties can be bilateral, that is, similar to a contract between states for a specified purpose. Alternatively, treaties may be multilateral, by establishing international rules of conduct for all parties to the treaty. Treaties commonly only bind those parties which are signatories, but treaties may make provisions for third parties that are non-parties to the agreement. *UNCLOS III*, the *Vienna Convention on the Law of Treaties* 1969, and the *Charter of the United Nations* 1945 are therefore examples of multilateral treaties, which establish rules of international conduct for states.

Australia's signature of an international convention/ agreement does not, of course, have effect within Australian domestic law without ratification.[10] The provisions of an international treaty require statutory implementation before the treaty is to form part of Australian law.[11] However, treaties are sometimes used to identify the existence of customary international law, as treaties often codify such law. As stated by the learned President of this Society, the Right

Honourable Sir Harry Gibbs, GCMG, AC, KBE in the 2000 Proceedings, even:

> ".....if a Convention is not incorporated into Australian law by statute, the Courts may give effect to it in two ways. They may conclude that the Convention is a statement of international law and that the common law should be developed consistently with it, or they may hold that individuals would have a legitimate expectation that administrative decision makers would not act inconsistently with the Convention".[12]

The High Court has held that a clearly recognised principle of customary international law can be used as a guide in respect of the duties and obligations of the state.[13] The Commonwealth Attorney-General's Department currently states on its website that customary international law is an important source of international law, and unlike treaties, a state is not required to have accepted a rule of customary international law to be bound by it. Therefore, international consensus on protection of people seeking asylum, or nations taking pre-emptive action to defend their sovereignty, may constitute emerging general principles of law recognised by nations (*opinio juris*). However, as Sir Harry Gibbs went on to state in the 2000 Proceedings:

> "It has not yet been explained how a person who has no knowledge of the existence of a treaty can have an expectation of that kind".[14]

Understandably, whilst international treaties may not authorise the use of procedures to enforce the treaties' provisions, customary international law may provide suitable remedies or alternatives. This customary international law position supports a general argument and/or presumption within Australian law, that statutes should not contradict the established rules of international law.[15] However, significantly, the High Court has determined that the presumption, that Parliament did not intend to contradict international treaties and/or customary international law, has only "restricted operation". In *Minister for Immigration and Ethnic Affairs v. Ah Hin Teoh*,[16] Mason C J and Deane J held that the presumption is only relevant if the words within a statute are ambiguous.

The High Court held unanimously in *Horta v. Commonwealth*[17] that:

> "The parliament's power with respect to 'external affairs' was not confined to the enactment of laws consistent with the requirements or constraints of international law ... [An enactment] within the legislative competence of the parliament, regardless of whether the treaty is void or invalid under international law or whether the making of a treaty or the implementation of its provisions would or would not be inconsistent with Australia's international obligations".

Doctrine of freedom of the seas

The classical assumption proposed by the Dutch scholar, Hugo Grotius, and derived from natural law was that the seas are open to all. Grotius developed the *mare liberum* theory in the 17th Century. His theory assisted the Dutch Republic in its trade in the East Indies. However, Grotius later modified his theory so that a sovereign state could claim jurisdiction and exclusive rights over part of the High Seas. It is this *mare liberum* theory, as developed by Grotius, that provides the foundation for the "freedoms" of the High Seas:

1. The freedom to navigate;
2. The freedom of overflight;
3. The freedom to fish; and

4. The freedom to lay cables and pipelines.[18]

Economic interest has remained the backdrop for the application of these theories until the present day.

UNCLOS III

UNCLOS III established some important changes to previous Conventions such as those of 1958, especially with respect to the delimitation of maritime zones. The objective of *UNCLOS III* was the establishment of a constitution for the oceans. It codified the customary international law of freedom of the seas. It entered into force, after obtaining 60 ratifications, in 1994.

Its provisions established three maritime zones. Each of these is subject to a specific juridical regime:

1. Territorial Sea: the area in which a state has full sovereignty;
2. Exclusive Economic Zone: the area in which a state has sovereign rights; and
3. High Seas: that part of the ocean in which a flag-state has jurisdiction only over its own vessels.

Significantly, the continental shelf was re-defined in Part VI of *UNCLOS III* in Article 76(1) as follows:

> "The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance".

More distant shelf areas may be claimed by the coastal state in certain circumstances, as prescribed in the remaining paragraphs of Article 76. The new definition is based on technical criteria, and clearly reflects the current technological advances and technical capability to explore and exploit mineral resources from the seabed.

Territorial sea

UNCLOS III, in Article 2, confirms the sovereignty of a state over its land territory and internal waters to the "belt" of sea adjacent to its coast called the territorial sea.[19] Article 3 of *UNCLOS III* allows states to establish a territorial sea extending for 12 nautical miles from the maritime baseline. Sovereignty extends to the air space above the territorial sea and to its bed and subsoil. Sovereignty over the territorial sea is not absolute, but is subject to the principles of customary international law. The most significant exception is the right of all states to enjoy innocent passage through other states' territorial seas. Generally,[20] Australia exercises a claim to the territorial sea with a breadth of 12 nautical miles.[21]

The sovereignty of Archipelagic Islands, such as the Cocos/Keeling Islands (which are excised under the *Migration Act*) extends to all the waters enclosed by the archipelagic baselines, their bed and sub-soil and airspace above. There is a right of innocent passage through archipelagic waters. Archipelagic Islands may have designated sea-lanes and air routes through the archipelagic waters in which all states enjoy rights.

Innocent passage through the territorial sea

Coastal states must allow and not hamper the right of innocent passage in territorial seas to the ships of all other states. Article 19 of *UNCLOS III* states that passage of a foreign vessel is considered prejudicial to the peace, good order or security of the coastal state if the vessel engages in:

1. The use or threat of force against the coastal state;
2. Exercise or practice with weapons;
3. Any act aimed at collecting information to the prejudice of the coastal state;
4. Any act of propaganda against the coastal state;
5. Launching, landing or taking on board of aircraft;
6. Launching, landing or taking on board of any military device;
7. *Loading or unloading any thing or person contrary to the customs, fiscal, immigration or sanitary laws of the coastal state* [emphasis added];
8. Any act of pollution;
9. Fishing;
10. Research activities;
11. Any act aimed at interfering with communications systems or facilities of the coastal state; and
12. Any other activity not having a direct bearing on passage.

Submarines are required to navigate on the surface and show their flag. A coastal state is not normally permitted to suspend the right of innocent passage.

Rights and obligations of coastal states

A coastal state, in respecting that right of innocent passage, may adopt laws and regulations on many aspects of navigation through the territorial seas, which must be given due publicity and must be complied with by foreign shipping. The coastal state may designate sea-lanes and traffic separation schemes for the regulation of shipping through its territorial seas.

Sovereignty over the territorial sea includes criminal jurisdiction on board foreign ships passing through the territorial sea. Article 27(2) of *UNCLOS III* enables the coastal state to "take any steps authorised by its laws for the purpose of arrest or investigation on board a foreign ship". The provision to take "any steps" can be contrasted with subsequent provisions enabling coastal states "control" over their EEZ. Kaye states that "the coastal State is to determine for itself what management principles it might wish to apply within its territorial sea, as an exercise of its sovereignty".[22]

Jurisdiction within the territorial sea

The territorial state has jurisdiction over foreign merchant vessels in internal waters,[23] and over crimes[24] committed on board such vessels.[25] This jurisdiction is concurrent with that of the flag state.[26] Foreign ships that enter in distress may not be subject to the jurisdiction of the coastal state.[27]

In *Wildenhus's Case*,[28] a treaty between the United States and Belgium granted each state jurisdiction necessary to maintain order on board merchant vessels located in internal waters. In that case, a murder below decks committed on board a Belgian ship in a US port was enough to found that jurisdiction. Generally, the jurisdiction of the coastal state is not exercised unless the offence disturbs the peace, dignity or tranquillity of the port.

As O'Connell comments, "a State has the competence under international law to extend its criminal law to any area which is subject to its sovereignty".[29]

Contiguous zone

Article 33 of *UNCLOS III* provides that the contiguous zone may not extend beyond 24 nautical miles from the baselines upon which the territorial seas are measured. Shearer defines a contiguous zone as:

> "[A] body of waters lying between the territorial sea and the high seas in which a coastal state may exercise certain enforcement powers in relation to its laws applying on land or in the territorial sea ... in effect it is a policing zone".[30]

Therefore, *UNCLOS III* provides a coastal State with sovereignty over the territorial sea, and policing powers to prevent nominated offences in the contiguous zone. Fitzmaurice states that the contiguous zone is not a "belt" of coastal state sovereignty, or jurisdiction beyond the territorial sea, it is merely a "policing zone".[31] Shearer states that:

> "It is sometimes rashly assumed that the contiguous zone is a zone of extended coastal state jurisdiction in matters enumerated in Art 33, viz. customs, fiscal, immigration, and sanitation. A close reading of the text and the drafting history, however, reveals that this is not so. The contiguous zone is juridically part of the high seas ... Moreover, the coastal state may only exercise 'control' (not sovereignty or jurisdiction) over the contiguous zone necessary:
>
> (a) to *prevent* infringement of the specified laws within its *territory or territorial sea*, and
>
> (b) to punish infringements of those laws committed within its territory or territorial sea".[32]

Article 33 of *UNCLOS III* provides two "limbs" under which a State may exercise control. Shearer proposes that the first limb is to prevent offences of "inward-bound" vessels intending to enter the territorial sea; the second limb provides for outward-bound vessels that have committed an offence within the territorial sea. *UNCLOS III* restricts the punishment of vessels in the contiguous zone to offences committed within the territorial sea. Therefore, punishment of vessels in the contiguous zone is arguably restricted to those vessels leaving the territorial waters.

The Commonwealth of Australia has claimed a contiguous zone beyond the territorial sea in the *Maritime Legislation Amendment Act* 1994. The application of coastal State powers was summarised in the Explanatory Memorandum to the *Border Protection Amendments Bill* 1999.[33]

The distinction between the *UNCLOS III* provisions pertaining to the territorial sea and the contiguous zone emphasise the intention of the drafters of *UNCLOS III* to differentiate the two "belts" of jurisdiction. Therefore, it has been argued by academics and the media that coastal states are limited in their ability to take preventative action against foreign flag and non-flag vessels, such as those carrying "asylum seekers", in the contiguous zone.[34] There is the potential for a breach of the duties espoused by Article 300 of *UNCLOS III*, that is the fulfilment in good faith of obligations assumed under the Convention. There is therefore the potential for Australian vessels acting in accordance with the *Migration Act* to act in breach of international law.

Exclusive Economic Zone

Under *UNCLOS III*, coastal states retain sovereign rights over the exclusive economic zone, although these sovereign rights limit the classical freedoms of the High Seas of other states. Part V of *UNCLOS III* creates a specific legal regime, the Exclusive Economic Zone (EEZ) in which coastal states have:

> "Sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities of the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds".

Under Article 57, this EEZ is not to extend beyond 200 nautical miles from the baselines. With regard to the *Migration Act*, Article 73(1) enables a state:

> "In the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws adopted in compliance with this convention".

Shearer suggests that coastal States merely have preferential rights to the fish stocks within the EEZ. Article 58(2) applies:

> "……Articles 88 to 115[35] and other pertinent rules of international law to the exclusive economic zone in so far as they are not compatible with this part".

Commentators have suggested that the detailed and specific articulation of enforcement powers of a coastal state contained in Part V of *UNCLOS III* is markedly distinct from similar, more general powers contained elsewhere in *UNCLOS III*.[36]

Australian maritime zones

The Commonwealth's sovereignty with regard to the territorial sea was proclaimed by s. 6 of the *Seas and Submerged Lands Act* 1973. Australia exercises a claim to twelve nautical miles of territorial sea. The Commonwealth has claimed a contiguous zone beyond the territorial sea. Similarly, Australian sovereignty over the contiguous zones and an Exclusive Economic Zone have also been claimed by subordinate regulation.[37] These legislative enactments have effectively adopted the international conventions signed by Australia into domestic law.

The coastal state does have sovereign rights to the resources within the territorial sea; however, its ability to enforce its rights within the EEZ is restricted to the conservation of the marine environment. Arguably, vessels stopped and boarded for *Migration Act* offences in the EEZ are under the jurisdiction of the flag state and not subject to the jurisdiction of the coastal state.[38] Generally speaking, the laws of the flag state apply in relation to ships, and except in certain circumstances, only the flag state can exercise jurisdiction in relation to ships entitled to fly the flag of that state (Article 92, *UNCLOS III*).

It has been argued that coastal state jurisdiction over the high seas would not recognise the operation of Australia's customs and migration laws within the EEZ.[39] Therefore, the establishment of jurisdiction beyond the territorial sea is essential for the enforcement of coastal state laws upon vessels of flagged states operating within the EEZ and adjacent high seas.

Jurisdiction and sovereignty – conclusion

Current Australian domestic legislation allows for a non-Australian flag vessel to be boarded and arrested for a *Migration Act* offence which may be committed outside Australia's contiguous zone.[40] Therefore, the *Migration Act* allows actions against non-Australian and non-flagged vessels within the 200-mile Exclusive Economic Zone.

The High Court has held that there is no territorial limitation placed upon the Commonwealth Parliament in passing laws for the "peace, order and good government of the Commonwealth". Further, it is for the Commonwealth to decide whether a law will be for the peace, order and good government of the Commonwealth.[41] The Commonwealth Government has the power to legislate with extra-territorial effect.

Significantly, the jurisdiction of the Commonwealth is not limited to laws which are consistent with international law, despite principles of international law to the contrary,[42] provided there is a sufficient nexus between Australia and the matters to which the laws relate.[43] Provided that valid nexus[44] exists between the state and the alleged offence, international law will recognise the jurisdiction of the state. The operation of jurisdiction extra-territorially is generally permitted where the offence is against the "security, territorial integrity or political independence of the state". Further, common "law courts have viewed the extension of jurisdiction legitimate where the intended result or the intended victim were within the territory and it was necessary to protect peace, order and good government".[45]

In *Davis v. Commonwealth*, Brennan J (as he then was) held that:

> "[T]he executive power of the Commonwealth extends to the protection of the nation against forces which would weaken it, it extends to the advancement of the nation whereby its strength is fostered. There is no reason to restrict the executive power of the Commonwealth to matters within the heads of the legislative power".[46]

Brennan J identified the prerogative power as a source of constitutional authority, which enables the Parliament to take action to protect the sovereignty of the Commonwealth and its laws. A use of a state's prerogative power includes relations with another state (known as the domestic act of a state).[47] The common law has held such acts of state to be non-justiciable in Australian Courts.[48]

The High Court of Australia has determined that the Commonwealth Parliament has the power to decide what international laws it will enforce in accordance with the Commonwealth Constitution. The accession of Australia to an international agreement will have no effect on the law of Australia.[49] Australian domestic legislation should, if possible, reflect the obligations imposed by international law; however, the Australian Parliament has been recognised as having the power to pass legislation with extra-territorial effect. Therefore it can be argued that the Commonwealth Parliament has a prerogative power to pass laws which may conflict with international laws, regardless of whether the *Migration Act* could be argued to be in breach of the sovereignty of a flag state.

By enacting these legislative amendments, Australia has adopted a dualist approach to international law, reflecting a historical predilection for positivism and a reluctance to relinquish internal sovereignty.[50] As a result, the

Commonwealth Parliament must ratify an international treaty before it can operate domestically. Additionally, customary international law is not obliged to be followed unless ratified by domestic legislation.[51] As Shearer has stated, Australia must ensure that it carefully and selectively adopts international law into domestic law to "guard against the danger of ... hasty incorporation of international law to the possible prejudice of the beneficial development of the common law of Australia".[52]

There is a general presumption of law that Parliament would not intend a statute to be inconsistent with the established rules of international law and comity of nations. In *Chhu Kkeng Lim v. Minister for Immigration, Local Government and Ethnic Affairs*,[53] the High Court favoured the construction of a Commonwealth statute which accorded with the obligations of Australia under an international treaty.

The High Court has clarified the circumstances in which that presumption can be used to interpret domestic legislation. Generally, there must be some ambiguity within the legislation which would provide recourse to international law to assist with statutory interpretation.[54] However, recourse to international law to assist in the construction of domestic law is not required if the statute expresses a clear intention which is contrary to international law.[55] Further, there is no requirement in the Constitution that the Commonwealth's legislative power is confined within the limits of Australia's legislative competence as recognised by international law. Therefore, our constitutional system limits full review by Australian courts in determining whether domestic legislation has breached international law.[56]

Although there is a strong presumption in the common law against the extra-territorial operation of law (*extra territorium jusdicenti impune non paretur*: "the sentence of those adjudicating outside their jurisdiction can be disobeyed with impunity"), the Australian Parliament is sovereign and expresses the will of the Australian people within the democracy.[57]

Australia's sovereignty, as espoused by the application of the *Migration Act* to the Islands excised from the migration zone, is within prerogative power.[58] As the President of this Society wisely stated in the 2000 Proceedings:

> "Some commentators say that the increasing inter-dependence of the nations of the world, and the need for Australia to relate to other nations, have made it necessary for us to transfer some of our sovereignty to the United Nations. It is true that we cannot live in isolation. It does not follow that we should allow remote Committees to decide what rights the inhabitants of Australia should have. The decisions they have so far made do not convince us that they have more wisdom than our own processes can provide".[59]

Endnotes:

1. Kirby, *Visions of the Legal Order in the 21st Century: Essays to honour His Excellency Judge C J Weeramantry* (Ed. Sturgess and Anghie), *The Growing Rapprochment Between International Law and National Law*. Parts of this contribution appeared in an earlier form in the paper by the author, *The Impact of International Human Rights Norms: A Law Undergoing Evolution* (1995), 25 *Western Australian Law Review*, 1.
2. *Border Protection Legislation Amendment Bill* (1999), Bills Digest No. 70,

1999-2000, Andrew Grimm, 13 October, 1999 at 2.

3. This is attempted by the use of the doctrine of "constructive presence": Churchill, Lowe, *The Law of the Sea* (2nd edn) (1988), Manchester University Press, at 172 –3.

4. Ss 184A(5), 184B(1), *Customs Act* 1901; ss 245B(5), 245C(1), *Migration Act* 1958.

5. The amendments bar unauthorised arrivals at these places from applying for a visa (section 46A); allow Commonwealth officials to move those people to a declared safe country (section 198A); and provide officials with discretion on whether to detain these people when in that offshore place (subsections 189(3) and (4)).

6. "*Offshore entry person*" is defined as a person who entered Australia at an excised offshore place, and became an unlawful non-citizen because of that entry (arrived without a visa or other authority under the *Migration Act*).

7. People who enter Australia's migration zone unauthorised at an excised place are barred from making any visa application as a result of entering Australia in that area illegally. The Minister, however, has the power to permit such people to make applications for visas of a specified class.

8. There are also "Secondary Sources", which allow the International Court of Justice to consider the writings of legal theorists.

9. The *Statute of the International Criminal Court* (Rome, 17 July, 1998: UN Doc A/CONF 183/9; 37 ILM 999 (1998)), Article 21(1)(c) allows the International Criminal Court to apply "general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction of the crime, provided those principles are not inconsistent with ... international law and internationally recognised standards".

10. *Koowarta v. Bjelke-Petersen* (1982) 153 CLR 168 at 193 per Gibbs J, at 212 per Stephen J, and 224 per Mason J.

11. *Victoria v. Commonwealth* (1996) 187 CLR 416 at 481 per Brennan C J, Gaudron, McHugh and Gummow J J.

12. Rt Hon Sir Harry Gibbs, *The Erosion of National Sovereignty*, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 12 (2000), p. xii.

13. *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 519, per Mason C J, Wilson and Dawson J J. Though this has been limited to issues arising from an ambiguity in the Statute, per *Acts Interpretation Act* 1901, s. 15AB.

14. *Loc. cit.*, p. xii.

15. *Jumbunna Coal Mine, NL v. Victorian Coal Miners' Assn* (1908) 6 CLR 309 at 363 per O'Connor J.

16. *Minister for Immigration and Ethnic Affairs v. Ah Hin Teoh* (1995) 128 ALR 353, at 362.

17. *Horta v. Commonwealth* (1994) 123 ALR 1, at 2, 4 per Mason C J, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh J J.

18. Report of the International Law Commission to the General Assembly, Document a/3159, printed in *Yearbook of the International Law*

Commission 1956, Vol II, 253 at 259. (Also issued as Official Records of the General Assembly, Eleventh Session, Supplement No 9.) As recognised by the First Committee during *UNCLOS I*. See *Ordering the Oceans: The Making of the Law of the Sea*, at 16.

19. *Convention on the Territorial Sea and the Contiguous Zone* (Geneva, 29 April, 1958; 516 LTNTS 205), Article 1, par 1; *United Nations Convention on the Law of the Sea* (Montego Bay, 10 December, 1982; UN Doc A/Conf 621122; 21 ILM 1261 (1982)), Article 2. Australia claims sovereignty over the territorial sea and seabed through the *Seas and Submerged Lands Act* 1973, s. 6, upheld as constitutional by the High Court of Australia in *New South Wales v. Commonwealth (Seas and Submerged Lands Case)* (1975) 135 CLR 337; 8 ALR 1; 50 ALJR 218.
As to the constitutional position with respect to the Australian States, see the *Coastal Waters (State Title) Act* 1980; *Coastal Waters (State Powers) Act* 1980; *Port MacDonnell Professional Fishermen's Assn Inc v. South Australia* (1989) 168 CLR 340; 88 ALR 12; 63 ALJR 671: *Halsbury's Laws of Australia* (1998) at 215.

20. An exception to the width of the territorial sea are the waters surrounding the Australian Islands in the Torres Strait, which are limited to three nautical miles. *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 Torres Strait, and Related Matters (Torres Strait Treaty)* (Sydney, 18 December, 1978; Australian Treaty Series 1985, No. 4), Article 3(2).

21. *UNCLOS III*, Article 3. On 20 November, 1990 the territorial sea was extended to 12 nautical miles by Proclamation under the *Seas and Submerged Lands Act* 1973, s. 7: *Commonwealth Gazette* S297, 13 November, 1990. See also Opeskin, Rothwell, *Australia's Territorial Sea: International and Federal Implications of its Extension to Twelve Miles* (1991), 22 *Ocean Development and International Law*, at 395-431.

22. Kaye, *International Fisheries Management* (2001), Kluwer Law International, London, at 90.

23. "See, for example, *R v. Anderson* (1868) LR 1 CCR 161; 11 Cox CC 198; *Wildenhus's Case* 120 US SC 1, 30 L. Ed. 565 (1887). This is an example of territorial jurisdiction. For the immunity of warships, see *The Schooner Exchange v. McFaddon* (1812) 7 Cranch 116 SC (US), where a public vessel owned by Napoleon as the reigning Emperor of the French was claimed by two Americans as having been forcibly taken by Napoleon's agents. As a result of their claim the vessel was arrested in the port of Philadelphia. The court held that the vessel was a public one commissioned and armed by the French Government for public purpose. As such, the vessel enjoyed the right to free passage. However, the court noted that were a sovereign to descend from the throne to become a merchant, he submits to the law of the country. Thus, a public vessel used for commercial purposes has no immunity": *Halsbury's Laws of Australia* (1998), at 215.

24. These rules apply to merchant ships and government ships operated for commercial purposes: *Convention on the Territorial Sea and the Contiguous Zone* (1958; *loc. cit.*), Pt I, Section III, Subsection B, Article 21; *United*

Nations Convention on the Law of the Sea (1982; *loc. cit.*), Pt II, Section 3, Subsection B. See *Halsbury's Laws of Australia* (1998), at 215:

> "Warships enjoy full immunity: *The Schooner Exchange v. McFaddon* (1812) 7 Cranch 116 SC(US). For the application of the *Customs Act* 1901 in cases of smuggling, see *R v. Bull* (1974) 131 CLR 203".

25. The local authorities may arrest persons on board foreign ships in internal waters: *R v. Garrett; Ex parte Sharf* [1917] 2 KB 99; (1917) 5 BILC 95; *Wildenhus's Case, loc. cit.*. For arrest on board a foreign ship for the purposes of extradition, see the *Eisler Case*: Jeniungs R, *Extradition and Asylum* (1949), 26 *British Yearbook of International Law*, 468.

26. *R v. Anderson* (1868), *loc. cit.*; *Wildenhus's Case, loc. cit.*. In *Re Sutherland* (1922) 39 (NSW) 108, an application for *habeas corpus* in respect of people detained as convicts under French law on board a French ship in Sydney harbour was refused because their detention was justified under French law. The *United Nations Convention on the Law of the Sea* (1982; *loc. cit.*), Article 218 provides that the coastal state may take action against a vessel that is voluntarily within a port with respect of any discharge from the vessel outside the internal waters, territorial sea or exclusive economic zone.

27. *The Creole* (1853) IV Moore, Int Arb 4375 at 4377. As to the meaning of distress, see *The May v. R* [1931] SCR 374 at 381; [1931] 3 DLR 15, SC (Canada), where an American fishing vessel was seized after having anchored 2.5 miles from the Canadian coast. The court determined that entry by a foreign vessel into Canadian waters cannot be justified on the ground of "stress of weather" unless the weather is such as "to produce in the mind of a reasonably competent and skilful master, possessing courage and firmness, a well grounded *bona fide* apprehension that if he remains outside the territorial waters he will put in jeopardy his vessel and cargo". In this case the court held that the Captain simply wanted to be more comfortable than he would have been outside the three-mile limit. This was an insufficient reason for entering Canadian waters: at 23.

28. *Wildenhus's Case, loc. cit.*.

29. O'Connell, *International Law of the Sea*, Vol II, (1984) Clarendon Press, Oxford, at 919.

30. Shearer, *Australia's New Maritime Zones* (1995), 69(1) *Australian Law Journal* 26, at 26.

31. Fitzmaurice, *The Territorial Sea and Contiguous Zone* (1955), 8 *International and Comparative Law Journal* 73, at 111.

32. Shearer, *Maritime Jurisdiction and Enforcement: Problems of Jurisdiction and Law Enforcement Against Delinquent Vessels* (1986), 35 *International Comparative Law Quarterly*, 320 at 330.

33. Paragraph 41: "It will be seen that contiguous zone jurisdiction differs according to whether or not there has been a contravention of Australian law in Australia or in the territorial sea. If a ship entered the contiguous zone in circumstances where it was suspected that an offence was about to be committed, Australia would have jurisdiction to exercise the control necessary to prevent the contravention occurring. In the case of an attempted importation of drugs, for example, this control might extend to

seizing and disposing of the drugs. However, there would be no jurisdiction to arrest or charge the persons involved with attempting to commit an offence against Australian law, since no offence would have occurred within Australia's territory or territorial sea".
Paragraph 42: "However, if there has been a contravention of customs, fiscal, immigration or sanitary law, and the ship is leaving Australia after having been used in the contravention, there is jurisdiction to arrest the persons on board, since the coastal state may exercise the control necessary to punish infringements of customs, fiscal, sanitary and immigration laws which have occurred within its territory or territorial sea".

34. Shearer, *loc. cit.*, (1986); McLauchlin, *Coastal State Use of Force in the EEZ Under the Law of the Sea Convention* (1999), 18 (1) *University of Tasmania Law Review*, 11; O'Connell, *op. cit.*; Churchill, Lowe, *op. cit.*.

35. *UNCLOS III*, which incorporates provisions such as Art 88: "No state may validly purport to subject any part of the high seas to its sovereignty"; Art 94: "Duties of flag states"; Art 111: "Right of hot pursuit".

36. Kriwoken, Haward, VanderZwaag, Davis, *Oceans Law and Policy in the Post-UNCED Era: Australian and Canadian Perspectives* (1996), Kluwer Law International, London, at 59 – 69.

37. *Commonwealth Gazette* S290, 1 August, 1994 (proclamation 29 July, 1994), incorporated into the *Seas and Submerged Lands Act* 1973, ss. 10B and 13B.

38. McLauchlin, *op. cit.*, at 14 - 16.

39. *Ibid.*; Shearer (1995), *op. cit.*; Donaghue, *Sovereignty and International Law* (1995), 17 *Adelaide Law Review*, 213: 1. No jurisdiction as an offence is yet to take place in the territorial sea. 2. Duty to prevent rather than board and arrest. 3. No internationally recognised exception to the doctrine of freedom of the seas and flag state jurisdiction.

40. Ss 184A(5), 184B(1), *Customs Act* 1901; ss 245B(5), 245C(1), *Migration Act* 1958.

41. *Polyukhovitch v. Commonwealth* (1991) 172 CLR 501, at 605 per Deane J, at 635-6 per Dawson J.

42. *Fishwick v. Cleland* (1960) 106 CLR 186. There is no requirement in the Constitution that the Commonwealth's legislative power is confined within the limits of Australia's legislative competence as recognised by international law: *Horta v. Commonwealth* (1994) 181 CLR 183 at 188-9, per Mason C J, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh J J.
However, this is in direct contrast to the *pacta sunt sevanda* (agreements are binding) principle prescribed by Art 2 (2) of the *Charter of the United Nations*, as amended (including the International Court of Justice), (done at San Francisco, 26 June, 1945), in force 24 October, 1945; and Art 26 of the *Vienna Convention on the Law of Treaties* (done at Vienna, 23 May, 1969), entry into force for Australia and generally, 27 January, 1980.

43. *Polyukhovich v. Commonwealth, loc. cit.*, at 599 per Deane J. The nexus can be defined between the state and the subject of the law by considering the territorial, nationality, protective, universality and passive personality principles; for more detail see Reicher (ed.), *Australian International Law: Cases and Materials* (1995), The Law Book Company, Sydney, at 244-6.

44. The criteria for establishing a valid nexus are discussed by Triggs. They are: (1) the territorial principle, which applies when an offence occurs within the territory of the prosecuting state; (2) the nationality principle, which applies when the offender is a national of the prosecuting state; (3) the protective principle, which is exercised where an extra-territorial act threatens the integrity of the prosecuting state; (4) the passive personality principle, which applies where the victim of the offence is a national of the prosecuting state; and (5) universality principle, which permits the exercise of jurisdiction by a state in respect of criminal acts committed by non-nationals, where the accuser's attack upon international order is of common concern to all mankind. Triggs, *Australia War Crimes Trials: A Moral Necessity or a Legal Minefield?* (1988), 16 *Melbourne University Law Review*, 382, cited in Reicher (ed.), *op. cit.*, at 244-245.

45. *Liangsiriprasert v. United States* [1991] 1 AC 225, at 251.

46. *Davis v. Commonwealth* (1988) 166 CLR 79 at 111.

47. "An act of the executive as a matter of policy performed in the course of its relationship with another State, including its relations with the subjects of that State ... is an act of State": Wade, *Act of State in English Law: Its Relations with International Law* (1934), 15 *British Yearbook of International Law* 98, at 103.

48. *Coe v. Commonwealth* (1979) 24 ALR 118 at 128, per Gibbs J; *Horta v. Commonwealth* (1994) 123 ALR 1 at 6 and 9; found the character of the actions and decisions made by the government were not justiciable; the court held it was unnecessary to answer the question of actions being justiciable; per Mason C J, Brennan, Deane, Dawson, Toohey, Gaudron, and McHugh J J.

49. *Bradley v. Commonwealth* (1973) 128 CLR 557.

50. Mason, *The Relationship Between International Law and National Law, and its Application in National Courts* (1992), 18 *Commonwealth Law Bulletin* 750, at 750.

51. *Kartinyeri v. Commonwealth* (1998) 195 CLR 337, at 384-5 per Gummow and Hayne J J.

52. Shearer; quoted in Alston, Chiam (eds), *Treaty Making and Australia: Globalisation Versus Sovereignty?* (1995), Federation Press, Leichhardt, at 93-98.

53. *Chhu Kkeng Lim v. Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 38, 53 per Brennan, Deane and Dawson J J.

54. *Minister for Immigration and Ethnic Affairs v. Ah Hin Teoh* (1995) 183 ALR 353 at 362, per Mason C J and Deane J, noted reasons for rejecting a narrow conception of ambiguity. If the language of the legislation is amenable to construction which is consistent with the provisions of an international instrument, which imposes obligations upon Australia, then a construction which is consistent with international law should prevail.

55. *Horta v. Commonwealth* (1994) 181 CLR 183 per Mason C J, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh J J at 188, 189.

56. The High Court has determined that issues arising from an exercise of the Parliament's prerogative power are not susceptible to judicial review:

Koowarta v. Bjelke-Petersen (1982) 153 CLR 168 at 229, per Mason J; *Minister for the Arts v. Peko-Wallsend Ltd* (1987) 15 FCR 274.

57. The Commonwealth Parliament can make laws in accordance with the heads of power established in the Constitution, but it cannot make laws to remove High Court jurisdiction (ss 75, 76, 77 of the Australian Constitution). The consequence of this doctrine in Australia is that a court cannot deny the validity of an exercise of legislative power merely on the grounds that the legislation abrogates freedoms which in the court's opinion should be preserved: *Nationwide News Pty Ltd v. Willis* (1992) 177 CLR 1, at 43 per Brennan J, and at 85–6 per Dawson J.

58. The Commonwealth of Australia has inherited all of the sovereign rights of the Queen: *Davis v. Commonwealth* (1988) 166 CLR 79 at 93. The prerogative powers of the Commonwealth include the power to enter international treaties, deal with other states and declare war, etc; *Simesk v. Macphee* (1982) 148 CLR 636 at 641-2.

59. Rt Hon Sir Harry Gibbs, *loc. cit.*, p. xx.