AUSTRALIAN OFFSHORE LAWS

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Contents

Preface

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

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

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

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

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1 See the Memorandum on p xxiv.

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

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

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

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

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

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

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

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

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

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

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

Chapter 13

Summary and Proposals for Reform

13.1 Introduction

It is difficult to produce a summary of the Australian offshore laws as there are so many of them and they all have aberrations, peculiarities and exceptions and, in some cases, there are even exceptions to the exceptions. To obtain such detail readers will need to go through the individual book chapters but some pertinent points may be made about each of the offshore law areas covered by the chapters. The object is to summarise the noteworthy characteristics of the laws arising from each chapter and so enable the reader to follow the basis for the recommendations for reform that are made in the following sections. This chapter has its focus, therefore, on suggestions for reform of the Australian offshore legal structure.

In Chapter 1 a short introduction is given to the British claims to offshore jurisdiction after the penal settlement was established in New South Wales in 1788 and legislative competence was gradually transferred to the Australian colonies. This explains the basis on which the subsequent law developed. When the colonies federated into one Commonwealth of Australia in 1901 the issue of the offshore jurisdiction lay dormant for many decades. In Chapter 2 the story is moved forward with mention of the need for national regulation of offshore petroleum and then that it was not until the High Court decision in the *Seas and Submerged Lands Act Case*[1] in 1975 that this was decided in favour of the Commonwealth Parliament's claim to jurisdiction for its laws from the low water mark or historic State boundaries.

This result was unsatisfactory to all parties so the Commonwealth and the States commenced negotiations and entered into the Offshore Constitutional Settlement 1979. This settlement restored a basic foundation of offshore jurisdiction to a regime something like the offshore jurisdiction that the States had claimed. This was that they had jurisdiction out to the outer limit of the territorial sea, then three nautical

1 *New South Wales v Commonwealth* (1975) 135 CLR 337.

miles in width. This may have been a satisfactory political solution in 1979 but the present inconvenience to the country of this situation will be discussed shortly.

Chapter 3 addresses the current offshore petroleum, mining and installation laws, including those that apply in the Timor Sea agreements with Timor-Leste. The massive amount of legislation regulating the offshore petroleum industry beyond the three mile limit is daunting and there would be very few people who could claim to understand all aspects of it. Fortunately there are many who understand their specialised areas of it and thanks to them, and to the pragmatic approach of most of those involved, the industry and the government are able to function tolerably well. Not only is there exception piled on exception in these laws but there have been many legislative changes in recent years and it is disappointing to record that the manner of these changes by the Commonwealth government leaves a lot to be desired. After some five years of consultation the *Petroleum (Submerged Lands) Act 1967* was replaced with the large new *Offshore Petroleum Act 2006*, which came into force about mid-2008. Within a few months the government had brought in 440 pages of amendments to accommodate the offshore greenhouse gas storage proposals whereby some of the vast amount of greenhouse gas produced on the land would be injected under the seabed there to be stored. To cap the difficulty of absorbing a huge amendment to an already massive Act, renamed as the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*, the government renumbered the amended Act and then did not produce a consolidated renumbered Act for over six months after it came into force. The good sense and pragmatism of those who have to work under this legislation have been sorely tried.

The offshore petroleum position is complex enough even without alluding to the State legislation that covers the first three miles offshore. The States were meant to ensure that their legislation mirrored that of the Commonwealth. However, as the years passed there have emerged more and more discrepancies, which has led to a poor result.

There is very little offshore mining, other than petroleum and the legislation regulating it is simple. As to offshore installations, petroleum platforms are governed in the main by the petroleum legislation except for some pollution and security issues. Non-petroleum offshore installations are in the main tourist installations in the Great Barrier Reef. Here there is some complexity as these sea installations also require laws relating to customs, immigration, security, quarantine and criminal administration. These are not easy areas of law as numbers of different Acts apply and they are not cross-referenced one to the other for the most part.

The offshore criminal laws, addressed in Chapter 4, are somewhat simplified by an outbreak of common sense in that, after a most turbulent history while the Commonwealth and the States disengaged their offshore criminal laws from those of the United Kingdom, it was agreed at

the Offshore Constitutional Settlement 1979 to apply the criminal laws of the States offshore to the fullest extent of the Australian jurisdiction. The outer extent is now the outer limits of the EEZ or the continental shelf where it extends beyond the EEZ. On closer inspection, however, there are complexities. The inner adjacent zone of the States extends for 12 miles to seaward from the baselines, whereas all other laws of the States under the Offshore Constitutional Settlement 1979 only extend for three miles. Fortunately, this may not matter too much because in the outer adjacent zone the State laws are applied by the Commonwealth law, with the effect that the zones abut and run into each cover to provide a seamless coverage. The result is that the same State laws apply offshore either of their own force or as applied laws of the Commonwealth.

But the complexities then emerge. Where there are offlying territories, the Jervis Bay criminal laws apply onshore and in its ports and other internal waters. However, once the ship leaves the port limits presumably the adjacent State criminal laws then apply and for ships travelling beyond the EEZ or outer continental shelf, the Jervis Bay criminal laws then apply again once they cross its outer limits. For the two States that have offlying islands - New South Wales and Lord Howe Island, and Tasmania and Macquarie Island - the State law would apply onshore, in the port and at sea until the outer limits of the EEZ or outer continental shelf. But Jervis Bay criminal law is not from Jervis Bay at all because under the *Jervis Bay Territory Acceptance Act 1915* the criminal law of the Australian Capital Territory applies in that territory. It may be seen, therefore, that the Australian offshore criminal laws have their fair share of uncertainties.

Chapter 5 addresses offshore defence laws and it will be seen that the main function of the armed forces, which is for the defence of Australia against an armed and aggressive enemy, has been distorted by a requirement for it to enforce a combination of police work and regulation of offshore control of immigration, fisheries, customs and quarantine. To ascertain exactly what laws apply to the defence personnel when operating offshore, it is necessary not only to trawl through the many naval, air force or army laws and regulations, depending on which arm of the service the relevant personnel are in, but also through the laws relating to fisheries, customs, quarantine, immigration and some of the offshore terrorism laws. This is, of course, not the most orderly form of governance for a defence force and it needs to be addressed.

Chapter 6 addresses the immigration laws that apply offshore, to the 'boat people' as they are known, including the refugees. Here the contemptible laws and administration of the Howard government years and its conduct in relation to the *Tampa* incident and its Pacific Solution, particularly as they were applied to those unfortunate refugees, are steadily being wound back, but their legacy lingers on. The more recent amendments in 2009 should see these offshore laws reformed so that incoming

boat people are processed according to law in a less harsh and more humane way. This would mean that these people should be taken into detention there to be sorted into their correct legal status. Those who are refugees should be supported and protected, those who are economic migrants should be treated on their merits and those who are criminals should feel the full force of the law. To achieve this, much of the "excised area" mentality that is still enshrined in the law needs to be reformed and the administration simplified. As may be seen in Chapter 6, the powers of enforcement in the offshore immigration area are spread through several different government agencies, which is not the best management for efficient governance and something which should be reformed and improved.

In Chapter 7 the fisheries laws again suffer from the three mile jurisdiction rule introduced by the Offshore Constitutional Settlement 1979 so that the States and the Northern Territory laws apply for three miles and then the Commonwealth laws apply. This is unnecessarily complex and it needs reform to simplify these laws. In relation to the Commonwealth laws alone, again the legacy of the Howard government needs to be wound back. The *Fisheries Management Act 1991* (Cth) needs reform in two important areas, both of which areas relate to the so-called automatic deprivation of property under the legislation. These aspects of the Act, as explained in Chapter 7, are unworkable and unjust and they should be repealed or, if that does not happen, the present court decisions should be distinguished or overruled.

The offshore laws relating to customs, quarantine and excise are dealt with in Chapter 8 and it may be seen from that discussion that the powers given to government officials to regulate and enforce these areas overlap with, and have some similarities to, the powers given to government officials relating to fisheries and immigration. This is not surprising as in each case the same officials are dealing with different incoming vessels and sea installations. When customs officials are dealing with hot pursuit, use of force, powers to board and search and powers of arrest, they are dealing with the powers also needed by immigration and fisheries officers. Excise and quarantine are, on the other hand, somewhat different although they, too, require these powers.

Chapter 9 deals with offshore laws relating to the Antarctic Territory and the Southern Ocean and the territories and islands located in it. The laws applicable in this region are almost unique, at least so far as the Australian laws are concerned, as the Antarctic is a special area in the Australian ethos. The protection and preservation of the marine environment in the Australian Antarctic Territory and the Southern Ocean is a very high priority in these laws and Australia's active involvement in the *Convention for the Conservation of Antarctic Marine Living Resources* illustrates this fact. Chapter 9 also deals with the laws of the islands in the Southern Ocean. Macquarie Island, south of Tasmania, is currently part

of Tasmania itself, which is an historical anomaly and it should be changed to a Commonwealth territory as Tasmania has little interest in or ability for its proper management. On the other hand, Heard Island and the McDonald Islands comprise a Commonwealth offshore territory, and the laws relating to this territory seem appropriate.

The theme of offshore islands is continued in Chapter 10, where the other offshore territories' laws are discussed. The Coral Sea Territory, to the east of the Great Barrier Reef, is a strange area of uninhabited islands and coral quays so the Commonwealth laws applying there are largely to an ocean area. Norfolk Island, which is a territory, has its own unique laws, arising from its history and background. The nearby Lord Howe Island, on the other hand, is not a territory at all but is part of New South Wales. It is doubtful if New South Wales has any real interest in the proper governance of Lord Howe Island and probably it should be transferred to become a Commonwealth territory, but its (small) population would be the best decision makers on that issue. The other islands discussed in the chapter are in the Indian Ocean, to the west of Australia, and once again they have their different histories which have led to their different territorial administrations. The Cocos (Keeling) Islands and not-too-distant Christmas Island are Commonwealth Indian Ocean Territories, and each island group has its own separate administration, and this also involves some of the Western Australian laws and administration. The uninhabited Ashmore and Cartier Islands comprise another Commonwealth territory and this region of small islands, quays and water is administered by a combination of Commonwealth and Northern Territory laws and services.

Chapter 11 discussed the offshore shipping laws and here the topic is so vast that a mere mention is made of the various legal structures that regulate offshore shipping, carriage of goods, salvage, admiralty law, towage and so on. These are mainly private laws, although marine pollution is a mixture of private and public law, so they are somewhat different to the public law mentioned in the other chapters. As mentioned in Chapter 11, the author has addressed these areas of law in other books and readers would need to refer to them for detail.

Finally, Chapter 12 deals with various important offshore geographical areas not otherwise covered. The Great Barrier Reef has a most complex legal arrangement which complexities have, once again, been increased by the provisions in the Offshore Constitutional Settlement 1979 that provide for the State, Queensland in this case, to have some jurisdiction and title for three miles offshore from the land. An exception is the law applicable to the Great Barrier Reef region itself where those activities covered by the *Great Barrier Reef Marine Park Act 1975* are covered from the low water mark, except for agreements on fisheries with Queensland, when Queensland law applies. Outside the Great Barrier Reef area and outside those activities covered by in the *Great*

Barrier Reef Marine Park Act 1975, the usual mixture of State and Commonwealth laws apply. The laws of the Torres Strait are, likewise, highly complex but in this case the main complexities arise from the Australian treaty with Papua New Guinea giving rise to the Torres Strait being a specially administered region. The laws relating to marine parks and other protected areas for selected offshore marine environments are also set out in Chapter 12 and it may be seen that, apart from the Great Barrier Reef, the States have jurisdiction over marine parks out to three miles and then the Commonwealth takes over. Chapter 12 concludes with a discussion on native title laws that apply offshore. These laws are having an impact in the offshore areas and they are still developing so the impact is likely to increase.

As mentioned early on in this book, the laws of the States and the Northern Territory are not able to be fitted into this work. They are extensive as they relate to seven parliaments all passing laws that have effect offshore. The interaction of these laws with those of the Commonwealth is complicated and marked with uncertainty in many situations.

Thus having summarised the Commonwealth laws set out in the 12 preceding chapters and mentioned the increased complexity of adding the numerous State and Northern Territory laws, it is now appropriate to take up one of the reasons for writing this book; namely, to suggest reforms to these areas of offshore law. There are three reasons; which are, first, to suggest that the Offshore Constitutional Settlement 1979 should be revised and the dividing line of the three miles offshore should be reviewed. A three mile width made some sense in 1979 but currently it has no logic or utility and creates complexity without benefit. Secondly, it is suggested that the enforcement of the offshore fisheries, immigration, customs, quarantine, security, petroleum and criminal laws be consolidated into the one Act. The government has announced that it will introduce a "Maritime Powers Bill" to address some aspects and this is to be welcomed. However, the announcement is very short on detail and it is to be hoped that the policy behind this will take into account the criticisms of the current situation made by others and including those made in this book. One criticism that has not been mentioned relates to the repeal of the automatic forfeiture provisions in the *Fisheries Management Act 1991*. Another not mentioned by the Attorney-General that needs attention is the complexity of the laws applicable to the Defence forces doing these civil policing tasks.

The third recommendation is that the consolidated offshore regulatory and enforcement laws should be administered by the one government service and be administered by the one government body, to be called, as one suitable name, the Australian Coast Guard. These three suggestions will now be dealt with in more detail in turn.

13.2 Revision of the Offshore Constitutional Settlement 1979

As has been illustrated in Chapter 2, the Offshore Constitutional Settlement 1979 was a political settlement amongst the Commonwealth and all of the States arising from the High Court decision in 1975 in the *Seas and Submerged Lands Act Case*.[2] The ratio of the High Court decision was that the Commonwealth Parliament had jurisdiction to seaward from the low water mark or the historic boundaries of the States at the time of federation on 1 January 1901. This fairly simple position was, however, complicated by the subsequent decision of the High Court in 1976, in *Pearce v Florenca*,[3] which held that, provided the nexus was established between the State and the activity, people and vessel, where the State legislation was for its peace, order or good government then the State law had jurisdiction offshore, including beyond the three mile limit.

What the governments agreed in the Offshore Constitutional Settlement 1979, in effect, was that the position should be returned to a similar position that the States had maintained beforehand, which was that the State Parliaments had jurisdiction out to the limit of the territorial sea, which was then three miles wide. The settlement had nuances on this basic proposition and it should be noted that the Commonwealth still retained a basic jurisdiction but under its subsequent legislation all of the powers, rights and titles were granted by the Commonwealth to the States.[4] There was a suitable and sensible logic behind the terms of the agreement in the Offshore Constitutional Settlement 1979, as the Commonwealth did not have the bureaucracy nor the wish to administer the many activities in which the States' citizens were engaged in waters close offshore. Also there was the benefit of a closer connection, for instance, between the States' regulators and the activities in the internal waters and the near offshore waters as the people, vessels, fish, pollution, etc all passed from one to the other. The choice of the then territorial sea width also had logic as it was a well-recognised sea boundary under the Australian laws and, importantly, under the then international law.

However, the sense of choosing the three mile offshore line was confused, some may say entirely lost, when Australia extended its territorial sea to 12 mile wide. This increased width was not the only change, as it was based on the new and widely accepted international agreement on the law of the seas, UNCLOS. This major international maritime convention has, over the years, gathered increasing force until it is now accepted as the codification of the laws of the sea for many purposes. As

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

3 (1976) 135 CLR 507.

4 *Coastal Waters (State Powers) Act 1980; Coastal Waters (State Title) Act 1980.*

has been set out in Chapter 2, UNCLOS established new offshore zones so that not only was a territorial sea of 12 nautical miles agreed, but so was a contiguous zone outside the wider zone, an EEZ and an outer continental shelf. These all gave new and different powers to the coastal state and the three mile width of the territorial sea quite disappeared from having any relevance.

Further, UNCLOS established straight baselines on a much wider scale than had been accepted in international law beforehand. The result is that the low water mark and historic boundaries, that marked the line limiting jurisdiction between the Commonwealth and the States, has been submerged into the baselines as the line of demarcation. This has been done, however, without any sufficient thought or discussion in Australia of the legal consequences. There are many areas where there is doubt about which Parliament has jurisdiction and it would require extensive litigation to resolve these.

Another area of uncertainty is the inter-tidal zone, which is the zone between the low water and the high water marks. This has not been addressed and in certain circumstances it creates confusion as to which parliament has jurisdiction. For instance, take an activity such as a ship coming ashore in the Great Barrier Reef and grounding and pollution resulting from it. The ship is under the *Great Barrier Reef Marine Park Act 1975* (Cth)when it is afloat but once it arrives on the beach it is then in the uncertain inter-tidal zone and any oil spills polluting the beaches and the sea cross jurisdictions. Further, if the vessel then lands people, stores, equipment etc they are landed in Queensland, and under the Queensland jurisdiction. Still further, any vessel operating close inshore but still afloat trying to salvage that grounded vessel would be operating under numerous laws. This is but one example of a common, if unfortunate, activity giving rise to jurisdictional uncertainty.

Another point is that since the Offshore Constitutional Settlement was made in 1979 the extent of offshore activity has increased substantially. Ships operate offshore in increasing numbers, fisheries are now much more extensive, protection of the marine environment is also more extensive and the amount of offshore petroleum activity has had almost exponential growth and importance, to name just a few changes.

Another change is that at the time of the Settlement in 1979 it was agreed that the Commonwealth and the States would have uniform legislation in many areas where the activities overlapped from one jurisdiction to the next. Particular areas for this that come to mind are petroleum and marine pollution. This started to happen but in the intervening years the divergence amongst these laws has steadily increased. The offshore petroleum code has not been followed by all of the parliaments and in the marine pollution field there are major divergences. In short, a voluntary cooperative approach in which each of the parliaments is requested to keep to uniform legislation has not worked. It would no

be rash to suggest that it would never be likely to work given the combative nature of politics between the Commonwealth and the States.

It is for these reasons that it is suggested that there should be a review of the terms of the Offshore Constitutional Settlement 1979. This review would best be done after an extensive inquiry by a panel of qualified persons. In particular, the inquiry would need to establish the impact of the present structure on the many activities and industries subject to them. These latter would include shipping, fisheries, immigration, defence, quarantine, offshore petroleum, criminal law, customs and quarantine. It would also need to look into the special offshore geographical areas, such as the Great Barrier Reef, Torres Strait, Southern Ocean and Antarctica, offshore territories, special fisheries areas and the Timor Sea Joint Petroleum Development Area. Reform of the law in these areas all needs to be investigated and debated by informed minds.

As a starting point it is suggested that the line of demarcation between the Commonwealth and the States should be moved from the present three nautical miles offshore to the present baselines. This would have the advantage of having a line of demarcation that was coincident with a well-recognised international one under UNCLOS. Also, from the domestic Australian point of view, it would be a line that would be carefully surveyed and published in suitable maps and charts as this has to be done to meet the UNCLOS requirements anyway. From the constitutional law point of view, moving to this line would mean that the complexities of interaction of the Commonwealth and State laws would be simplified.

The structure for the federal governance of these offshore laws also should be reviewed. As a starting point for improvement of governance and towards a uniformity in the laws of the Commonwealth and the States, it is suggested that there be established a joint council on which all of the States and self-governing Territories should be represented. The role of this council would be to settle on the principles for the governance of offshore jurisdiction from the baselines and it would then be for the Commonwealth Parliament to pass the legislation, effective outwards from the baselines. This would avoid the present position of having numerous offshore laws by seven different State and Northern Territory Parliaments that then interact with the Commonwealth laws. It is suggested that this council would also have jurisdiction to negate the "nexus" provisions presently available under the High Court decision in *Pearce v Florenca*. Under this suggestion the council would vote on relevant matters and the States and the Commonwealth would be bound by the outcome, except in particular Commonwealth matters such as defence where the Commonwealth's view would prevail. The administration of these activities would be the responsibility of the Commonwealth, but it would be open for the Commonwealth and any of the States to enter into agreements for cooperative arrangements.

13.3 Consolidation of Offshore Regulatory and Enforcement Powers

The second substantive suggestion is that steps should be taken, irrespective of steps in this first point, to simplify the many Commonwealth laws that overlap and interrelate in their offshore application.

It has been shown in Chapters 4 (Criminal Laws), 5 (Defence), 6 (Immigration), 7 (Fisheries) and 8 (Customs, Quarantine and Excise) that the regulatory and enforcement powers are spread through the separate Acts of the Parliament over the separate agencies that regulate and enforce the laws in these separate activities. As just one example, Chapter 6, section 6, deals with the powers of officials, as set out in the *Migration Act 1958*, to deal with detention, removal and deportation of illegal immigrants, including boarding at sea, hot pursuit and the use of armed force. These are powers that should be clear and easily understood, but similar but not identical powers are addressed in Chapter 7, section 4, where the provisions of the *Fisheries Management Act 1991* are discussed. But, in the main the actual offshore patrol boats are operated by the Navy and the Customs and Border Protection Service, whose personnel have the primary duties of regulation and enforcement even though fisheries and immigration officers are often carried in their vessels. It follows that similar, but again not identical, provisions had to be inserted in the *Defence Act 1903* (see Chapter 5) and the *Customs Act 1901* (see Chapter 8).

The result of these numerous similar, but not identical, provisions is that the Australian offshore laws for regulating and enforcing these activities are overlapping and unclear. It is a burden on the officers of these services and agencies to require them to operate under such poorly drafted laws. It is recommended, therefore, that there should be a consolidation of such laws as may sensibly be consolidated and that for the rest there be some simplification. The Attorney-General, in his media release and his speech of 15 September 2009 about a Maritime Powers Bill, said, apart from the matters that have just been addressed, that there was a proposal to include new aspects relating to implementation of relevant international treaties.[5] It is respectfully suggested that this proposal will need a great deal of further planning and consultation if it is not to be just a further addition to the matrix of complicated legislation that exists already. The current proposal hints at border protection being the main driving force behind this reform, but of course the regulatory and enforcement powers addressing illegal fishing, violent criminal actions on offshore installations, evasion of customs or excise, are not really border protection matters and one aspect of the national interest should not be confused by conflating it with other aspects.

5 See the Memorandum Concerning the Proposed Maritime Powers Bill, inserted at the beginning of this book, which sets out more detail about the proposal and where it may be found.

Although these comments are not meant to be exhaustive, one can note that the proposal for this new Bill does not mention the defence powers, but they are essential ones to be addressed as the current Navy personnel, especially in the patrol boat squadrons, are primarily being used in policing roles. The naval officers and ratings deserve full protection and clear powers so they know where they stand. After all, as mentioned in Chapter 5, they may be called on to use their weapons in lethal force and they could be the ones charged with the most serious offences as a result. Another aspect is that the proposal makes no mention of repeal of the automatic forfeiture laws currently in the *Fisheries Management Act 1991*, Chapter 7, section 5. In any reform process these should be considered. A third aspect about this Bill is that the proposal currently hints that perhaps the defence powers for enforcement against piratical criminal actions in distant waters, as sanctioned by the UN Security Council resolutions, may need an explicit legislative basis. This no doubt is correct but it is far from sensible to include these provisions in the proposed Bill as they probably should be in the current *Defence Act 1903*, as they relate to the Australian naval forces, not customs, fisheries, immigration, etc and they are not closely connected to border protection.

It is suggested, therefore, that the policy underpinning legislative reform needs far more debate and thought, and that included in this should be one or more public inquiries in which all of the agencies who have an interest in any of these many aspects are invited to put their views. Finally, it may be said that the shape, manner and extent of this or these inquiries themselves need some considerable thought and debate.

13.4 An Australian Coast Guard

As part of the simplification and clarification of the offshore regulatory and enforcement governance, it is suggested that certain sections of the Commonwealth departments that currently regulate and enforce these offshore laws should be consolidated into the one department or agency. A convenient title for this new department would be the "Australian Coast Guard", although the title is not important so long as it is sufficiently descriptive of its functions. The precise functions of an Australian Coast Guard would need to be the subject of debate but a sensible way in which to approach it would be to start small and then slowly expand those functions as the Coast Guard service gained equipment, personnel and skills.

After all, Australia has already moved along this path to some extent. The Customs and Border Protection Service already operates a fleet of patrol vessels and its officers carry arms for self-protection. The Department of Agriculture, Fisheries and Forestry has some offshore vessels that are armed. The Department of Defence employs most of its patrol

vessels in carrying out essentially civil and criminal enforcement functions. Finally, the Customs and Border Protection Service and the Department of Defence form the joint body known as the Border Protection Command. These are all steps, especially the Border Protection Command, along the path to a coast guard service.

It is probably because of the force of this conclusion that others have also come to the view that an Australian Coast Guard is in the national interest. In a paper published on 22 August 2008 the Australian Strategic Policy Institute, Canberra, also recommended a move towards a coast guard out of the existing Border Protection Command.[6] This would enhance and move towards the goal of simplifying Australia's offshore laws. Instead of the new body being responsible to several organisations, as is the case with the present situation, there would be the one body reporting to the one minister.[7]

Many other countries have coast guards, with the largest being that of the United States. Its commandant summarised its functions in terms that have some attraction for Australia. He wrote:

> One of the Coast Guard's greatest strengths is of multi-mission character. It allows us to conduct a wide range of functions in the maritime domain, from marine safety, to law enforcement and national defense, to environmental protection and humanitarian response ... [T]hese duties ... are most efficiently and effectively accomplished by a single federal maritime force.[8]

There is a lot to be said for this view that a wide range of functions in the maritime domain are most efficiently and effectively accomplished by a single maritime force. The Canadian experience, which has many analogies for Australia, is that of a Coast Guard that gradually evolved from other services, which is a path that has much to commend it for Australia.

Of course there would be opposition from some persons in the various departments who would see some loss of function, prestige, influence or money by such a move. The Navy probably would not like to see some of its patrol vessel force taken from it as the patrol boats used on fisheries, immigration, customs and other such duties are useful in the development of seagoing skills and experience by Navy personnel. This is a powerful point, but it is suggested, however, that these skills and experience would not be lost to the national interest and could be called

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6 D Wolner, *Policing Our Ocean Domain: Establishing an Australian Coast Guard* (Australian Strategic Policy Institute, Canberra, 2008).

7 (2008) 171 *Australian Maritime Digest* 3.

8 Admiral Thad Allen, Commandant, United States Coast Guard, *The Coast Guard Proceedings*, Journal of Safety and Security at Sea of the Marine Safety and Security Council, Summer 2008 issue, p 1, "Commandant's Perspective". It is available at <www.uscg.mil/proceedings>.

in aid in war or warlike operations should the occasion demand. The formation of an Australian Coast Guard is therefore suggested as being in the national interest and the gradual movement in this direction from the current Border Protection Command and the Customs and Border Protection Service has much to commend it.

13.5 Conclusions

The Author's Preface at the start of this book sets out three reasons for writing it, the second of which was to demonstrate the unnecessary complexity of the Australian offshore legal regime. It may be seen in the early part of this final chapter an attempt has been made to mention some of the more important aspects of the offshore laws pertaining to each chapter. Even this short summary makes it apparent that Australia's offshore laws have just expanded over the past years without rhyme or reason beyond meeting an immediate demand.

The result of this expansion is that these laws are unclear, overlapping and unnecessarily complex, making them difficult to understand and to enforce. The other two sections of this chapter then suggest approaches that may be taken to address the situation. The first is to review the Offshore Constitutional Settlement 1979 and to reform it so that its structure gives rise to a more efficient and more effective system of demarcation between the Commonwealth and the States. The second is to suggest that, irrespective of reform of the Offshore Constitutional Settlement 1979, the offshore regulatory and enforcement laws should be consolidated into the one Act and that their offshore enforcement should be by the one department, called here the Australian Coast Guard.

As to the other two reasons for writing this book; namely, to provide a reference for offshore laws for the benefit of practitioners, regulators, academics and students; and to stimulate interest in constitutional law teaching, discussion and scholarly writing, only time will tell but it is to be hoped that some success attends them.