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2013

# Legislative implementation of the law of the sea convention in Australia

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## Publication Details

Gullett, W. (2013). Legislative implementation of the law of the sea convention in Australia. *University of Tasmania Law Review*, 32 (2), 184-207.

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All States with marine and maritime interests need to ensure that their domestic laws enable them to meet their obligations, and to take advantage of the rights afforded to them, under the international law of the sea. This body of international law is structured around one of the most extensive and widely ratified international treaties: the United Nations Convention on the Law of the Sea ('LOSC').<sup>1</sup> This paper reviews the general process by which obligations and rights in international treaties become part of domestic law and then examines Australia's experience in incorporating into its domestic law three broad areas of prescriptive and enforcement jurisdiction provided in the LOSC: maritime zones, fisheries and navigation. It is revealed that there are a number of areas in which Australia's domestic law does not align exactly with provisions in the LOSC. This is due to the nature of the process for domestic legislative incorporation of international law and the desire by the Australian Government to contribute to the development of the international law of the sea in areas where LOSC provisions are open to a range of interpretations.

## **Keywords**

law, implementation, sea, australia, legislative, convention

## **Disciplines**

Arts and Humanities | Law

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# Legislative Implementation of the Law of the Sea Convention in Australia

WARWICK GULLETT\*

## Abstract

All States with marine and maritime interests need to ensure that their domestic laws enable them to meet their obligations, and to take advantage of the rights afforded to them, under the international law of the sea. This body of international law is structured around one of the most extensive and widely ratified international treaties: the United Nations Convention on the Law of the Sea ('LOSC').<sup>1</sup> This paper reviews the general process by which obligations and rights in international treaties become part of domestic law and then examines Australia's experience in incorporating into its domestic law three broad areas of prescriptive and enforcement jurisdiction provided in the LOSC: maritime zones, fisheries and navigation. It is revealed that there are a number of areas in which Australia's domestic law does not align exactly with provisions in the LOSC. This is due to the nature of the process for domestic legislative incorporation of international law and the desire by the Australian Government to contribute to the development of the international law of the sea in areas where LOSC provisions are open to a range of interpretations.

## I INTRODUCTION

A consequence of the consensual nature of international law is that the negotiation process for multilateral treaties entails identifying the maximum standards that are acceptable to all potential State parties. This explains why international law is typically insufficiently ambitious because its development is limited to setting obligations which are the maximum achievable in a politically and diplomatically complex regional or global setting. This means that a new treaty may not be as far-reaching as some State parties intended because compromises were needed in order to ensure the support of more States and thereby extend the application of the treaty to more issues or a larger geographical area. One method of compromise is to craft treaty articles in vague language. This enables States to reach agreement on general principles and thereby

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<sup>1</sup> United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994).

proceed to the conclusion of a treaty while leaving to a later date more difficult interpretation questions about the substance of obligations. While this may be inelegant or indeed unhelpful as a matter of legal development, it is a feature of international law that reveals it as much a political and diplomatic process as it is a legal process. The multilateral negotiation process that led to the LOSC is a classic illustration of this phenomenon. It involved a series of negotiating conferences, which commenced in 1930 and concluded in 1982, and produced a text that is noteworthy for its coverage of a large array of issues but with a lack of specificity in most areas. Nevertheless, it is a treaty that can boast 166 parties.<sup>2</sup>

All State parties to a convention have the responsibility to ensure that their domestic laws allow them to fulfil their obligations under the convention. Regarding the LOSC, this includes ensuring that the actions of the executive to implement LOSC obligations are authorised within the domestic legal framework, typically under legislation, but also potentially under executive authority contained in constitutions.<sup>3</sup> A complication regarding the LOSC is that many of its provisions have the status of law outside the convention itself. This is because much of the LOSC codifies rules of customary international law that had emerged prior to the conclusion of the treaty in 1982. There are differences in the way domestic law embraces convention law and customary international law. A further complication is that the body of customary international law of the sea has relevance to the interpretation and development of the LOSC.

The process by which domestic law is revised to incorporate new international laws differs among States. In some States there is automatic incorporation of international law into domestic law. In others States, such as Australia, there needs to be legislative action. Practical and legal problems can arise where there are disjunctions between a State's domestic laws and its international obligations. Problems can arise such as where coastal State enforcement officers undertake a boarding of a foreign ship pursuant to authority provided in domestic law which goes beyond what is permitted under international law. In such a case a protracted international legal dispute could arise between the coastal State and the flag State about the correct interpretation of the international law

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<sup>2</sup> On 7 August 2013 Niger became the 165<sup>th</sup> State party to the LOSC. Additionally, the European Union ratified the LOSC in 1998: United Nations Division for Ocean Affairs and the Law of the Sea, Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements as at 29 October 2013: <[www.un.org/Depts/los/reference\\_files/chronological\\_lists\\_of\\_ratifications.htm](http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm)>.

<sup>3</sup> For example, the boarding by Australian Special Air Services personnel in 2001 of the Norwegian-flagged *MV Tampa* to prevent its docking at an Australian port was held by the Full Court of the Federal Court of Australia to be authorised by the executive power conferred under article 61 of the Australian Constitution: *Ruddock v Vadarlis* (2001) 110 FCR 491 at 544 (French J with Beaumont J agreeing).

while enforcement officers remain in doubt about the parameters of their authority.

## II APPROACHES TO THE INCORPORATION OF INTERNATIONAL LAW INTO DOMESTIC LAW

The general approach to the incorporation of international law into domestic law is framed by two competing theories.<sup>4</sup> The first is *dualism*. The dualism theory holds that international law and domestic law operate in two separate, independent spheres because of the different sources of the two fields of law (domestic law is sourced in the will of the sovereign State whereas international law is sourced in the collective will of individual States). This means that developments in international law do not automatically effect change to a State's domestic laws. Rather, international law needs to be 'transformed' or 'incorporated' into domestic law by a specific action of the State, typically by the enactment of implementing legislation. The second theory is *monism*. This theory holds that domestic and international law are essentially 'part of one and the same universal normative order'.<sup>5</sup> A consequence of this view for States that adopt a strict monist legal structure is that there is no need for any specific act to incorporate international law into domestic law. Rather, developments in international law automatically become part of a State's domestic law. As a general rule, common law States reflect dualism theory and civil law States reflect monism theory. Some States have more intricate arrangements, including some of those based on other legal traditions (such as Islamic law) and those States that embrace a mixture of legal traditions.<sup>6</sup>

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<sup>4</sup> See Rosalie Balkin, 'International law and domestic law' in Sam Blay, Ryszard Piotrowicz, B. Martin Tsamenyi (eds) *Public International law: An Australian Perspective* (Oxford University Press, 2<sup>nd</sup> ed, 2005) 115-116. However, as indicated in the discussion below, the monism/dualism dichotomy does not accurately reflect the complexity of Australia's legal regime. For example, there are differences in the manner in which treaty law and customary law are utilised in the development of the common law or in the interpretation of legislation or the constitution. See, eg, Hilary Charlesworth, Madelaine Chiam, Devika Hovell and George Williams, 'Deep anxieties: Australia and the international legal order' (2003) 25 *Sydney Law Review* 423 and Stephen Donaghue, 'Balancing sovereignty and international law: The domestic impact of international law in Australia' (1995) 17 *Adelaide Law Review* 213.

<sup>5</sup> *Ibid* p 116. See also David Feldman, 'Monism, dualism and constitutional legitimacy' (1999) 20 *Australian Yearbook of International Law* 105.

<sup>6</sup> For example, the origin of Pakistan's legal system is the English common law, yet its 1973 Constitution requires that its laws are consistent with Islam.

### A *Common law States*

States that have legal frameworks based on English law, namely former or existing Commonwealth States,<sup>7</sup> generally adopt the approach that a specific act of the legislature is needed to incorporate international treaty law into domestic law. The international law so incorporated becomes part of the domestic law but it is the authority of the domestic law which gives it force. In this situation, a State could be bound at international law to an international obligation to which it has agreed but not have the ability to implement the obligation until any necessary revisions to domestic law have been made. Similarly, implementing legislation could subsequently be repealed leaving a disjunction between domestic and international law. Nevertheless, States that are based on the English common law may have differences in their constitutional frameworks, which alter the manner in which international law becomes part of domestic law. For example, international treaty obligations automatically become part of United States (US) domestic law by virtue of a provision in the *Constitution of the United States of America* (US Constitution). Article 6 of the US Constitution provides (in part):

[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Australia is an example of a State in which treaty law obligations are not part of domestic law until they have been transformed by an act of the legislature. As stated by Mason CJ and Deane J of the High Court of Australia in 1995:

It is well established that the provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into our municipal law by statute. This principle has its foundation in the proposition that in our constitutional system the making and ratification of treaties fall within the province of the Executive in the exercise of its prerogative power, whereas the making and alteration of the law fall within the province of Parliament, not the Executive. So, a treaty which has not been incorporated into our municipal law cannot operate as a direct source of individual rights and obligations under that law.<sup>8</sup>

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<sup>7</sup> For example, Antigua and Barbuda, Australia, Bahamas, Bangladesh, Canada, Fiji, Ghana, Grenada, (Hong Kong), India, Ireland, Malaysia, Nauru, Nigeria, New Zealand, Pakistan, South Africa, St Vincent and the Grenadines, Tonga, Trinidad and Tobago, Tuvalu, Uganda, and the United States.

<sup>8</sup> *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 286-287 (Mason CJ and Deane J). See also *Kruger v Commonwealth* (1997) 190 CLR 1, 70-71 (Dawson J), 87 (Toohey J), 159 Gummow J).

The two principal sources of international law – treaty law and customary law – are not treated identically in the domestic legal sphere. There is less need to enact implementing legislation for rules of customary international law because by their nature they are less precise and generally have more vague obligatory standards than treaty law. Nevertheless, customary international law can influence the development of domestic common law<sup>9</sup> as well as the interpretation of legislation. In the process of interpretation the courts will attempt to construe legislation in a manner that is consistent with international law where it is possible to do so. The High Court of Australia aptly stated this approach nearly one century ago: '[i]t is trite law that Statutes should be construed, so far as their language permits, so as not to clash with international comity.'<sup>10</sup>

This principle of interpretation is enshrined in s 15AB(2)(d) of the *Acts Interpretation Act 1901* (Cth), which provides that extrinsic material can be used in the interpretation of an Act, including 'any treaty or other international agreement that is referred to in the Act'. Indeed, there is a presumption that legislation is not intended to be inconsistent with a State's international law obligations.<sup>11</sup> Nevertheless, international law cannot be used to override the plain intention of legislation because it is the court's responsibility to give effect to the will of the parliament as expressed in the words of the legislation and in relevant extraneous material.<sup>12</sup> Therefore, in this context, the rules of international law merely provide a guide to how an Act should be construed and thereby provide a source of law that can be influential in the interpretation of legislation and the piecemeal development of the common law. This means that customary international law of the sea could be a source of influence for the interpretation of domestic legislation but it cannot override inconsistent legislation. Regarding the common law, the approach taken in Australia is to examine each rule of international law separately in appropriate litigation to determine whether it has been received into

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<sup>9</sup> *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 42 (Brennan J). However, the Federal Court of Australia has determined that customary international law should not be adopted in domestic law in the absence of enacting legislation: *Nulyarimma v Thompson* (1999) 96 FCR 153. See Burmester, H and Reye, S, 'The place of customary international law in Australian law: Unfinished business' (2000) 21 *Australian Yearbook of International Law* 39.

<sup>10</sup> *Zachariassen v Commonwealth* (1917-1918) 24 CLR 166, 181 (Barton, Isaacs and Rich JJ). In this case the High Court held that the *Customs Act 1901-1910* (Cth) should be construed consistently with the international principle that foreign ships have a right to exit a port.

<sup>11</sup> Feldman, above n 5, 106.

<sup>12</sup> See below concerning the hot pursuit of the *Volga*.

domestic law. However, there is no requirement that the common law conforms to international law.<sup>13</sup>

Implementing legislation is required where existing legislation is insufficient to enable the taking of actions to fulfil treaty obligations. Ideally, the required legislation is developed before the treaty enters into force, so that there is the ability to meet treaty obligations as soon as they exist, thereby avoiding a potential breach of international law.<sup>14</sup> This section now reviews the three main ways to incorporate treaty obligations in legislation.

**B** *Directly incorporate a treaty, or part of a treaty, in legislation*

The simplest method to give effect to a treaty in domestic law is to include it, or selected provisions, in legislation. This method ensures consistency between domestic and international law because the text of the treaty is copied into legislation. However, this is not the preferred approach for incorporating treaty law into domestic law in Australia because it has the shortcoming of leaving to the courts the interpretation of treaty provisions, which are well known for their 'indeterminate language'.<sup>15</sup> Areas of uncertainty about treaty provisions would remain until such time as there is domestic litigation which results in a court declaring the meaning of an ambiguous treaty provision. This approach runs the risk of domestic courts interpreting treaty provisions inconsistently with the meaning ascribed to them by other State parties.

**Australian example: Civil liability and the *Protection of the Sea (Civil Liability) Act 1981 (Cth)***

Schedule 1 of the *Protection of the Sea (Civil Liability) Act 1981 (Cth)* provides the text of the 1969 International Convention on Civil Liability for Oil Pollution Damage. Certain provisions of the Convention are declared in the Act to have 'the force of law'. The amending 1992 Protocol to the Convention is included in Schedule 2.

***Protection of the Sea (Civil Liability) Act 1981 (Cth) s 8***

(1) The following provisions of the Convention have the force of law as

<sup>13</sup> Balkin, above n 4, p 119. See also Brent, M, 'International law in constitutional interpretation: A theoretical perspective' (2012) 23 *Public Law Review* 197.

<sup>14</sup> Charlesworth et al, above n 4, 445.

<sup>15</sup> *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 392 (McHugh, Gummow, Kirby and Hayne JJ). Their Honours stated: '[W]hile the obligations of Australia under some international conventions and agreements are relatively clear, many international conventions and agreements are expressed in indeterminate language as the result of compromises made between the contracting State parties. Often their provisions are more aptly described as goals to be achieved rather than rules to be obeyed.'



part of the law of the Commonwealth: Articles I to VI (inclusive), paragraphs 1, 8 and 9 of Article VII, Article VIII, paragraphs 1 and 3 of Article IX, Article XII bis (other than paragraph (b)), paragraph 1 of Article X.

*C Specify in legislation that it is to be implemented consistently with a treaty*

A less direct way of attempting to harmonise legislation with treaty obligations is to link the treaty to the legislation by providing that the implementation of the legislation is to be guided by the treaty. This can be done by including the text of a treaty in a schedule to the legislation or by specifying in the objectives section of the legislation that decision-makers, when administering the legislation, should consider international obligations. This provides a clear indication that the treaty is relevant to the implementation of the legislation but it does not give the treaty the force of law as part of domestic law.<sup>16</sup> The Australian example below includes both steps of including the text of the international agreement in the legislation and declaring the relevance of the international obligations to the legislation.

**Australian example: Transboundary fish stocks and the *Fisheries Management Act 1991* (Cth)**

Schedule 2 of the *Fisheries Management Act 1991* (Cth) provides the text of the United Nations Fish Stocks Agreement (Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks).

Section 3(2) obliges decision-makers under the Act to 'have regard to' the objective of implementing Australia's international obligations contained in international fish stocks agreements. This section has the effect that the international treaty obligations are relevant to the implementation of domestic law without actually giving them the force of law.

***Fisheries Management Act 1991* (Cth) s 3(2)**

[T]he Minister, AFMA [Australian Fisheries Management Authority] and Joint Authorities are to have regard to the objectives of:

...

<sup>16</sup> Balkin, above n 4, p 127.

(c) ensuring that conservation and management measures in the AFZ [Australian Fishing Zone] and the high seas implement Australia's obligations under international agreements that deal with fish stocks; and

(d) to the extent that Australia has obligations:

(i) under international law; or

(ii) under the Compliance Agreement or any other international agreement;

in relation to fishing activities by Australian-flagged boats on the high seas that are additional to the obligations referred to in paragraph (c)--ensuring that Australia implements those first-mentioned obligations;

*D Include in legislation modified text of specific treaty obligations*

The preferred method in Australia for implementing treaties in domestic law is to give effect to selected treaty obligations by including them in legislation but in a revised manner that is consistent with domestic legal parlance and Australia's interpretation of the international obligations. This may be done by substituting vague expressions in treaties with more specific terminology, the meaning of which has been developed over time in the domestic legal setting, or by including an expanded or restricted version of an ambiguous treaty obligation in accordance with Australia's interpretation of the treaty. This method has practical appeal because it offers more certainty for government officers charged with the responsibility to implement the treaty and provides an opportunity for a State to elucidate the meaning of a vague treaty obligation in accordance with its national priorities. The problem to be avoided is providing a legal definition that is inconsistent with the interpretation of treaty obligations by other State parties and which runs the risk of foreign States disputing the legality of enforcement action taken in reliance on the domestic law.

**Australian example 1: Piracy and the *Crimes Act 1914* (Cth) and the *Criminal Code Act 1995* (Cth)**

Article 101 of the LOSC provides a definition of 'piracy'. The text of this article is given effect in three sections (ss 51-53) of the *Crimes at Sea Act 1914* (Cth). Most of the language used is identical to the LOSC although the legislation extends piracy to the territorial sea and some waters landwards of the territorial sea. A lesser maximum penalty (15 years' imprisonment) is provided for the offence of 'voluntary participation' in the operation of a pirate ship compared with the act of violence, detention or depredation offence (life imprisonment). The acts of 'inciting' or

'intentionally facilitating' other piratical acts can be prosecuted under separate legislation (*Criminal Code Act 1995 (Cth)*) which creates general offences of incitement and aiding and abetting certain offences.

***LOSC Article 101- Definition of piracy***

Piracy consists of any of the following acts:

(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship

or aircraft;

(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

***Crimes Act 1914 (Cth) s 51***

'[A]ct of piracy' means an act of violence, detention or depredation committed for private ends by the crew or passengers of a private ship or aircraft and directed:

(a) if the act is done on the high seas or in the coastal sea of Australia--against another ship or aircraft or against persons or property on board another ship or aircraft; or

(b) if the act is done in a place beyond the jurisdiction of any country--against a ship, aircraft, persons or property.

***Criminal Code Act 1995 (Cth)***

A person who urges the commission of an offence is guilty of the offence of incitement: cl 11.4(1).

A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly: cl 11.2(1).

**Australian example 2: Interruption of hot pursuit and the *Fisheries Management Act 1991* (Cth)**

Article 101 of the LOSC provides that a coastal State may conduct a hot pursuit of a foreign ship in certain circumstances and that the pursuit may only be continued outside the territorial sea or the contiguous zone 'if the pursuit has not been interrupted'. The LOSC is silent regarding the circumstances in which a pursuit will be regarded as having been 'interrupted'. Under ss 87(1A)-(1C) of the *Fisheries Management Act 1991* (Cth), a hot pursuit conducted by Australia with respect to suspected fisheries violations must be done 'without interruption'. However, the legislation provides that merely losing sight of the pursued boat will not amount to interruption nor will the loss of radar output or other sensing device.

***Fisheries Management Act 1914* (Cth) s 87**

...

(2) For the purposes of subsections (1A), (1B) and (1C), a pursuit of a person or boat is not taken to be interrupted only because the officer or officers concerned lose sight of the person or boat.

(3) A reference in subsection (2) to losing sight of a person or boat includes a reference to losing output from a radar or other sensing device.

### III THE LAW OF THE SEA CONVENTION

The LOSC is one of the most ambitious international treaties because it has set out the legal framework for all sea activities throughout the world and it has achieved formal acceptance by the majority<sup>17</sup> of the world's States, including numerous land-locked States. It is the principal international law dealing with the world's marine waters. Its main contribution is that it provides for various zones of jurisdiction adjacent to coastal States and sets out the prescriptive and enforcement jurisdiction of coastal States in them. The maritime zones the LOSC has confirmed or created are critical to the activities of all States at sea because there is a careful balancing of the rights of coastal States with those of other States in the different zones. A coastal State has greater rights in maritime zones in which it has full sovereignty (that is, internal waters,<sup>18</sup> archipelagic waters,<sup>19</sup> and the territorial sea),<sup>20</sup> than in zones in which it merely has

<sup>17</sup> With the notable exception of the United States of America.

<sup>18</sup> LOSC art 8.

<sup>19</sup> *Ibid* pt IV.

'sovereign rights' (that is, the contiguous zone,<sup>21</sup> the exclusive economic zone (EEZ),<sup>22</sup> and the continental shelf).<sup>23</sup> There also are zones that are beyond national jurisdiction (that is, the high seas<sup>24</sup> and 'the Area'<sup>25</sup> – the seabed, ocean floor and subsoil beyond coastal states' continental shelf)<sup>26</sup> and a special regime is established for straits used for international navigation.<sup>27</sup> Coastal States in particular face considerable challenges in harmonising their domestic laws with LOSC. This is due to a range of factors, including the spatial extent and scope of maritime jurisdictional zones, the number of marine industries and activities affected, and the ambiguities riddled throughout the LOSC text.

Although the LOSC is a binding legal agreement, it can be misleading to view it simply as a legal document. It is a complex legal and political instrument that is based on many hard-fought compromises between the interests of various types of States (such as States with or without large coastlines, States with large commercial, military or fishing fleets, and developing States). There are overlapping rights and concurrent jurisdiction between coastal States and flag States in the different maritime zones and there are differences between coastal State and flag State rights depending on the type of vessel or activity. Perhaps the best example is that the EEZ is a zone in which the coastal State has almost complete power with respect to fishing yet for navigational purposes it is only marginally different from the high seas. There are also competing principles for ocean use enshrined in the LOSC, such as between preservation and protection of the marine environment and optimum utilisation of marine resources, and between freedom of navigation and protection of sovereignty and sovereign rights.

The various balances of interests that have been crafted into the LOSC text provide ready scope for international dispute if States in their activities and enforcement conduct do not respect the balances achieved. Coastal States and flag States therefore face complex policy, regulation and enforcement options. This is especially the case because the LOSC text is deliberately vague or ambiguous in many places, yet State parties need to ascribe further meaning into its provisions when they incorporate

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<sup>20</sup> Ibid pt II.

<sup>21</sup> Ibid art 33. The contiguous zone is located in an area in which the coastal State has 'sovereign rights'. However, the enforcement powers that a coastal State has in the contiguous zone relate to the prevention or punishment of breach of laws within its territory (that is, areas under sovereignty).

<sup>22</sup> Ibid pt V.

<sup>23</sup> Ibid pt VI.

<sup>24</sup> Ibid pt VII.

<sup>25</sup> Ibid pt XI.

<sup>26</sup> Ibid art 76.

<sup>27</sup> Ibid pt III.

them into domestic law, in a manner that is workable for the government officers who have the responsibility to implement the convention.

The LOSC covers many topic areas, ranging from defining the various maritime jurisdictional zones to setting up marine environment protection principles and rules and providing for the conduct of marine scientific research, the development and transfer of marine technology, and procedures for settling disputes between State parties. Its provisions affect activities within all marine sectors (such as fishing, maritime transport, defence and security, seabed resource exploitation, marine scientific research, tourism, and environmental protection). A complication is that other international agreements (both binding and non-binding) have been developed since the conclusion of the LOSC which have developed standards in various law of the sea topic areas. This further development of international law of the sea was envisaged by the drafters of the LOSC who created it as a framework convention designed to facilitate the progressive development of the international law of the sea.

#### IV INCORPORATION OF LOSC RIGHTS AND OBLIGATIONS IN AUSTRALIA'S DOMESTIC LAW

The cross-sectoral nature of the LOSC, combined with Australia's sectoral approach to marine legislation, means that it is not practicable to incorporate all of its provisions in one piece of legislation. This section reviews the more difficult aspects of the legislative incorporation of the LOSC in Australia, focusing on selected pieces of legislation from the following list of implementing legislation. It is important to note that not every article in the LOSC needs to be specifically incorporated into legislation. For example, the complex detail about the limits of the continental shelf provided in art 76 does not need to be repeated in legislation.<sup>28</sup> Rather, what is necessary is that there is competence of the parliament to enact regulations or make proclamations that give effect to the rights embodied in the article. As listed in the following table, this power is provided in the *Seas and Submerged Lands Act 1973* (Cth).<sup>29</sup>

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<sup>28</sup> In some other areas there are no implementing regulations in Australia. For example, the obligation to authorise foreign vessels to conduct marine scientific research in the EEZ under LOSC art 255 is implemented by an executive granting of 'public vessel status' by the Department of Foreign Affairs and Trade, a process that is unsupported by legislation.

<sup>29</sup> Section 12 'Limits of the continental shelf' provides: 'The Governor-General may, from time to time by Proclamation, declare, not inconsistently with Article 76 of the Convention or any relevant international agreement to which Australia is a party, the limits of the whole or any part of the continental shelf of Australia.' Note that the Australian Parliament has virtually unfettered ability to enact legislation with effect offshore under the Australian Constitution's external affairs power (s 51(xxix)) see Warwick Gullett, *Fisheries Law in*

**List of principal Australian implementing legislation for the LOSC**

| <b>Sample LOSC provision</b> | <b>Legislation</b>   | <b>Topic area</b>                   | <b>Sample legislative section</b> |
|------------------------------|--|-------------------------------------|-----------------------------------|
| art 11                       | <i>Maritime Transport and Offshore Facilities Security Act 2003</i> (Cth)  | definition of port                  | s 12                              |
| art 28                       | <i>Admiralty Act 1988</i> (Cth)  | <i>in rem</i> proceedings           | s 22                              |
| art 60                       | <i>Customs Act 1901</i> (Cth)  | high seas boarding and safety zones | s 84A(4A)                         |
| art 62                       | <i>Fisheries Management Act 1991</i> (Cth)                                 | fisheries                           | s 35                              |
| art 65                       | <i>Environment Protection and Biodiversity Conservation Act 1999</i> (Cth) | whales                              | s 236                             |
| art 76                       | <i>Seas and Submerged Lands Act 1973</i> (Cth)                             | maritime zones and limits           | s 12                              |
| art 94                       | <i>Crimes at Sea Act 2000</i> (Cth)  | offshore criminal jurisdiction      | s 6                               |
| art 94                       | <i>Shipping Registration Act 1981</i> (Cth)                                | flag State duties                   | s 12                              |
| art 98                       | <i>Australian Maritime Safety Authority Act 1990</i> (Cth)                 | search and rescue service           | s 2A                              |
| art 101                      | <i>Crimes Act 1914</i> (Cth)   | piracy                              | s 51                              |
| art 110                      | <i>Maritime Powers Act 2013</i> (Cth)                                      | right of visit                      | s 21                              |
| art 194                      | <i>Protection of the Sea (Powers of Intervention) Act 1981</i> (Cth)       | maritime casualty                   | s 8                               |
| art 194                      | <i>Protection of the Sea</i>   | marine pollution                    | s 9                               |

*Australia* (LexisNexis Butterworths, Sydney, 2010) 43-46. Note also that in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), a Bill must be accompanied by a statement concerning its compatibility with human rights.

|         |   |                                  |       |
|---------|---|----------------------------------|-------|
|         | <i>(Prevention of Pollution from Ships) Act 1983</i><br>(Cth) |                                  |       |
| art 219 | <i>Navigation Act 1912</i><br>(Cth)                           | detention of unseaworthy vessels | s 210 |

### A *Maritime zones and limits*

The maritime zone-based jurisdiction provided for in the LOSC means that the most important task for coastal States when implementing the convention is to ensure that they can establish the maximum allowable limits to the various claimable maritime zones.<sup>30</sup> The approach Australia has taken to provide the legislative ability to establish these various zones under domestic law is straightforward. The text of relevant parts of the LOSC are included in the schedule to the *Seas and Submerged Lands Act 1973* (Cth),<sup>31</sup> namely LOSC Part II (territorial sea and contiguous zone), Part V (EEZ) and Part VI (continental shelf). The various zones are declared to have the same meaning as that provided for in the LOSC.<sup>32</sup> The Act provides authority to the Governor-General to declare by proclamation the limits of the various zones, provided that this is done consistently with the LOSC.<sup>33</sup> Proclamations have been made for all zones. The latest is the *Seas and Submerged Lands (Limits of Continental Shelf) Proclamation 2012*<sup>34</sup> which confirms the outer limits of the Australian continental shelf including those areas of continental shelf beyond 200 nm from the territorial sea baseline based upon the April

<sup>30</sup> Note that coastal States must lodge with the United Nations charts or lists of coordinates depicting the limits of the territorial sea, EEZ and continental shelf: LOSC arts 16(2), 75(2) and 84(2). There is no requirement to depict the outer limit of the contiguous zone. This limit may extend up to 24 nm from the territorial sea baseline (LOSC art 33(2)). Only approximately half of the State parties to the LOSC have declared a contiguous zone. States that have declared a contiguous zone include Australia, Cambodia, China, Japan, South Korea, Taiwan, Thailand, and Vietnam. States in the South and East Asia region which have not claimed contiguous zones include Indonesia, Malaysia, Papua New Guinea, the Philippines and Singapore.

<sup>31</sup> This Act was enacted principally to declare Commonwealth sovereignty in the territorial sea and to exclude the operation of some state laws in this area. It was amended significantly in 1994 by the *Maritime Legislation Amendment Act 1994* (Cth) in anticipation of the entry into force of the LOSC.

<sup>32</sup> *Seas and Submerged Lands Act 1973* (Cth) s 3(1). The same approach is adopted in other legislation. See, eg, *Maritime Powers Act 2013* (Cth) s 8 regarding the definition of 'archipelagic waters', 'territorial sea', 'contiguous zone', 'continental shelf', 'exclusive economic zone', 'installation', 'artificial island', 'structure' and 'safety zone'.

<sup>33</sup> Sections 7(1) (territorial sea), 10B(a) (EEZ), 12 (continental shelf) and 13B(a) (contiguous zone). The Governor-General may also proclaim historic bays and historic waters: s 8.

<sup>34</sup> Proclaimed on 24 May 2012.



2008 recommendations of the United Nations Commission on the Limits of the Continental Shelf (made in response to Australia's November 2004 submission of scientific data and information on its extended continental shelf).

Australia has generally taken a conservative approach to the setting of its maritime limits. For example, it did not claim a 12 nm territorial sea until 1990 or an EEZ until 1994.<sup>35</sup> The Australian Government took a particularly conservative approach with respect to the Great Barrier Reef by not enclosing it within straight baselines in order to avoid giving control over its waters to the state of Queensland.<sup>36</sup> However, concern has been expressed about Australia's 1987 proclamation of four historic bays in South Australia<sup>37</sup> and its claim of an EEZ and extended continental shelf from Middleton Reef and Elizabeth Reef to the north of Lord Howe Island.<sup>38</sup>

Although the legal power to define the limits of the various maritime zones is in the *Seas and Submerged Lands Act 1973* (Cth), separate legislation gives effect to the zones. For example, fisheries powers in the EEZ are in the *Fisheries Management Act 1991* (Cth), the whaling prohibition is in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), and the power to board vessels in the contiguous zone is provided in the *Customs Act 1901* (Cth).

#### **Australian legislative authority to define the limits of the territorial sea**

##### ***Seas and Submerged Lands Act 1973* (Cth) s 7 – Limits of the territorial sea**

(1) The Governor-General may, from time to time, by Proclamation, declare, not inconsistently with Section 2 of Part II of the Convention, the limits of the whole or of any part of the territorial sea.<sup>39</sup>

<sup>35</sup> However, Australia had created a 'declared fishing zone' in waters 12 nm from the baseline in 1967 and had declared an 'Australian Fishing Zone' to 200 nm in 1979: Gullett W, *Fisheries Law in Australia* (LexisNexis Butterworths, 2008) 208-213.

<sup>36</sup> Prescott JRV, *The maritime political boundaries of the world* (Methuen, 1985) 183.

<sup>37</sup> The 1987 proclamation was replaced in 2006 by the *Seas and Submerged Lands (Historic Bays) Proclamation 2006* (Cth) which revised the limits of the bays and the location of the baseline. There is doubt as to whether the bays qualify for historic status. See Kaye S, 'The South Australian Historic Bays: An Assessment' (1995) 17 *Adelaide Law Review* 269, 282 and Roach JA and Smith RW, *United States responses to excessive maritime claims* (Martinus Nijhoff, 2<sup>nd</sup> ed, 1996) 36.

<sup>38</sup> See Prescott V, 'The uncertainties of Middleton and Elizabeth Reefs' (1998) 100 *Maritime Studies* 8.

<sup>39</sup> The proclamations made under this section regarding the limits of the territorial sea are two proclamations establishing territorial sea baselines (1983 and 1987) and the declaration

(2) For the purposes of such a Proclamation, the Governor-General may, in particular, determine either or both of the following:

- (a) the breadth of the territorial sea;
- (b) the baseline from which the breadth of the territorial sea, or of any part of the territorial sea, is to be measured.

### B *Fisheries*

The various maritime zones confirmed or established by the LOSC provide coastal States with different levels of rights and obligations with respect to fisheries resources. In areas under sovereignty there are few constraints imposed by the LOSC. There are none in internal waters; in the territorial sea there is only the obligation not to hamper innocent passage of foreign vessels (on which passage such vessels cannot engage in fishing);<sup>40</sup> and in archipelagic waters the traditional fishing rights of immediately adjacent neighbouring States are preserved.<sup>41</sup> However, in the EEZ, which is the most contentious maritime zone (and for many States their largest maritime zone), there is a careful balancing of rights of coastal States and flag States. This is seen most obviously in the obligation on coastal States to optimally utilise the living resources in the EEZ.<sup>42</sup> This means that coastal States must determine the total allowable catch of the living resources in the EEZ and give access to other States, under agreed conditions, to the surplus of the allowable catch.<sup>43</sup> Although coastal States have prescriptive powers to make laws and regulations with respect to their sovereign rights in the EEZ, which include enforcement procedures,<sup>44</sup> the interests of foreign States are preserved by constraints on enforcement activity. This includes restricting coastal State enforcement activity on the high seas to circumstances of hot pursuit<sup>45</sup> (including constructive presence),<sup>46</sup> and the requirement that coastal States must promptly release arrested vessels and their crews upon the

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establishing the outer limit of the territorial sea at 12 nm seaward of the baseline (1990). Note that Australia's territorial sea is restricted to 3 nm around some islands in the Torres Strait in accordance with a treaty with Papua New Guinea: 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, 18 December 1978 (entry into force 15 February 1985, [1985] ATS 4.

<sup>40</sup> LOSC art 19(2)(j).

<sup>41</sup> Ibid arts 47(6), 51(1).

<sup>42</sup> Ibid art 62(1).

<sup>43</sup> Ibid art 62(2).

<sup>44</sup> Ibid arts 62(4)(k), 73(1).

<sup>45</sup> Ibid art 111.

<sup>46</sup> Ibid art 111(4).

posting of 'reasonable bond or other security'<sup>47</sup> and the prohibition on coastal States setting imprisonment as a penalty for violations of fisheries laws and regulations in the EEZ.<sup>48</sup> Each of these rights and obligations requires implementing legislation that, for practical reasons, must provide more content than what is provided in the LOSC. Other States might consider Australia's implementing legislation that has given content to these provisions as being inconsistent with LOSC, in particular, the manner in which some enforcement actions can be taken against foreign fishing vessels.

### 1 *Hot Pursuit*

Foreign vessels suspected of fishing unlawfully in Australian waters may be boarded and inspected on the high seas by fisheries officers where there has been a 'hot pursuit'. The customary international law right of hot pursuit was codified in the LOSC. This treaty provides that where a vessel flees to the high seas, pursuit may be undertaken when there is 'good reason' to believe that a vessel has violated the laws and regulations of a coastal State.<sup>49</sup> With respect to suspected fisheries offences, the pursuit must be commenced while the foreign vessel is in the internal waters, territorial sea or the EEZ of the coastal State.<sup>50</sup> A hot pursuit may only be commenced after a 'visual or auditory signal to stop' has been given 'at a distance which enables it to be seen or heard' by the foreign vessel. The pursuing vessel or aircraft must first have satisfied itself that the foreign vessel is within the limits of the EEZ. The pursuit of a vessel to the high seas may only be continued 'if the pursuit has not been interrupted', although there is no elucidation of the circumstances in which a pursuit will be regarded as having been 'interrupted'.<sup>51</sup>

The right of hot pursuit is included in Australia's fisheries legislation. However, although the domestic law provisions are generally consistent with the requirements for hot pursuit set out in the LOSC, there are some potentially significant differences. In particular, it was not until 2008 that there was a requirement for a 'stop order' to be issued<sup>52</sup> and a pursuit is not to be taken as having been terminated or interrupted only because the pursuing officer loses sight of the boat or loses 'output from a radar or other sensing device'.<sup>53</sup> The discrepancies between the hot pursuit requirements in Australian and international law, notably the previous lack of a 'stop order' requirement in the former, potentially can be

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<sup>47</sup> Ibid art 73(2).

<sup>48</sup> Ibid art 73(3).

<sup>49</sup> Ibid art 111(1).

<sup>50</sup> Ibid art 111(4).

<sup>51</sup> Ibid art 111(1).

<sup>52</sup> *Fisheries Management Act 1991* (Cth) s 87(1A)(b).

<sup>53</sup> *Fisheries Management Act 1991* (Cth) s 87(2), (3).

significant in operational contexts, as occurred during the 2002 seizure by Australia of the Russian vessel, *Volga*.<sup>54</sup> The circumstances leading up to and including the arrest of the *Volga* were that Australia's naval vessel (which was outside visual range) had changed its course for the purpose of intercepting the *Volga* and had sent off its helicopter while the *Volga* was within Australia's EEZ, although contact was not made with the vessel until it had reached the high seas. Further, there was no order to 'stop' as such, but rather, there was a broadcast from the helicopter announcing that the vessel was about to be boarded. In the course of domestic legal proceedings, the absence of a stop order was of no consequence because the primary responsibility of the court was to give effect to the words in the legislation, not the LOSC. The significant difference in expression between s 87 and art 111 means that the latter cannot be used to confine the operation of the former.<sup>55</sup> The consequence in the domestic proceedings concerning the seizure of the *Volga* (which was effected pursuant to the pre-2008 legislative provision) was that for the purposes of domestic law, a pursuit may be commenced by an authorised vessel or aircraft which changes course or increases its speed in order to intercept the suspect vessel, even in circumstances where the suspect vessel is outside visual (and possibly, radar) range, without the need for a stop order to be issued.<sup>56</sup>

Legislative inconsistency with LOSC can also appear at the sub-national level. Due to the complicated regime for offshore jurisdiction in Australia (which involves overlapping federal and state responsibilities),<sup>57</sup> hot pursuits may also be conducted by state officers. For example, the ability to conduct hot pursuit from New South Wales waters appears in s 261 of the *Fisheries Management Act 1994* (NSW) but the requirements for a hot pursuit are expressed almost identically to the pre-2008 formulation of hot pursuit in the federal legislation, resulting in a discrepancy between NSW law and the LOSC which potentially could result in a breach of a LOSC obligation, attributable to Australia.<sup>58</sup>

The potential for a State to be in breach of its obligations under the LOSC due to activities it has undertaken lawfully under domestic law can exist without any direct inconsistency between its domestic laws and the LOSC. For example, a hot pursuit conducted by Australia must be in

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<sup>54</sup> See Warwick Gullett, 'Prompt release procedures and the challenge for fisheries law enforcement: The judgment of the International Tribunal for the Law of the Sea in the *Volga* Case (Russian Federation v Australia)' (2003) 31 *Federal Law Review* 395.

<sup>55</sup> *Olbers Co Ltd v Commonwealth* (2004) 148 A Crim R 547; 212 ALR 325, 332.

<sup>56</sup> See *Olbers Co Ltd v Commonwealth* (2004) 148 A Crim R 547.

<sup>57</sup> See Warwick Gullett and Gregory Rose, 'Australia's marine jurisdictions under international and domestic law' in Warwick Gullett, Clive Schofield and Joanna Vince (eds) *Marine resources management* (LexisNexis Butterworths, 2011) 25-40.

<sup>58</sup> See also *Fisheries Act 1995* (Vic) s 110 and *Living Marine Resources Management Act 1995* (Tas) s 186.

conformity with the provisions in the *Fisheries Management Act 1991* (Cth). However, Australia has an agreement with France that hot pursuits conducted by each other State with respect to third party States can be continued through each other's territorial sea.<sup>59</sup> This relies on an untested interpretation of LOSC art 111(3) that its apparent prohibition on hot pursuits continuing through the territorial sea of third States does not apply if the coastal State in question has waived the protection it receives under this provision, as Australia and France have done with each other.<sup>60</sup> A further area of possible inconsistency between LOSC obligations and potential practice under the Australia-France Treaty is its attempt to modernise the doctrine of constructive presence by extending its application to a wide range of vessels used to support the operation of foreign vessels illegally fishing in Australian or French waters.<sup>61</sup>

## 2 Automatic forfeiture

Many States provide as a potential penalty for foreign fishing in their EEZ the forfeiture of things used in the offence, such as the fishing vessel. This practice is seen as falling within a coastal State's prescriptive and enforcement jurisdiction in order for it to protect its sovereign rights in its EEZ. The practice in other States is for vessel forfeiture to take place after the conviction in a court of a fisheries offence, typically some months after the vessel was apprehended.<sup>62</sup> Australia has taken a novel approach by effecting forfeiture of foreign vessels at the moment the relevant offence occurs. This means that, for the purpose of Australian law, the legal title in a foreign fishing vessel which fishes unlawfully in Australian waters transfers to the Commonwealth of Australia at the moment the acts constituting the offence take place.<sup>63</sup> The concern here is that, although the operation of this domestic legal provision has withstood an exhaustive legal challenge in the domestic courts, the manner in which Australia chooses to exercise its enforcement powers will still need to be consistent with its obligations under the LOSC, especially regarding its conduct of hot pursuits and boarding of vessels on the high seas as well as

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<sup>59</sup> Treaty between the Government of Australia and the Government of the French Republic on Cooperation in the Maritime Areas adjacent to the French Southern and Antarctic Territories (TAAF), Heard Island and the McDonald Islands, Canberra, 24 November 2003 (in force 1 February 2005) art 4. Treaty text available at [2005] ATS 6, and (2004) 19 *International Journal of Marine and Coastal Law* at 545–553.

<sup>60</sup> Warwick Gullett and Clive Schofield, 'Pushing the limits of the Law of the Sea Convention: Australian and French cooperative surveillance and enforcement in the Southern Ocean' (2007) 22 *International Journal of Marine and Coastal Law* 545, 565–567.

<sup>61</sup> See *Fisheries Management Act 1991* (Cth) ss 87(1C), (7).

<sup>62</sup> See, eg, *Fisheries Act 1996* (NZ) ss 252(3), 255(2). However, not all States provide for forfeiture of fishing vessels upon conviction for fisheries offences. For example, in Taiwan article 68 of the *Fisheries Act 2008* (Taiwan) provides that catch and fishing gear may be confiscated but there is no express power to confiscate fishing vessels.

<sup>63</sup> *Fisheries Management Act 1991* (Cth) s 106A.

the manner in which it fulfils its obligation to promptly release detained vessels and their crews upon the posting of reasonable bond or other security.<sup>64</sup> Although there is concern about the apparent inconsistency between Australia's automatic forfeiture provision and various provisions in the LOSC, the enactment of the section in question was not a matter of legislative drafters simply being unaware of the nature of LOSC obligations. Rather, s 106A was inserted into the *Fisheries Management Act 1991* (Cth) in 1999 in order to remedy a problem with respect to third party interests that became apparent following Australia's first seizure of a suspected illegal foreign fishing vessel, the Panamanian-flagged *Aliza Glacial*, in the sub-Antarctic ocean in 1997.<sup>65</sup> This bold legislative action reflects Australia's strong stance regarding combating illegal foreign fishing yet uncertainty remains about the full legal consequences of its operation regarding ownership and flag State duties.<sup>66</sup>

### C Navigation

One significant aspect of the maritime zones available to coastal States under the LOSC is the navigational rights of foreign flag States within them, which needs to be considered if a coastal State seeks to take action against foreign vessels in exercise of its enforcement jurisdiction. In the EEZ foreign States have an almost unfettered freedom of navigation and in the territorial sea they have a more restricted navigation regime known as innocent passage. Subject to one exception, the innocent passage

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<sup>64</sup> LOSC art 73(2). See Warwick Gullett, 'Smooth sailing for Australia's automatic forfeiture of foreign fishing vessels' (2005) 22 *Environmental and Planning Law Journal* 169.

<sup>65</sup> Prior to 1999, a foreign fishing vessel could only be forfeited to Australia when a crew member had been convicted of a fisheries offence involving the use of the vessel. In the case of the *Aliza Glacial* two of its crew members were charged with fisheries offences but they left Australia when they were released on bail. This meant there was little prospect of a conviction being recorded, and accordingly, there was little chance that the Australia would be able to realise its interest in the vessel. The Norwegian mortgagee of the vessel initiated legal action under the *Admiralty Act 1988* (Cth) in the Federal Court of Australia to recover the vessel when its owner defaulted on loan repayments. The court ruled that the mortgagee's property rights in the vessel prevailed over that of Australia's mere potential proprietary interest, and therefore the mortgagee was entitled to recover the vessel: *Bergensbanken ASA v Ship Aliza Glacial* [1998] FCA 1322. See also *Readhead v Admiralty Marshal* (1998) 87 FCR 229. Australia introduced the automatic forfeiture provision for vessels and equipment used in foreign fishing offences to ensure that the forfeiture of vessels to Australia in similar circumstances will prevail over third party interests. The section operates to transfer the title of a foreign vessel from its owner to Australia at the time it is used in a relevant fisheries offence. Where a relevant fisheries offence has been committed, the section operates to automatically forfeit to Australia the vessel itself, fishing equipment and fish. The provision has also been held to apply to fuel bunkers: *Scandinavian Bunkering AS v The Bunkers on Board The Ship FV Taruman and Others* (2006) 151 FCR 126.

<sup>66</sup> See, in particular, the decision of the International Tribunal for the Law of the Sea concerning Russia's forfeiture of a Japanese fishing vessel following a conviction: *Tomimaru case* (2007) (Japan v Russian Federation) ITLOS case no 15.

regime does not apply within internal waters.<sup>67</sup> Articles 18 and 19 of the LOSC define ‘passage’ and ‘innocent’ and art 21 provides coastal States with the prescriptive power to make laws to regulate innocent passage in eight areas. Australia, consistently with many other States, has not enacted laws which specifically regulate innocent passage. Rather, enforcement action against foreign vessels regarding navigation will take place mostly in accordance with general navigation provisions in the *Navigation Act 1912* (Cth).<sup>68</sup>

A special regime of transit passage applies in straits used for international navigation.<sup>69</sup> Transit passage ‘shall not be impeded’ by Strait States although sea lanes and traffic separation schemes can be developed.<sup>70</sup> In Australia’s Great Barrier Reef and the Torres Strait (which is a strait used for international navigation), Australia has developed a compulsory pilotage regime applicable to foreign ships.<sup>71</sup> This has seen objections from other States.<sup>72</sup> There is also a ‘particularly sensitive sea area’ (‘PSSA’) in the Torres Strait which is a new concept not found in the LOSC but which has been developed by the International Maritime Organization (‘IMO’).<sup>73</sup> Some of Australia’s measures can be seen as interpreting the LOSC in a manner that seeks to maximise environmental protection, as a result of modern circumstances and challenges. However, other States are likely to continue to interpret the LOSC in a narrow manner and consider some of Australia’s measures as being inconsistent with the LOSC.

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<sup>67</sup> LOSC art 8(2).

<sup>68</sup> Note that ‘innocent passage’ rarely appears in Australian legislation. One exception is s 9 of the *Navigation Act 2012* (Cth). This section provides that the application of certain offences and civil liability provisions do not apply to foreign ships in the territorial sea ‘in the course of innocent passage’: s 9(f). See also *Admiralty Act 1988* (Cth) s 22(4). Similarly, there is no Australian legislative implementation of the ‘internal economy’ principle regarding coastal State discretion to exercise jurisdiction over foreign ships.

<sup>69</sup> LOSC art 38.

<sup>70</sup> *Ibid* arts 38(1), 4(1).

<sup>71</sup> *Navigation Act 1912* (Cth) s 186H.

<sup>72</sup> See Robert C Beckman, ‘PSSAs and transit passage: Australia’s pilotage system in the Torres Strait challenges the IMO and UNCLOS’ (2007) 38 *Ocean Development and International Law* 325.

<sup>73</sup> See IMO Assembly Resolution A.982(24) *Revised Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas*, adopted 1 December 2005. The IMO designated the Torres Strait as a PSSA in 2003 following an application submitted by Australia and Papua New Guinea: Julien Roberts, ‘Balancing Australia’s rights and obligations to protect the marine environment: The Torres Strait Particularly Sensitive Sea Area’ in Warwick Gullett, Clive Schofield and Joanna Vince (eds), *Marine Resources Management* (LexisNexis Butterworths, Sydney, 2011) p 279. See also Roberts J, ‘Compulsory pilotage in international straits: The Torres Strait PSSA proposal’ (2006) 37 *Ocean Development and International Law* 93 and Chelsea Purvis, ‘Coastal State jurisdiction under UNCLOS: The *Shen Neng 1* grounding on the Great Barrier Reef’ (2011) 36 *Yale Journal of International Law* 207.

## V CONCLUSION

There are a number of areas of textual disparity between Australia's domestic law and the LOSC, spanning a number of subject matters. However, this does not mean that Australia is in breach of LOSC obligations. This is because much of the LOSC is deliberately vague by virtue of it being a global framework convention and it therefore needs to be interpreted and clarified for the purpose of implementation by State parties. For particularly vague provisions it is inevitable that State parties will seek to ascribe them with a meaning that is consistent with their practice and interpretation of the LOSC. Australia has unashamedly sought to contribute to the development of the international law of the sea by developing its implementation legislation and practice in a manner that seeks to 'modernise' the interpretation of the LOSC so that it can be used most effectively to address current maritime exigencies. There is a need for such an approach because the LOSC text was settled over 30 years ago in 1982 (and indeed the text of numerous provisions were settled in the 1970s), long before the onset of modern challenges, such as large scale illegal fishing, the resurgence and new vectors of maritime asylum seekers, significant maritime security and piracy threats, and marine pollution challenges. Further, there are considerable legal and political challenges in effecting a formal textual amendment to the LOSC.<sup>74</sup>

Australia's innovative interpretation of the LOSC is seen most obviously with respect to domestic legal measures it has taken to improve its ability to take strong action against foreign fishing vessels fishing illegally in Australian waters, particularly with regard to the parameters of the right of hot pursuit. Indeed, the Australian Government claimed that it was 'working towards a 21<sup>st</sup> century definition of hot pursuit.'<sup>75</sup> In 2004, Australia's Foreign Minister stated:

The furthering of legal concepts and principles through the development of international custom, and the conclusion of bilateral, regional and other international agreements, all provide impetus for the clarification and expansion of legal concepts which may one day form part of the Convention itself.<sup>76</sup>

Few States have made formal objections to Australia's implementation of the LOSC. The notable examples are the objection to Australia's declaration of historic bays in South Australia by the United States<sup>77</sup> and

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<sup>74</sup> See the procedures set out in LOSC arts 311–316, especially arts 312 and 313.

<sup>75</sup> The Hon. Alexander Downer, Minister for Foreign Affairs, 'The United Nations Convention on the Law of the Sea: Ten Years of benefits for Australia' (Speech delivered at the Symposium 'Strategic Directions for Australia and the Law of the Sea', Canberra, 16 November 2004) <[www.foreignminister.gov.au/speeches/2004/041116\\_unclos.html](http://www.foreignminister.gov.au/speeches/2004/041116_unclos.html)>..

<sup>76</sup> Ibid.

<sup>77</sup> Kaye, and Roach and Smith, above n 37.



the concerns raised by a number of States (including Singapore, Panama and the Russian Federation) about the legality of Australia's compulsory pilotage regime in the Torres Strait.<sup>78</sup> However, Australia's innovative provisions in its fisheries legislation (in particular, regarding hot pursuit and forfeiture of foreign vessels) have not been the subject of formal objections.<sup>79</sup> This may continue to be the case. A State which might have different interpretations of the LOSC might not be inclined to lodge an objection against Australia until such time, if ever, that Australia takes enforcement action against one of its vessels. In the meantime, other States might develop their implementing legislation in a manner consistent with that of Australia, thus developing the body of State practice that may be relevant in a future international dispute settlement when ITLOS or another appropriate body will be obliged to clarify the meaning of a disputed LOSC provision. Such piecemeal but progressive development of State practice, in which State implementing legislation plays a crucial role, is a pragmatic way of developing the international law of the sea to the point where it needs to be in order to be most effective in addressing modern challenges. Such an approach is arguably more likely in common law States such as Australia which have a long tradition of interpreting laws in ways that recognised their underlying purpose. However, progressive interpretation of the LOSC can also be seen by civil law States.<sup>80</sup>

Further developments in States' interpretation of the LOSC can be envisaged, especially by coastal States, such as Australia, which face increasing pressures and threats to their zones of sovereignty and sovereign rights. Areas for focus are likely to be the particularly opaque rights enjoyed by coastal States in the contiguous zone with respect to responding to security, immigration and quarantine threats, as well as in the EEZ where there is much uncertainty about the full parameters of overlapping coastal State and flag State rights. States should be encouraged to implement the LOSC in a manner that is most conducive to addressing modern challenges, provided that the essential balances between coastal and flag States struck in the LOSC text are respected. Such State practice may involve implementing legislation that adopts ambitious interpretations of the LOSC text, yet the risk of this approach

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<sup>78</sup> Beckman, above n 72; Roberts n 73.

<sup>79</sup> The Russian Federation did question the validity of Australia's hot pursuit of the *Volga* in the 2002 prompt release litigation in the International Tribunal for the Law of the Sea (ITLOS) (above n 54). However, this argument was not entertained by ITLOS because in the special prompt release proceedings the Tribunal can only address issues related to prompt release: LOSC art 292(3).

<sup>80</sup> For example, France has formalised its position that a hot pursuit can be conducted through the territorial sea of a third State despite the wording of LOSC art 111(3): see above n 59.

resulting in international disputation can be ameliorated by the exercise of discretion in taking strong enforcement action.