EXECUTIVE SERIES

ADFP 06.1.2

AUSTRALIAN MARITIME JURISDICTION

Australian Defence Force Publication 06.1.2 (First edition) is issued for use by the Australian Defence Force and is effective forthwith. This publication supersedes Australian Defence Force Publication 9 Supplement 2—Australia’s Maritime Jurisdiction, (First edition).

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Air Chief Marshal
Chief of the Defence Force

Department of Defence
CANBERRA ACT 2600

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FOREWORD

1. Australian Defence Doctrine Publications (ADDP) and Australian Defence Force Publications (ADFP) are authorised joint doctrine for the guidance of ADF operations. ADDP are pitched at the philosophical and high-application level, and ADFP at the application and procedural level. Policy is prescriptive as represented by Defence Instructions, and has legal standing. Doctrine is not policy and does not have legal standing, however it provides authoritative and proven guidance which can be adapted to suit each unique situation.

2. ADFP 06.1.2 provides guidance for operational level planners on maritime security, regulations and law enforcement within and around Australia’s maritime zones. This publication is an updated version of ADFP 9, Supplement Two, Australia’s Maritime Jurisdiction. The extant version of this publication has limited information on Australia’s territorial sea baselines and aspects of maritime law enforcement, such as fisheries and hot pursuit. It is not a comprehensive reference publication for ADF maritime security operations on the Australian station, and has not been updated to take into account substantial legislative changes in the area from 1999 onwards.

3. In 2004, the document was substantially rewritten at the ADF Warfare Centre. The writing team sought to create a comprehensive reference publication for use by ADF operational commanders, planning staff, legal officers and training organisations. The new version was expanded to include such topics as Australia’s maritime boundaries, fisheries protection, resource protection, border protection and the apprehension of vessels.

4. Before the draft publication could receive Vice Chief of the Defence Force approval, the new organisation, Border Protection Command (BPC), was created which led to significant structural, legislative and policy changes in Australia’s domestic maritime security arrangements. This most recent version of the publication seeks to incorporate information on these changes. The purpose of the publication remains to provide a comprehensive reference publication for ADF operational, planning, legal and training staff on Australia’s Maritime Jurisdiction: Regulation and Enforcement. In particular, this document will be the principle reference for the Domestic Maritime Security Operations course.

5. Due to the nature of maritime law enforcement and the law itself, this document cannot remain static and will require regular revision to ensure its currency. Future anticipated changes to legislation include the proposed Maritime Powers Act which aims to consolidate offshore enforcement powers into a single Act. The proposed Act will provide greater clarity for personnel at the tactical level in exercising powers in the maritime environment,
particularly where personnel currently undertake enforcement activities pursuant to multiple pieces of legislation. Developments in international law which will affect Australia include the 2005 Protocol on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation.

6. The contents of this ADFP have been derived from relevant legislation, operational requirements and recent ADF experience. Where necessary specialist legal advice should be sought to expand and clarify points stated in this publication.

7. This publication refers to the Australian Defence Glossary, but predominantly draws its definitions directly from the relevant legislation and international law such as the 1982 United Nations Convention on the Law of the Sea and other relevant sources of law which are discussed throughout.

8. Every opportunity should be taken by users of this publication, particularly personnel involved in maritime surveillance and enforcement operations and training to examine constructively its contents, applicability and currency. Where deficiencies are found, Commander BPC welcomes any and all assistance, from whatever source to improve this publication and to implement amendment action where appropriate.

FURTHER INFORMATION FOR READERS

9. The following list is not an exhaustive summary of sources, however those readers who are interested in further information on the contents of this document can consult the following:

Commonwealth legislation
www.comlaw.gov.au

State/Territory legislation and case law
www.austlii.edu.au

Treaties

Gazettes

Note:

When a reference is made to the ‘Gazette’ in this publication, it refers to one of four Commonwealth Gazette Publications – Public Service Gazette, General Gazette, Special Gazette or Periodic Gazette. References to the
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CHAPTER 1

MARITIME ZONES

Executive Summary

- The 1982 United Nations Convention on the Law of the Sea (UNCLOS) covers a number of maritime zones which apply to Australia.

- The waters surrounding Australia and its territories are divided into internal waters, territorial seas, a contiguous zone an exclusive economic zone (EEZ) as well as the continental shelf.

- In Australia, the states have jurisdiction over internal waters and the territorial sea within three nautical miles (nm) whereas the Commonwealth has jurisdiction over the remainder of the territorial sea, the contiguous zone, EEZ and continental shelf.

- Australia claims sovereignty over the Australian Antarctic Territory (AAT).

- In order to form a legal framework for activities in Antarctica to proceed unencumbered by arguments over the validity of sovereignty claims, the Antarctic Treaty was concluded in 1959 and entered into force in 1961.

INTRODUCTION

1.1 Generally, the closer a maritime zone is to the coast of a State, the greater the level of jurisdictional control the State will have over activities taking place within that zone. Australian legislation reflects this, with greater regulation possible in waters immediately adjacent to the Australian coast. The zones considered in this chapter will start near to shore, with the internal waters and territorial sea then begin moving further out to the contiguous zone and conclude with the two most remote jurisdictional areas, the EEZ and the continental shelf. These zones are shown in figure 1-1.
Diagram showing relationship of maritime features, limits and zones seaward of the territorial sea baseline (TSB) (not to scale).

Figure 1–1: Maritime zones
MARITIME ZONES

Baselines

1.2 The primary task for maritime boundary determination is the delineation of the baseline from which the outer limits of the various maritime zones are measured. This is the territorial sea baseline (TSB) and it consists of several components including normal baseline, straight baselines and bay and river closing lines.

1.3 The TSB is the 'marker' from which the outer limits of a number of maritime zones are measured. These include the three nm limit of coastal waters, the 12 nm limit of the territorial sea, the 24 nm limit of the contiguous zone, and the 200 nm limit of the Australian EEZ. As well, the outer limit of the extended continental shelf is sometimes based on a constraint line lying 350 nm beyond the TSB.

1.4 In accordance with Article 5, UNCLOS, the normal baseline, in the absence of any other indicator, is the low-water line along the coast. This means where no other baselines are applicable or have been proclaimed, the lowest astronomic tide (LAT) is used to calculate the baseline of the territorial sea. The LAT is the lowest possible tide in a tidal cycle and occurs about once every 16 to 17 years. It is not often directly observable and therefore should be derived from charts.

1.5 The UNCLOS does however permit coastal States to draw baselines across the mouths of bays and other features, thereby enclosing certain sea areas as internal waters. There are a number of situations where such baselines can be drawn including the following:

a. seaward of the low-water line of a reef fringing an island or atoll (Article 6, UNCLOS);

b. across areas where the coastline is deeply indented or cut into or where the coastline is unstable or where fringed by islands – providing the baselines do not depart from the general direction of the coast (Article 7, UNCLOS);

c. across the mouths of rivers (Article 9, UNCLOS);

d. across the mouths of certain bays (Article 10, UNCLOS);

e. around permanent harbour works (Article 11, UNCLOS);
f. around roadsteads which are to be considered part of the territorial sea if they would otherwise be outside it (Article 12, UNCLOS); and

g. low-tide elevations within the territorial sea can be used for baselines if within the breadth of the territorial sea of land (Article 13, UNCLOS).

1.6 A bay can be enclosed by baselines if its mouth is less than 24 nm across and its area is greater than that of a semi-circle whose diameter is the width of the bay’s mouth. The width of a bay’s mouth does not include any islands in the mouth, merely the sum of the distances of the water between. This rule does not prevent a State enclosing ‘historic bays’. Historic bays are waters which have been subject to claim and complete control by a State over a very long period of time, without objection from other States.

1.7 The baseline of Australia’s territorial sea is derived in a number of different ways. Firstly, in 1988 TSB were proclaimed between various designated baseline turning points in accordance with Part II of the UNCLOS. This proclamation was made by the Governor-General pursuant to section 7 of the Seas and Submerged Lands Act. In 2006, the Governor-General issued the Seas and Submerged Lands (Territorial Sea Baseline) Proclamation 2006 which proclaimed new baseline turning points for the mainland and islands off the states and the Northern Territory.

1.8 The 1988 and 2006 proclamations also provided that all bays meeting the UNCLOS requirements and rivers are automatically enclosed by TSB. Applicable bays are less than 24 nm width at the mouth and have a water area greater than the area enclosed by a semicircle with a diameter the same width as the bay mouth. Individual baseline turning points for these rivers and bays are not specified and can be derived by checking the physical dimensions of a bay on charts.

1.9 Section 8 of the Seas and Submerged Lands Act also provides that the Governor-General may make other baseline proclamations. This has occurred on three occasions. In 1987, four historic bays were proclaimed along the coast of South Australia. Anxious Bay, Encounter Bay, Lacepede Bay and Rivoli Bay were proclaimed after a joint Commonwealth-South Australian Committee found they exhibited the characteristics necessary to be designated historic bays. The United States Government has protested Australia’s proclamation of these four bays and Australia has rejected the protest. The 2006 proclamation included new baselines with respect to these historic bays.
1.10 In 2000, the Governor-General also proclaimed baselines around a roadstead in the Gulf of Carpentaria, off the town of Karumba. The waters inside the baselines are treated as internal waters.

**Internal waters**

1.11 Internal waters represent those waters which are intrinsically part of the State, over which the State has complete and unfettered sovereignty. These waters are treated as being essentially the same as land. A State therefore has complete power over them and thus may legitimately exclude any vessel from entering those waters. Most typically, rivers and lakes would be internal waters, but internal waters can be linked to, or be part of the sea. The UNCLOS defines internal waters in Article 8 as being those waters on the landward side of the baseline of the territorial sea.

1.12 Within Australia, such waters should be treated as if they are the land territory of a state, such that the waters of Port Jackson are part of New South Wales and the waters of the Derwent Estuary are part of Tasmania. All state laws so far as they can be applied in a marine setting, will be applicable in these waters.

**Territorial sea**

1.13 The territorial sea is defined in Articles 2 and 3 of the UNCLOS as the belt of sea adjacent to a State and its internal waters. A State exercises sovereignty over its territorial sea, although its sovereignty is subject to qualification. This qualification is largely in the context of allowing vessels a right of innocent passage to proceed through its territorial sea. The territorial sea can be up to 12 nm from the baselines. Most of the international community accepts that 12 nm is the maximum lawful width, although some States, largely in Africa and South America, have asserted wider territorial seas. The airspace above the territorial sea is also part of a State's national airspace.

1.14 Australia has a 12 nm territorial sea, consistent with the UNCLOS. On 9 November 1990, the Governor-General made a proclamation under section 7 of the *Seas and Submerged Lands Act* to extend Australia’s territorial sea from the baseline to the maximum distance of 12 nm.\(^1\) Prior to this, Australia had claimed only a three nm territorial sea, consistent with the United Kingdom, United States of America and most other Western States.

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\(^1\) Gazette No. S 297, Tuesday, 13 November 1990.
Contiguous zone

1.15 The contiguous zone is a belt of sea surrounding the territorial sea of a State, to a maximum distance of 24 nm beyond the TSB. It gives the coastal State limited jurisdiction in respect of fiscal, immigration, sanitary and customs regulations under Article 33 of the UNCLOS.

1.16 The Seas and Submerged Lands Act provides for the proclamation of a contiguous zone by the Governor-General. With effect from 14 April 1999, the Governor-General proclaimed the contiguous zone to 24 nm. Its principal uses in the context of Australia are with respect to customs and immigration laws.

Exclusive economic zone

1.17 The EEZ provides a State with sovereign rights over the resources of the waters adjacent to its territorial sea. It is important to note that it does not grant sovereignty to, but rather sovereign rights over, the exploration and exploitation of the living and non-living resources of the sea and seabed. As such, the EEZ gives a coastal State the right to regulate all fishing activities and oil and gas extraction activities taking place within the zone. The EEZ also includes rights over marine scientific research and environmental protection. The EEZ extends beyond the territorial sea, to a distance of up to 200 nm from the TSB.

1.18 A coastal State is also given exclusive jurisdiction over artificial structures in its EEZ. It can apply its laws to these structures and proclaim safety zones of up to 500 metres around them. It is incumbent upon the coastal State to give notice of the artificial structure to the International Maritime Organisation, including those structures abandoned but not removed.

1.19 Australia first extended its fisheries jurisdiction to 12 nm in 1967 and declared a 200 nm fishing zone in 1979. The Australian fishing zone (AFZ) applied to all waters around Australia and its external territories, with the exception of the AAT, which was exempt from the operation of the AFZ one day after the AFZ was created.

1.20 In 1994, Australia proclaimed a 200 nm EEZ but the AFZ was retained and continues to operate under the Fisheries Management Act 1991. Unlike the AFZ, the EEZ applies to all waters around Australia and its

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territories, including the AAT. This was accomplished under section 10B of the *Seas and Submerged Lands Act*. The range of enforcement powers pertaining to the EEZ is considered in chapter three.

**Continental shelf**

1.21 The continental shelf predates the EEZ and to a large extent the rights it generates also pertain to the EEZ, to such an extent that during the negotiations of the UNCLOS, it was formally suggested that the continental shelf be removed. It was retained in part because in limited circumstances, outlined in Article 76, it can extend beyond 200 nm. This extension is based on a series of complex factors, stemming from the structure, depth and distance of the sea floor from various points on the seabed. The extension cannot exceed 350 nm or 100 nm beyond the 2500 metre isobath.

1.22 The shelf gives no rights over the superjacent waters, in the absence of the EEZ. The rights generated by the continental shelf are exclusive rights to explore and exploit the seabed, both non-living and living sedentary resources. The coastal State also has exclusive rights to drill, construct artificial islands, construct other installations and to tunnel.

1.23 Australia first proclaimed a continental shelf in 1953. On 15 November 2004 Australia put its submission to the UN Commission on the Limits of the Continental Shelf to extend its continental shelf claim beyond 200 nm, and on 9 April 2008 the Commission considered that submission and made recommendations. Australia has not yet proclaimed the limits of its extended continental shelf (shown in figure 1-2).
Australia’s Antarctic claim

1.24 Australia claims sovereignty over the AAT. The claimed territory was placed under the administration of Australia by a British Order in Council of 1933. Australia then passed the Australian Antarctic Territory Acceptance Act 1933, which accepted the Territory and vested the Governor-General with power to make ordinances for it. Control of the Territory was officially transferred from Great Britain to Australia in 1936.
1.25 Australia and six other States\(^3\) have territorial claims in Antarctica. Each of these claims is recognised by a limited number of other States. Only four States recognise Australia’s territorial claim: France, New Zealand and Norway whose claims are adjacent to Australia’s, and the United Kingdom.

1.26 In order to form a legal framework for activities in Antarctica to proceed unencumbered by arguments over the validity of sovereignty claims, the Antarctic Treaty was concluded in 1959 and entered into force in 1961. Article IV of the Antarctic Treaty provides that nothing in the Treaty shall be interpreted as a renunciation of a claim, or as prejudicing the position of any party as regards its recognition or non-recognition of any other State’s claim, to territorial sovereignty in Antarctica. In addition, while the Treaty is in force, no new claim, or enlargement of an existing claim, may be asserted by parties and no acts or activities taking place while the Treaty is in force shall constitute a basis for asserting, supporting or denying a claim. Thus, the Antarctic Treaty in effect provides for a balance between potentially competing interests, by preserving the status quo as it was at the time of the Treaty’s completion. Australia’s claim precedes the entry into force of the Antarctic Treaty.

1.27 Twenty one of the twenty eight consultative parties to the Antarctic Treaty have made no claims to Antarctic Territory and do not recognise the existing claims. There are currently 46 parties (consultative and non-consultative) in total.

**Maritime zones in Antarctica**

1.28 Article VI of the Antarctic Treaty provides that nothing in the Treaty shall prejudice or in any way affect the rights, or the exercise of the rights, of any State under international law with regard to the high seas within that area. Under the Antarctic Treaty no provision has been made for controlling whaling in the maritime areas below 60 degrees South. The Convention on the Conservation of Antarctic Marine Living Resources 1980 (CCAMLR) which deals with fishing activities in the area, specifically preserves the operation of the International Convention for the Regulation of Whaling 1946 (Whaling Convention). Article VI of the Antarctic Treaty preserves the rights of States with regard to the high seas in the area to which the Antarctic Treaty applies. This contemplates the Whaling Convention, which entered into force before the Antarctic Treaty.

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\(^3\) France, New Zealand, Norway, United Kingdom, Argentina and Chile.
1.29 Under UNCLOS, maritime zones are attributable to any territory, including in the Antarctic. Accordingly, Australia has established maritime zones off the AAT. Australia considers that this is consistent with Article IV of the Antarctic Treaty because EEZ rights do not constitute a sovereign claim. However, not all States recognise Australia’s claim and therefore they will regard the waters off Antarctica as the high seas.

1.30 Enforcement of Australian law against foreigners in Antarctic waters, based on jurisdiction deriving from Australia’s territorial claim to the AAT and associated EEZ, can be expected to prompt an adverse reaction from other Antarctic Treaty parties. To date, the Australian Government has not enforced its laws in Antarctica against the nationals of other States which are party to the Antarctic Treaty, except when such persons have voluntarily subjected themselves to Australia law (for example, by applying for permits under the applicable Australian laws), as each State has responsibility for the activities of its own nationals under the Antarctic Treaty.

The Australian Antarctic Territory and adjacent waters under Australian law

1.31 In accordance with Australia’s claim under international law, as a matter of Australian law, the AAT has been accepted as a territory of the Commonwealth of Australia (section 2 of the Australian Antarctic Territory Acceptance Act 1933). Similarly, in accordance with Australia’s claim under international law, waters adjacent to the AAT have been proclaimed as part of Australia’s EEZ under the Seas and Submerged Lands Act. As a matter of Australian law, therefore, the AAT is an external territory, and the relevant waters off the AAT are part of Australia's EEZ.

Offshore jurisdiction - Offshore Constitutional Settlement

1.32 Prior to 1975, uncertainty existed over whether the states of the Commonwealth (for example, Queensland, Victoria) had sovereignty over the territorial sea and sovereign rights over the continental shelf. The Commonwealth enacted the Seas and Submerged Lands Act 1973 which declared that such sovereignty and sovereign rights rested with the Commonwealth. The states challenged the validity of the legislation before the High Court, but were unsuccessful.

1.33 After a change of Government, negotiations commenced between the Commonwealth and the states to grant them jurisdiction over the territorial sea. In 1980, the Commonwealth and the states reached an agreement, entitled the Offshore Constitutional Settlement (OCS) to achieve that end. The OCS confirmed the High Court’s position that sovereignty over waters (aside from those which were part of a state at Federation) was vested in the
Commonwealth. However, the OCS provided the states jurisdiction over the sea and seabed within three nm of the baselines of the territorial sea.

1.34 The OCS was achieved by a package of Commonwealth and state legislation which came into effect in 1983. The two key pieces of the package were the *Coastal Waters (State Powers) Act 1980* and the *Coastal Waters (State Title) Act 1980*, the impact of which is outlined below. Notably, the OCS was expressly stated to be in accord with Australia’s international obligations with respect to the territorial sea.

1.35 The *Coastal Waters (State Powers) Act* vests each state with the power to make laws with respect to the adjacent ocean to their territory to a distance of three nm from the TSB. The waters within that three nm limit are ‘coastal waters’. This amounts to a grant of plenary extraterritorial authority, as the Act explicitly states it does not extend the limits of a state. As such, a state can validly make laws with respect to activities taking place in a three nm belt of territorial sea without having to establish any causal nexus with the state, as would be required with other instances of legislation having extraterritorial effect.

1.36 The *Coastal Waters (State Title) Act* vests title to coastal waters in each state as if the waters and seabed in issue were located within the limits of the state. This was described at the time as the vesting of proprietary rights in the states to the relevant waters and seabed and was therefore complementary to the granting of power to regulate the areas. If new TSB are drawn, as occurred in 1983 and 1988, the area subject to state title is increased appropriately. Existing arrangements, such as the Great Barrier Reef Marine Park, remain unchanged by the legislation.

1.37 Under the OCS, the Commonwealth retained control of certain activities taking place in the areas now subject to state control. Most importantly, they allowed the Commonwealth exclusive control over oil and gas pipelines and related facilities. In addition, the OCS also recognised the need for cooperative federalism in the management of ocean resources. There is scope for the conclusion of specific agreements between Commonwealth and state/territory Governments for the unified management of particular marine living resources, found in waters subject to both Commonwealth and state control. These arrangements may allow state authorities to manage resources, even outside coastal waters. To date, there have been over 25 arrangements concluded in this regard.

**Offshore Petroleum Settlement**

1.38 Prior to 1960, no legislation existed to regulate the exploration for and exploitation of undersea oil deposits. There was a difference of opinion as to
whether state or Commonwealth legislation would be appropriate. In the 1960s, the discovery of oil in the seabed beneath Bass Strait forced the Commonwealth Government to reconsider Australia’s offshore regime. Disagreement between Commonwealth and states was avoided by the negotiation of a compromise arrangement dealing with offshore petroleum exploitation.

1.39 The Commonwealth Parliament passed the *Petroleum (Submerged Lands) Act 1967* and each state passed complementary legislation to deal with offshore areas. The Australian continental shelf was divided into vast regions, with each state responsible for the administration of their respective region. Revenue derived from each region was to be shared between the Commonwealth and the relevant state.

1.40 The regions extended over international areas of the deep seabed, beyond Australia's jurisdiction. This did not mean that Australia was in breach of its international obligations under international law, as the settlement was a domestic arrangement and therefore it did not amount to a claim over the continental shelf of the state areas. These arrangements continue and are presently contained in the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*. The zones associated with this Act are shown in figure 1-3.

1.41 The zones established in the Offshore Petroleum Settlement have also been retained for use in the *Crimes at Sea Act 2000* for determining which state’s criminal law may apply aboard ships in waters around Australia.
Figure 1–3: The *Offshore Petroleum and Greenhouse Gas Storage Act 2006* zones
CHAPTER 2

AUSTRALIA’S MARITIME BOUNDARIES

Executive Summary

- Australia shares its maritime boundaries with several other States.
- As a result, Australia has entered into agreements with neighbouring States to avoid disputes over sovereignty.

INTRODUCTION

2.1 While Australia is geographically remote from most other landmasses it shares maritime boundaries with at least seven other States. Delimited boundaries exist complete or in part with Indonesia, East Timor, Papua New Guinea (PNG), the Solomon Islands, France and New Zealand (NZ), while boundaries with Norway and possibly Vanuatu are yet to be determined.

DEVELOPMENT OF AUSTRALIA’S MARITIME BOUNDARIES

2.2 International law provides limited guidance on how maritime boundaries are to be delimited. The 1982 Convention on the Law of the Sea (UNCLOS) only indicates that boundaries for the exclusive economic zone (EEZ) and continental shelf may be concluded by agreement or be determined by a judicial authority to produce an equitable result. While such a result will often be an equidistance or median line, this will not always be the case. International cases have, from time to time, indicated other criteria that may be relevant in the delimitation of a maritime boundary. A definitive methodology is yet to emerge.

2.3 Australian practice to date has been to endeavour to reach workable and practicable maritime boundaries with its neighbours. As a result, most of Australia’s maritime boundaries and potential maritime boundaries have been determined. This is relatively unusual as most States, particularly those in the Asia Pacific region, have been slow to move to delimit their boundaries. Australia’s boundaries also show some creativity in their implementation, with the use in places of zones of shared jurisdiction or resources and the division of seabed and fisheries by separate boundaries. Figure 2-1 shows Australia’s maritime boundaries with other States.
Australia concluded its first maritime boundary agreement in 1971, reaching consensus with Indonesia over the continental shelf boundary between the two States. The area dealt with in this agreement ran from a point near the southern coast of the island of New Guinea (then under Australian jurisdiction) to a point designated A12 in the Arafura Sea. On PNG independence in 1975, the Australia-Indonesia seabed boundary ran from point A3. The points were determined on the basis of equidistance. Figure 2-2 displays Australia's maritime boundary with Indonesia.
2.5 The 1971 agreement provides for consultation or negotiation in the event of any dispute but provides for no specific mechanism under which such negotiation is to take place. Article 7 of the agreement states that in the event that a deposit of minerals or hydrocarbons located on or about the boundary is discovered and this deposit is extractable from the other side of the line, then the two Governments will seek to reach a unitisation agreement to share the deposit.

2.6 In 1972 negotiations pertaining to the seabed of the area immediately to the west continued. The area of seabed under negotiation was the Arafura Sea. For the most part the seabed in this region is flat and relatively shallow. Geologically speaking, the Australian continental shelf extends far out to sea and, ignoring the presence of Indonesia, would extend beyond 200 nautical miles (nm).

2.7 The most prominent feature of this area is the Timor Trough, which lies approximately 40 to 60 nm off the island of Timor and runs more or less parallel to the island. The Trough is over 3000 metres deep in places and appears to mark the plate boundary between the Indo-Australian and the Asian continental plates.

2.8 The boundary that was negotiated in 1972 reflects the Australian position that the presence of the Timor Trough was relevant in the
delimitation of the continental shelf boundary. Commencing from point A12, at the end of the previous delimitation line, the boundary maintains a course west initially reflecting a median line until it meets the eastern end of the Timor Trough. The line then runs along the southern side of the Trough, approximately along the 200 metre isobath.

2.9 The line is interrupted along its passage on the 200 metre isobath, between points A16 and A17. This break in the line, popularly known as the Timor Gap, reflected the then-Portuguese and now independent eastern portion of the island of Timor. From A17, the line continues along the Trough until terminating at point A23, where the end of the Trough and the presence of Ashmore and Cartier Islands and Roti Island would begin to influence its path.

2.10 In 1974, a memorandum of understanding (MOU) was concluded between Australia and Indonesia concerning traditional fishing, which sought to limit the number and type of Indonesian fishing activities in Australian waters. The 1974 MOU permits Indonesian fishermen who had traditionally fished for fish and sedentary species in Australian waters around the Ashmore Islands, Cartier Island, Scott Reef, Seringapatam Reef and Browse Islet to continue to do so within a defined box but limits their right to land on these features for fresh water to East and Middle Islets in the Ashmore Islands Group. The term ‘traditional fishermen’ was defined to mean those who had traditionally taken fish by methods that had become tradition over decades of time.

2.11 In March 1997, Australia concluded a Treaty with Indonesia settling the remainder of the maritime boundary between the two States. The Treaty has yet to enter into force.

2.12 In the years since 1974, Australia and Indonesia had both extended their fisheries jurisdiction to 200 nm and by 1997, both had declared full EEZ. Where the continental shelf boundary represented a median line was also a convenient location for the EEZ/fisheries boundary and this was incorporated into the 1997 Treaty. However, the use of the 1972 continental shelf boundaries in the vicinity of the Timor Trough to delimit the respective water columns between the two States was unacceptable to Indonesia, as being too far to the north.

2.13 The Treaty resolved the Australian position of wishing to retain the continental shelf boundaries and the Indonesian desire for a more southerly boundary by dividing seabed and water column jurisdictions. Accordingly, west of point A12, the EEZ boundary line separates from the continental shelf proceeding along a more southerly course. This separation of EEZ and
continental shelf is unusual in international practice but is a legitimate method to resolve the problem.

2.14 Most significantly, the EEZ includes the seabed and economic activities taking place under and upon it, thereby overlapping in jurisdictional terms with the regime of the continental shelf. This problem is addressed in the Treaty in Article 7 which provides that where different parties have rights to the continental shelf and EEZ of an area of ocean then sovereign rights attaching to the EEZ are restricted to the water column. Issues in relation to the construction of artificial islands and other structures, exploration, pollution control and marine scientific research are to be resolved on a case by case basis through cooperation by both States.

2.15 West of point A25, the Treaty deals with the EEZ and continental shelf boundaries to the north and west of the Ashmore Islands. The Ashmore Islands Group consists of uninhabited sandy cays in the Timor Sea that are organised like that of an Australian external territory. Both the boundaries for the continental shelf and the EEZ run to the north of the Ashmore Islands at a distance of 24 nm, which represents about one third of the distance between the Ashmore Islands and the Indonesian island of Roti.

2.16 In total, the boundaries trace the following courses. In the east, up to point A12 in the Arafura Sea, the EEZ and continental shelf boundaries follow the same course, which essentially is a median line between Australian and Indonesian territory. West of point A12 towards the Ashmore Islands, the EEZ boundary continues as a median line, while the old continental shelf boundary swings further to the north following the Timor Trough. In the vicinity of the Ashmore Islands, the EEZ boundary circles northward of the islands and then continues westward approximating the median line between the two States, terminating at point Z100, 200 nm from the Australian mainland and Indonesian archipelagic baselines. The continental shelf boundary beyond point A25 proceeds south from that point to a point 24 nm north of the Ashmore Islands and then skirts those islands. From point A49 it heads south-west to point A50, which correlates with point Z88 on the EEZ boundary. This is a single point of contact as the continental shelf boundary heads northward. Between points A82 and A51, the continental shelf line lies beyond 200 nm from the Australian coast, derived from the formula used in Article 76 of the UNCLOS.

2.17 There is also an EEZ/continental shelf boundary under the Treaty between Christmas Island and Java. The boundary delimited in this instance consists only of three points - two termini 200 nm from Christmas Island at the edge of the Australian EEZ and a single point between Christmas Island and Java. The single point lies 38.75 nm to the north of Christmas Island, on
2.18 As both parties are yet to ratify the 1997 Boundary Treaty it has not entered into force. This does not appear to be as a result of dissatisfaction on the part of either Australia or Indonesia but rather in administrative and legislative delays associated with the implementation of the Treaty. By virtue of Article 18 of the Vienna Convention on the Law of Treaties, having signed the Treaty, both States are under an obligation to refrain from acts which would defeat the object and purpose of the Treaty.

East Timor

2.19 Australia had concluded an interim petroleum sharing Treaty, known as the Timor Gap Treaty, with Indonesia in 1991. Following East Timorese independence in 1999, the Timor Gap Treaty lapsed and it became necessary for East Timor and Australia to establish new boundary arrangements. Shortly after it assumed responsibility for East Timor, the United Nations Transitional Administration in East Timor concluded a further interim arrangement to retain jurisdiction of the shared portion of the Timor Gap Treaty, to access the petroleum revenue the Timor Gap Treaty generated.

2.20 Before the interim arrangement expired, Australia began discussions with the provisional Government of East Timor to reach some form of agreement. These discussions led to the negotiation of the Timor Sea Treaty. The intention was to create a Joint Development Zone (JDZ) that would similarly operate to the existing central portion of the old Timor Gap Treaty (known as Area A) of co-operation in the Timor Sea. It was agreed that Australia and East Timor would continue to share jurisdiction and revenue but in order to reach agreement quickly and to give aid to East Timor, Australia agreed to a revenue sharing arrangement of 90:10 in favour of East Timor rather than 50:50 which had been the case with Indonesia.

2.21 The area of joint jurisdiction between Australia and East Timor is called the Joint Petroleum Development Area (JPDA). It is administered by a designated authority and it operates similarly to that under the Timor Gap Treaty. It was designed to operate for 30 years unless a permanent boundary is ultimately decided between the parties. The agreement entered into force on 2 April 2003. The JPDA is bound to the north by the Timor Trough, the south by a line of equidistance between Australia and East Timor and by median lines on its eastern and western sides.
2.22 An additional difficulty in the negotiation of the Timor Sea Treaty was the presence of a very large gas field to the east of the JPDA known as Greater Sunrise. It was estimated about 80 percent of Sunrise was on the Australian continental shelf and about 20 percent extended into the JPDA. This required a unitisation agreement to ensure an appropriate share of revenue took place. The unitisation agreement was agreed upon and it entered into force about one month before the ratification of the Timor Sea Treaty. There was a split of 79.9 percent of the Sunrise and Troubadour fields to Australia with the remaining 20.1 percent allocated to East Timor.

2.23 Continuing efforts at negotiating a permanent boundary brought about a reappraisal of the Timor Sea Treaty. Australia and East Timor both agreed that while the basic provisions of the Timor Sea Treaty were appropriate, in the interests of greater revenue and stability for East Timor, there would need to be changes to the arrangements.

2.24 The result was theCertain Maritime Arrangements in the Timor Sea Treaty, adopted in January 2006. This Treaty provided for the retention of the JPDA for a further 50 years, dividing petroleum revenue in the same 90:10 ratio as the Timor Sea Treaty. However, the Treaty also provided that East Timor would receive 50 percent of the revenue from Greater Sunrise, even though 80 percent of the field is outside the JPDA. In addition, the Treaty also provided that the water column boundary between the two States would be the median line between them. This is basically identical to the water column boundary previously agreed between Australia and Indonesia in 1997. The Treaty entered into force on 23 February 2007.
2.25 Prior to and following PNG independence in 1975, the *Torres Strait Treaty* was negotiated. With the exception of the Torres Strait region, the rest of the maritime boundary between Australia and PNG is relatively straightforward, based on equidistance. Slight adjustments to the line were made at the eastern end of the line to reflect the presence of a number of small islands in the Coral Sea Islands Territory, the Louisade Archipelago and Pocklington Reef and at the western end, to ensure the boundary met the terminus of the earlier Australia/Indonesia delimitation.

2.26 The presence of the large number of islands in Torres Strait itself provides the most interesting and complicated parts of the Treaty. Although a single boundary is used elsewhere, the seabed and fisheries jurisdiction lines separate as they draw near the centre of the Strait.
2.27 The seabed boundary runs along a course far south of the inhabited islands of Saibai, Dauan and Boigu, as well as a number of small uninhabited cays. The line is not a median line using the two mainlands but takes into account the southern Australian islands in the centre of the Strait. The fisheries jurisdiction line, while following the seabed line for most of the boundary, turns sharply northward to enclose the three northern inhabited islands but does not enclose a number of the Australian uninhabited islands at the eastern and western ends of the Strait. This ‘top hat’ effect is designed to try to accommodate PNG wishes for a share of the exploitable resources of Torres Strait, while preserving the right of the Torres Strait Islanders to enjoy the fisheries surrounding their islands. The fact the fisheries line does not enclose the eastern and western uninhabited islands demonstrates that the latter concern ceased to be a factor in determining the fisheries line. Figure 2-4 shows the *Torres Strait Treaty* zone.

2.28 Article 2 of the Treaty provides that sovereignty over islands includes sovereignty over the territorial sea, sea-bed and sub-soil of the territorial sea. Australia and PNG agreed that in the central area of the Strait, north of the seabed line, they would limit their territorial seas to three nm regardless of any subsequent extension of the territorial sea for the rest of their territory. As such, when Australia extended its territorial sea to 12 nm in 1990, the islands north of the seabed line in Torres Strait were specifically exempt in the proclamation and still retain a three nm territorial sea.

2.29 As Saibai, Dauan and Boigu islands lie within six nm of PNG territory, the Treaty delimits a territorial sea boundary between them. The boundary appears to be a median line and, to ensure there is no confusion, the annexes to the Treaty specify the individual baseline turning points to be used to delimit the territorial seas of all the Australian islands north of the seabed line. Islands to the south of the sea-bed are entitled to the full 12 nm territorial sea currently claimed by Australia. Pearce Cay, one of the islands specified in annex three, is within three nm of the sea-bed line, so it has a three nm territorial sea to its north and a 12 nm territorial sea from its southern coast, producing what has been described as a ‘flying saucer-shaped’ territorial sea.

2.30 As the boundary is split in the central area of the Torres Strait for continental shelf and fisheries purposes, it was necessary to consider where the boundary would lie for other more unusual facets of jurisdiction. The Treaty establishes a definition of ‘residual jurisdiction’, to cover such activities as preservation of the marine environment, marine scientific research, energy production from water, currents or winds and seabed and fisheries jurisdiction not directly related to exploration or exploitation of resources. Within the area between the continental shelf line and the fisheries line, the parties have agreed that neither shall exercise residual jurisdiction without the concurrence of the other.
2.31 One revolutionary aspect of the Treaty was the establishment of a 'Protected Zone' in the northern third of the Strait. The Protected Zone serves a number of functions in relation to jurisdiction and the traditional inhabitants. The Zone itself surrounds all the Australian islands north of the sea-bed line, as well as most of the Australian islands in the central part of the Strait, mid-way between the two mainlands. Only the southern group, adjacent to Cape York is omitted. In this way, all the islands where the indigenous inhabitants still largely pursue their traditional lifestyles on their ancestral islands are within the Zone. The Zone also includes Kawa, Mata Kawa, Kussa and Yapere islands in PNG, with its northern boundary being the PNG mainland's southern coast for most of the area adjacent to the fisheries line.

2.32 As noted above, the Protected Zone serves a number of functions. Firstly, it provides an area expressly designated to protect the traditional way of life and rights of the people living in the Zone. This is done by permitting freedom of movement between the States for traditional activities with no customs, quarantine or like control for temporary visitors engaged in such activities. In addition, both States are to preserve any traditional rights of use and access of the nationals of the other State, on at least as favourable
conditions as its own nationals. Priority for traditional fishing as opposed to commercial fishing is guaranteed.

2.33 In terms of fisheries, the Zone provides for a system of resource allocation. Any commercial fishing permitted in the Strait, over and above traditional activity, is to be apportioned between the States in differing ratios depending on where in the Zone the fishing took place. In areas under Australian jurisdiction, PNG receives 25 percent of the catch; in areas under PNG jurisdiction, Australia receives 25 percent. While in the territorial sea of the Australian islands north of the fisheries line, the catch is apportioned equally between the States.

**Solomon Islands**

2.34 In 1988, Australia and the Solomon Islands concluded a maritime delimitation Treaty. The boundary is relatively short with only three points, two of which are its termini at the ends of the Australia/PNG and Australia/France boundaries. The boundary itself seems to be based on equidistance, with the single turning point on the boundary virtually equidistant from Mellish and Indispensable Reefs. Of note is the fact that there is an area of 370 square nm of high seas which are enclosed by the EEZ of Australia, the Solomon Islands, and PNG. This area is often neglected on some charts because it is so small.

**France**

2.35 In September and October 1980, Australia and France conducted negotiations to determine the maritime boundary between their respective territories in the Pacific and Indian Oceans. The Pacific boundary consists of 22 turning points. The line firstly runs essentially north-south between the Australian Mellish Reef and the French Chesterfield Reefs in the north and Kenn and Wreck Reefs and Cato Island for Australia and the Bellona Reefs and Caye de l'Observatoire for France, in the south. The line then runs essentially eastwards, due to the influence of the Australian Elizabeth and Middleton Reefs, and Norfolk Island. The line ends once the Matthew and Hunter Islands, to the east of New Caledonia, become a relevant consideration.

2.36 These islands are currently the subject of a dispute between Vanuatu and France. Australia appeared to be reluctant to take sides by implicitly recognising a French claim by extending the boundary. If Vanuatuan sovereignty over Matthew and Hunter Islands is confirmed, Australia would have to negotiate with that State to complete the boundary. The agreement indicates that the final point, R22 is without prejudice to the position of either State with regard to the outer edge of the continental shelf.
2.37 The Indian Ocean boundary runs between Australia’s Heard and McDonald Islands and the French Kerguelen Islands. The line consists of eight turning points and appears essentially to be a median line. One difficulty with the boundary is that its termini are exactly 200 nm from both sets of islands, at the points where the EEZ cease to overlap. On its own this would not present a problem but the continental shelf in question extends beyond the edge of the boundary, on both sides. In fact, this situation is recognised by the parties themselves, with Article 3 of the agreement reserving the question of the continental shelf beyond the boundary to some future delimitation, without prejudicing either side’s position.

2.38 Australia and France are yet to conclude an agreement over the potential maritime boundary between the waters offshore of the Australian Antarctic Territory and Adelie Land.
In July 2004, Australia and NZ signed a Treaty to delimit the EEZ and continental shelf boundaries between the two States. The Treaty entered into
force in January 2006. The Treaty provides for a median line boundary between the overlapping EEZ that had been observed de facto by the two States for more than two decades. The EEZ overlapped in two regions: between Norfolk Island and the northern tip of New Zealand at Three Kings Island; and between Macquarie Island and Auckland and Campbell Islands in the south.

2.40 In addition, both States could lay claim to large areas of continental shelf beyond 200 nm pursuant to Article 76 of the UNCLOS. Although the areas of continental shelf were both remote and relatively deep water, delimitation was still necessary. The northern-most portion of the boundary line begins at the intersection of the outer limit of the continental shelf beyond 200 nm with an arc drawn 350 nm from Norfolk Island. It then runs south-westerly to the northernmost point of Three Kings Ridge and then southward along the western margin of the Three Kings Ridge until it meets the line of equidistance between Phillip Island, to the south of Norfolk Island, and the Three Kings Islands, which it follows in a south-westerly direction to the point where the two EEZ diverge. It then turns westerly and north-westerly along the outer limit of the EEZ generated by Phillip Island until its intersection with the parallel of latitude 31º 30' S, from where it proceeds south-westerly to the intersection of the outer limit of the EEZ generated by Ball’s Pyramid, south of Lord Howe Island with the parallel of latitude 32º 30' S. The line then follows that outer limit south-westerly to its intersection with the line of equidistance between the Australian and New Zealand mainlands giving half-effect to Three Kings Island. It then proceeds south-easterly to intersect an arc drawn 350 nm from Ball’s Pyramid, before running south-westerly along that arc to its intersection with the mainland equidistance line, thence south-westerly along that line to a point beyond the furthest extent of continental shelves of both States.

2.41 The southern line begins north of Macquarie Island on the outer limit of Australia’s EEZ at a meridian of longitude slightly west of the furthest possible extent of the area of continental shelf beyond 200 nm from both countries, runs east along that outer limit and then south-east along the equidistance line between Macquarie Island and Campbell and Auckland Islands. From the southernmost point of overlap, it resumes a southerly course along the outer limit of Australia’s EEZ, to a point on that line where it diverts to the south-east for a short distance to divide equally a small area of continental shelf beyond 200 nm from both States.

2.42 Parts of the boundary relating to the delimitation of areas of continental shelf beyond 200 nm do not, however, run along the equidistance line. It is consistent with international law and practice that in some circumstances, an isolated island of one State (lying between the mainland of that State and that of another State) is given a reduced weight in delimiting
maritime boundaries between those two States. This factor particularly affects Lord Howe and Norfolk Islands, the latter of which lies closer to New Zealand than to the Australian mainland. Thus, the boundary dividing the area of continental shelf beyond 200 nm located between Lord Howe Island and mainland New Zealand is drawn in such a way as to give less than full weight to the coastline of Lord Howe Island and Balls Pyramid.

2.43 In relation to the Three Kings Ridge, the proposed boundary line is drawn so as to leave most of the Three Kings Ridge under New Zealand jurisdiction. There are two small areas of overlapping continental shelf beyond 200 nm from the Australian and New Zealand coastlines in the vicinity of Macquarie Island and Auckland Island. One of these areas is placed under New Zealand jurisdiction and jurisdiction over the other is divided equally between Australia and New Zealand. Figure 2-5 shows the Australia-New Zealand maritime boundary.

2.44 Australia and New Zealand have yet to delimit the maritime areas off their respective Antarctic territories but otherwise have now settled all maritime boundaries between them.

Norway

2.45 There is a potential maritime boundary between the EEZ off the Australian Antarctic Territory and that generated by the Norwegian territory of Dronning Maud Land. There are no moves currently planned to delimit this boundary.
CHAPTER 3

LEGISLATION THAT EMPOWERS THE AUSTRALIAN DEFENCE FORCE

Executive Summary

- There are a number of different Acts under which members of the Australian Defence Force (ADF) have powers relating to civil law enforcement offshore, as well as the executive power.

- Use of the ADF for maritime law enforcement (MLE) on behalf of civilian agencies, 'civil enforcement', is distinct from 'calling the ADF out'.

- There are some legal issues that need to be taken into account when considering whether it is appropriate to use the ADF for civil law enforcement as opposed to the function being purely a civilian one.

- The use of the executive power is usually at the discretion of the Government of the day, rather than a power routinely available to the ADF as a power under legislation would be.

INTRODUCTION

3.1 There are a number of general issues concerning the ADF and civil law enforcement offshore. Any use of military power for purposes other than warfighting can be a matter of controversy. The starting point is a discussion of the constitutional basis of law enforcement by the ADF. This chapter outlines the different Acts under which members of the ADF have powers relating to civil law enforcement offshore, as well as the executive power.

CONSTITUTIONAL BASIS

3.2 General. The High Court’s only consideration of the question of using the ADF to enforce laws of the Commonwealth offshore was in the case of Li Chia Hsing v Rankin.
There is no constitutional reason why an officer of the naval forces should not assist in the enforcement of a law of the Commonwealth such as the Fisheries Act.

Li Chia Hsing v Rankin (1978) 141 CLR 182 at 195

3.3 The constitutional basis of the grant of such powers to the ADF would appear to arise as an incident of the power to legislate for the various legislative topics, such as under the following sections of the Constitution:

   a. section 51 (i) - trade and commerce with other countries;
   b. section 51 (ix) - quarantine;
   c. section 51 (x) - fisheries in Australian waters beyond territorial limits;¹
   d. section 51 (xix) - naturalization and aliens;
   e. section 51 (xxvii) - immigration and emigration;
   f. section 51 (xxviii) - the influx of criminals;
   g. section 51 (xxix) - external affairs;
   h. section 51 (xxxix) - the incidental power; and
   i. section 122 - the territories power.

3.4 There is no prohibition in the Constitution on using the ADF for these purposes and, indeed, it does not directly address the question of how the ADF may be used. Section 68 simply grants the Governor-General, as the Queen’s representative, ‘command-in-chief’ over the naval and military forces of the Commonwealth. This is a device that would appear to place the control of the ADF clearly in the hands of the executive branch of Government. In Ruddock v Vadarlis (2001) FCA 1329, the Federal Court in its consideration of the use of the ADF under the executive power did not

¹ The Offshore Constitutional Settlement has virtually made this provision redundant as, constitutionally, the Commonwealth has exclusive jurisdiction below the low water line. See chapter one for more information.
express any reservations about the ADF being used to ‘execute and maintain the laws of the Commonwealth’.

3.5 **Distinction from call out.** Use of the ADF for MLE on behalf of civilian agencies, ‘civil enforcement’, is also quite distinct from ‘calling the ADF out’. Call out is concerned with high level or large scale violence. Civil enforcement is predominantly about Commonwealth law enforcement in the Commonwealth maritime jurisdiction, and is not concerned with high level or large scale violence. Call out is provided for in Part IIIAAA of the *Defence Act 1903*, and discussed further in chapter 10.

3.6 **Using the Australian Defence Force against Australian citizens.** There is no constitutional or legal impediment to using the ADF to enforce the law against Australian citizens. The constitutional position applies equally to Australian citizens as it does to foreigners. The *Fisheries Management Act 1991*, the *Torres Strait Fisheries Act 1984*, the *Migration Act 1958*, the *Customs Act 1901* and the *Crimes Act 1914* all provide for the use of powers by the ADF against Australian citizens.

3.7 Nonetheless, there is historical and consistent practice of not using the ADF to enforce the law against Australian citizens except in extraordinary circumstances. If there is such a likelihood then it is a matter for call out in accordance with the *Defence Act*. This approach does not take account of ADF law enforcement activities offshore though. It echoes the historical position described by the High Court in *Re: Tracey; Ex Parte Ryan*.

> The navy was considered the protector of the nation. It was the ‘wooden wall’ that kept invaders off England’s shores and ensured the success of maritime commerce. Land forces, on the other hand, were frequently as much of a burden and danger to the English citizenry as they were to any foreign enemy.

*Re: Tracey; Ex Parte Ryan (1989) 166 CLR 518, 561*

3.8 It would appear that the restraint on the use of the ADF enforcing the law against Australian citizens, without call out, derives from long standing political convention. Commanders should take into account that enforcement action against Australian citizens, Australian flagged or registered vessels or Australian registered aircraft may be sensitive and should seek appropriate guidance before undertaking any such enforcement action.
There are some legal issues that need to be taken into account when considering whether it is appropriate to use the ADF for civil law enforcement as opposed to the function being purely a civilian one. Currently the offshore enforcement burden is shared between the ADF and the civilian Customs National Marine Unit. A combination of ADF and civilian enforcement capability, along current lines, has some advantages.

**3.10 Traditional and orthodox naval role.** Navies have always required law enforcement knowledge and skills in any operation requiring the use of force, but not involving a distinct enemy. These include belligerent blockades, search and capture of shipping, peace operations, force protection and noncombatant evacuation operations, as well MLE on behalf of civilian agencies.

**3.11 Armed conflict.** A purely civilian agency would be far more difficult to classify as a military objective in time of armed conflict, and therefore more likely to be able to fulfil its civilian role.

*Attacks shall be limited strictly to military objectives…*

**Article 52(2) of Protocol 1 Additional to the Geneva Conventions 1949 and Relating to the Protection of Victims of International Armed Conflicts**

On the other hand, a military force trained and equipped for war, but adapted to MLE, can make a much better contribution to warfighting in an armed conflict.

**3.12 Enforcing the law against Australian citizens.** A separate civilian agency can more readily enforce the law against Australian citizens without offending the long standing practice of the ADF refraining from doing so.

**LEGISLATION THAT EMPOWERS THE AUSTRALIAN DEFENCE FORCE FOR MARITIME LAW ENFORCEMENT**

Most of the relevant agencies have legislation that creates enforcement powers offshore. As each agency had different problems in mind when developing the legislation that it administers or implements, the powers vary a great deal in their scope and have gaps and inconsistencies.
3.14 The ADF is empowered directly under the following principal acts:

a. Resource protection:
   (1) *Fisheries Management Act 1991*.
   (2) *Torres Strait Fisheries Act 1984*.
   (3) *Fish Resources Management Act (WA) 1994*.
   (4) *Environment Protection and Biodiversity Conservation Act 1999*.

b. Border protection:
   (1) *Customs Act 1901* (including powers for offences under the *Quarantine Act 1908*).
   (2) *Migration Act 1958*.

c. Good order at sea:
   (1) *Crimes Act 1914* (for piracy).

d. Response to maritime terrorism incidents:
   (1) *Defence Act 1903* (Part IIIAAA).

The executive power under the Constitution

3.15 Legislation is not the only authority under which the ADF can act. Section 61 of the Constitution describes the executive power.
3.16 It is important to note that the use of the executive power is usually at the discretion of the Government of the day, rather than a power routinely available to the ADF as a power under legislation would be. It allows the Government to take certain actions without the authority of parliament, usually in accordance with the traditional prerogatives of the Crown. For the ADF, this more usually includes the use of force in international relations, whether for an armed conflict, a peace operation or an evacuation operation overseas. This is discussed briefly below.

3.17 The use of force by the ADF under the authority of the executive power for domestic purposes is more controversial. There have been two well known incidents. The first concerned the call out of ADF personnel to protect the Commonwealth Heads of Government Regional Meeting (CHOGRM) around Bowral in 1978, following a suspected attempt to assassinate the Indian Prime Minister.

**HISTORICAL EXAMPLE – COMMONWEALTH HEADS OF GOVERNMENT REGIONAL MEETING 1978**

An extensive operation occurred in 1978 around the town of Bowral, in the Southern Highlands of New South Wales (NSW), to protect a Commonwealth Heads of Government Regional Meeting (CHOGRM). Whilst this location is obviously not offshore, some of the issues are nonetheless pertinent.

A bomb exploded outside the Hilton Hotel in Sydney where the CHOGRM meeting was taking place, killing two people and fatally wounding another. Discussions between the then Premier of NSW, Mr Neville Wran, and the then Prime Minister, Mr Malcolm Fraser, quickly determined that the threat to the foreign dignitaries was a Commonwealth interest. Mr Wran also conveyed that NSW police resources would be inadequate, given the new threat, to protect the previously planned move of CHOGRM from Sydney to Bowral.
With the concurrence of the NSW Government, the Commonwealth therefore initiated a call out by the Governor-General to protect the Commonwealth interest.

Approximately 1,000 Army personnel secured the road and rail route between Sydney and Bowral, and the area around where the meeting was to take place. They deployed armoured personnel carriers and mine detection equipment, and also had Royal Australian Air Force (RAAF) helicopter support. For the most part, NSW Police interacted with the public rather than the ADF. In an unannounced change of plans, RAAF helicopters actually transported the visiting dignitaries to Bowral. Whilst there was a carefully documented call out procedure, the operation relied upon the executive power and not legislation.

There has been no consideration of this operation in the courts but a subsequent Protective Security Review by Justice James Hope, with a legal opinion by retired Justice Sir Victor Windeyer, saw the use of the executive power in this way as lawful. They both saw it as an exercise of the inherent right of self protection by the Commonwealth of its interests, and in particular endorsed the initiation of the call out by the Commonwealth rather than NSW.

3.18 The more recent and relevant example relied almost solely upon an exercise of the executive power under section 61. This was the boarding of merchant vessel TAMPA off Christmas Island on 29 August 2001.

The merchant vessel TAMPA rescued 433 people from a boat between Christmas Island and Java on Sunday, 26 August 2001.

After initially making course for the Indonesian port of Merak, the master altered course for Christmas Island after some of the rescued people made clear that they would commit suicide if he did not take them to Australia. The master indicated to Australian search and rescue (SAR) authorities that he wished to take the rescued people into Christmas Island port to offload them. He was advised that he would not be allowed to do this. The master replied that he had a number of seriously ill people onboard and needed to bring them in to Christmas Island.
An assessment by the Royal Flying Doctor Service indicated that this would not be necessary and Australian SAR authorities advised that appropriate assistance would be brought out to the ship. The master of TAMPA disagreed with this assessment and started to bring the vessel into the port at Christmas Island citing the urgency of the medical cases onboard.

Upon entering the territorial sea, armed Australian Defence Force (ADF) special forces (SF) personnel went out to TAMPA by boat. The master lowered a gangway and the ADF boarded the vessel. They advised the master that he could not proceed to Christmas Island harbour as the TAMPA was too large to come alongside and that he should leave Australian territorial waters. The master remained in control of the vessel. The rescued boat people received medical and humanitarian assistance from the ADF.

There was no request to board the vessel pursuant to the Migration Act 1958 and the ADF exercised no powers under the Act. It was not possible to make a request to board under the Migration Act, as it stood at the time, as there was no commander of a Commonwealth ship or aircraft available to make a request. The SF boats could not be Commonwealth ships because they were not flying ensigns as required by section 5 of the Migration Act.

On Friday, 31 August 2001, the Victorian Council for Civil Liberties and Mr Eric Vadarlis filed applications in the Federal Court to restrain the Commonwealth, and various individual ministers, from taking further action with regard to TAMPA until an application in the nature of a writ of habeas corpus (in this case, an action for release in order to be brought before the court), among other applications, could be heard. At first instance the court decided that the rescued people had been unlawfully detained and they were to be brought ashore. It ordered that the Commonwealth could move the rescued people from TAMPA to Her Majesty’s Australian Ship MANOORA, where they were to remain embarked until an appeal could be heard against the court’s decision.

The Full Court of the Federal Court made a decision on the appeal of the matter on 18 September 2001. The majority found that the Government had acted lawfully. Beaumont J decided on the basis that a court could not order a writ of habeas corpus compelling an alien’s entry into Australia where there is no common law right for an alien to enter Australia. Black CJ, in dissent, developed the reasoning of North J at first instance. He stated that ‘the power of the Executive under section 61 includes powers accorded to the Crown at common law’.
HISTORICAL EXAMPLE (CONT) - THE TAMPA INCIDENT

Crown prerogatives can only exist in so far as a statute covering the same field has not extinguished them, and where they have not fallen into disuse. In this case, the *Migration Act* had extinguished any crown prerogative to prevent unlawful entry and to expel aliens. As the boarding of TAMPA was not pursuant to the *Migration Act* it was unlawful, and the boat people should be allowed to come ashore.

Only French J decided this on the basis of a lawful use of the executive power. His view was that the power to prevent unlawful entry and to expel aliens was an incident of nationhood. The executive power extended to being able to secure Australia’s borders in this fashion. Common law prerogatives of the Crown can exist, depending upon their importance, even alongside statutes on the same subject where the parliament has not explicitly extinguished them.

Lessons for the Australian Defence Force

*The existence of statutory powers under this Act do not prevent the exercise of any executive power of the Commonwealth to protect Australia’s borders, including, where necessary, by ejecting persons who have crossed those borders.*

**Section 7A, Migration Act**

3.19 The legislation clearly preserves any executive power there may be in respect of border protection. The difficulty is that only French J, of the four judges that considered the matter, decided primarily upon the basis of the executive power to control borders. It may be better to rely on the executive power after the event as necessary, as was the case in its first use with TAMPA.

3.20 The other significant lesson is the willingness of parties in Australia to engage in litigation on behalf of people seeking to enter Australia unlawfully by boat, such as the Victorian Council for Civil Liberties and Mr Vadarlis. Their difficulties with standing before the courts did not prevent a thorough hearing of the matter. Even despite their ultimate lack of success, the parties subjected an ADF operation to judicial and public scrutiny in a way that had never occurred before. The courts in fact dictated operational decisions, and there was substantial delay in the operation while waiting for those decisions. Despite the protection from liability provisions and the offshore entry regime,
discussed in chapter six, there is still room for action in the courts by third parties. The lesson for the ADF is the need for scrupulous attention to legality in planning and execution of operations to enforce the Migration Act.

Other maritime operations

3.21 There are other aspects of the executive power which are relevant to ADF operations at sea. It is important to distinguish civil law enforcement at sea from the conduct of armed conflict at sea. Although in some cases there are comparable rights to board vessels in an armed conflict, these rights are applicable under different circumstances.

3.22 Distinction from law of naval warfare. There is a distinct body of law covering naval warfare that permits a certain degree of interference with such law of the sea rights as freedom of navigation. This applies only during an armed conflict, whether as a belligerent or neutral party.

3.23 The threshold for an armed conflict is a test of fact. In accordance with Common Article 2 of the Geneva Conventions of 1949, once there are actual hostilities occurring between the combat forces of belligerent parties, whether they are regular or irregular, the law of armed conflict (LOAC) applies. In domestic law, the Government may take action to use force in its international relations through exercise of the executive power under the Constitution. Where such action becomes an armed conflict, it is regulated to some degree by the incorporation of some of the LOAC into statute, such as the Geneva Conventions Act 1957. An assessment of the legality of the conduct of armed conflict though must still rely to a large extent on unincorporated Treaty and customary international law.

3.24 The executive power and maritime enforcement operations. The Government may authorise operations in accordance with United Nations Security Council Resolutions, as in the case of sanctions against Iraq and North Korea, or in accordance with a regional peace agreement, such as in Bougainville, or to evacuate Australian citizens, as in the Solomon Islands, to which the law of armed conflict does not necessarily apply.

3.25 Boarding of vessels in such situations is not usually considered combat against an enemy. The authority to engage in such action derives from the executive power under the constitution and not from legislation.

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2 See, for example, the rules with regard to blockades in the San Remo Manual on International Law Applicable to Armed Conflicts at Sea International Institute of Humanitarian Law, San Remo, 1994, Rules 93-100.
Regulation of the conduct of such operations derives to some extent from legislation in so far as the criminal law applies through the *Crimes at Sea Act 2000* and the *Defence Force Discipline Act 1982*. 
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CHAPTER 4
CRIMINAL LAW AT SEA

Executive Summary

- While the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and domestic legislation governs the rights Australia may enforce in its maritime zones, it is the criminal law that determines the possible offences for Australian Defence Force (ADF) conduct.

- The laws of criminal investigation, procedure and evidence of the Commonwealth and states apply to maritime offences in accordance with a particular scheme.

- The Defence Force Discipline Act 1982 (DFDA) applies both inside and outside of Australia to members of the ADF.

- Members of the ADF are not constables and only have the powers granted to them by specific enforcement legislation.

- Piracy is an ancient crime and pirates have been described as hostis humanes generis, or the enemy of the human race.

INTRODUCTION

4.1 At the heart of the issue of the use of force is the risk to life, limb and property when force is used. In any area of the law the use of force is usually subject to a great deal of regulation and discussion. However, the UNCLOS generally does not elaborate on powers over individuals. There are references to fisheries and environmental investigations but there is no reference to powers in the area of customs, quarantine and immigration. In this sense, the UNCLOS is an orthodox instrument of international law that governs relations between States, and, through the concept of the flag State, their vessels.

4.2 International human rights law and the law of State responsibility provide some international law guidance on the relationship between States and private individuals. Other than this, however, the conduct of a boarding officer (BO) in the maritime environment is very much the domain of domestic law, whether it is the law of the nationality of the BO or the law of the flag State of the vessel subject to the boarding. This applies to BO use of
force, their powers over the people onboard a boarded vessel and their powers of investigation. The law of the flag State is a case by case proposition and will not be dealt with here, other than to say that it creates an overlapping jurisdiction with that of the BO.

CRIMINAL LAW AT SEA

4.3 While the UNCLOS and domestic legislation govern the rights Australia may enforce in its maritime zones, it is the criminal law that determines the possible offences for the conduct of ADF members. It also establishes certain powers where they are not clearly provided for elsewhere.

International law

4.4 General criminal law is that law which governs behaviour on the land against persons, property and the State, and so, when applied at sea, it does not relate at all to the specific rights created by the various maritime zones. The UNCLOS is predominately concerned with regulatory offences, that is, offences against the regulation of oceans management policy, rather than against persons, property or the State as such. The application of criminal law at sea then is simply an extension of the ordering of the affairs of the land territory, rather than being concerned with particular issues of oceans management policy.

4.5 It is important to distinguish between prescriptive and enforcement jurisdiction. A State may prescribe any legislation it pleases. It may not generally act to enforce its jurisdiction though where the vessel or person concerned is within the jurisdiction of a foreign State. Such jurisdiction includes foreign sovereign waters and foreign flagged vessels on the high seas.

4.6 Article 27 of the UNCLOS provides that the criminal jurisdiction of a coastal State must not be exercised against foreign flagged vessels that are merely passing through the territorial sea of the coastal State, in connection with any crime committed on board, except in the following circumstances:

   a. where the consequences of the crime extend to the coastal State,

   b. where the crime is of a kind to disturb the peace of the country or the good order of the territorial sea,
c. where the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular official of the flag State, or

d. if such measures are necessary for the suppression of illicit trafficking in narcotic drugs or psychotropic substances.

4.7 Where a foreign flagged vessel has left the internal waters of the coastal State and passes through the territorial sea, a coastal State may exercise criminal jurisdiction against it.

Crimes at Sea Act

4.8 The *Crimes at Sea Act 2000* codifies a cooperative scheme to give greater certainty to the application of the criminal law to Australian ships, Australian nationals, and certain foreign flagged vessels. The motivation for the legislation was to remedy the difficulties caused by the bulk of Australian criminal law being generated at a state level, while at the same time the states had difficulties in the application of their criminal jurisdiction offshore. It avoids a state having to demonstrate a nexus between the criminal act and the state, which would otherwise be required to justify the extraterritorial operation of state law.

4.9 State jurisdiction in the ‘adjacent area’. The *Crimes at Sea Act 2000* applies the laws of the states and the Northern Territory by force of Commonwealth legislation to what is termed the ‘adjacent area’. The ‘adjacent area’ is marked on a map attached to the Act as Appendix 1 (see also figure 1-2 in chapter one). It divides jurisdiction between the states and the Northern Territory to areas adjacent to each jurisdiction, from the outer edge of the territorial sea to areas beyond 350 nautical miles seaward in places. The ‘inner adjacent area’ is the territorial sea adjacent to each state and the Northern Territory to which the law applies by force of state or Northern Territory law. The Commonwealth Attorney General must consent to any prosecution for an offence on a foreign flagged ship, and must take into account any views expressed by the flag State. Importantly, none of these limitations prevent the making of an arrest, the collection of evidence and the laying of charges.

4.10 Beyond the ‘adjacent area’. This Act extends jurisdiction beyond the ‘adjacent area’, including the external territories, to Australians, Australian ships and activities controlled from Australian ships. This includes the ADF and would also include boarding operations on foreign flagged vessels from ADF ships. This Act also extends jurisdiction to foreign flagged ships if after the criminal act the first country at which the ship calls, or a person who has left the ship lands, is Australia. It is a defence to a charge to prove that there
is a defence, or no corresponding offence, for the same action under the law of another State that Australia recognises as having jurisdiction under international law, most likely the flag State in the case of a foreign flagged vessel.

4.11 This Act applies the law as it applies in the Jervis Bay Territory\(^1\) and the *Jervis Bay Territory Acceptance Act 1915* applies the law as it applies in the Australian Capital Territory (ACT) from time to time. Ironically, the only landlocked jurisdiction in Australia is the source of the law for Australian criminal jurisdiction on the high seas.

4.12 **Application of other Commonwealth law.** In terms of the interaction of the *Crimes at Sea Act 2000* with other criminal legislation, it is important to note that this Act was not intended to be the sole source of applicable criminal law at sea for Australia. The Act does not seek to displace other legislation. The purpose of the Act is to apply state criminal law offshore in certain circumstances. It cannot operate to fetter the Commonwealth Parliament’s ability to make laws under the enumerated heads of power under the Constitution.

4.13 For example, the provisions of the *Crimes (Ships and Fixed Platforms) Act 1992* fall under the external affairs power of section 51 (xxix) of the Constitution, by virtue of their geographic externality. Other Commonwealth criminal legislation with extraterritorial application, such as parts of the *Criminal Code 1995* and the *Maritime Transport and Offshore Facilities Security Act 2003*, could also be considered valid on the same basis.

**Investigations**

4.14 **General.** Clause 3(2) of schedule 1 of the *Crimes at Sea Act 2000* provides that the laws of criminal investigation, procedure and evidence of the Commonwealth and states apply to ‘maritime offences’ in accordance with a particular scheme. The scheme operates to apply the relevant law for investigations, procedures and evidence, where actions by Commonwealth authorities are subject to Commonwealth law and actions by state authorities

\(^1\) The Explanatory Memorandum to Crimes at Sea Bill 1999 does not explain why this is the case. The Jervis Bay Territory is the only non-self-governing internal territory in the Commonwealth. It would be fair to assume that the Territory’s laws would be suitable for application as they purport to regulate the full range of activities that occur in mainland Australia, whereas the law for the offshore territories might not. Further, and perhaps more importantly, the Commonwealth has direct control of the law without the possible intervention of a territory legislature, as in the Australian Capital Territory.
is subject to relevant state law. This is supported by clause 5 of the *Intergovernmental Agreement* which indicates that an ‘adjacent state shall have primary responsibility for taking investigation and prosecution action under its applied law where the alleged offence occurs in its adjacent area’.

**4.15 Investigation of other Commonwealth law.** The definition of the ‘maritime offence’ in clause 1 of schedule 1 refers to laws applied ‘under this scheme’, and clause 4 of the *Intergovernmental Agreement* similarly links the application of state primacy in investigation and prosecution to laws applicable by virtue of the *Crimes at Sea Act 2000*. These provisions therefore have no effect on the investigation and prosecution of offences under laws which are outside the cooperative scheme, such as the *Crimes (Ships and Fixed Platforms) Act*. Accordingly, the Commonwealth would retain primacy in the administration of justice of its applicable law outside applied state offences under the *Crimes at Sea Act 2000*.

**4.16 Overlapping investigative responsibility.** It should be noted that terrorist acts at sea would certainly infringe applicable state criminal law, and therefore the *Crimes at Sea Act 2000* could also be applied to such acts in ‘adjacent areas’ or beyond. The investigation and prosecution of such offences would be subject to clause 4 of the *Intergovernmental Agreement*, which gives the adjacent state primary responsibility. However, clause 6 of the *Intergovernmental Agreement* recognises that there may be circumstances where more than one party may take investigation or prosecution action in relation to the same alleged offence. In such a circumstance, where it appears to one of the parties may ‘more conveniently take action to investigate or prosecute…it should do so’, following consultation between the parties.

**4.17 The mechanisms for consultation for the investigation of terrorist offences are laid down in the National Counter Terrorism Handbook. Where Commonwealth authorities undertake such an investigation, it is, as noted above, subject to Commonwealth laws of investigation, procedure and evidence pursuant to clause 3(2) of Schedule 1 of the *Crimes at Sea Act 2000*.**

**4.18 Timor Gap and offshore installations.** The *Crimes at Sea Act* applies state and Northern Territory (NT) law to offshore installations according to which part of the ‘adjacent area’ they are in. Part 3A makes special provisions with regard to the Joint Petroleum Development Area (JPDA) that reflects the *Timor Sea Treaty* with East Timor. It applies the law of the NT to an act that is ‘connected with, or arises out of, the exploration for, or exploitation of, petroleum resources as if the act had been done in the Northern Territory’. NT law does not apply though to acts done in ships or aircraft, or by nationals or permanent residents of East Timor who are not
also Australian nationals. It also does not apply to offences already dealt with by East Timor. The Crimes at Sea Act 2000 does not prevent arrest, charging and remand in custody or bail in such situations though. It is also possible to convey a person in custody through Australia who has been arrested under East Timorese law in the JPDA.

DEFENCE FORCE DISCIPLINE ACT

4.19 The DFDA also has extra-territorial application to all members of the ADF by virtue of section 9. This means it applies both inside and outside of Australia to members of the ADF. The purpose of the DFDA is to create offences relating to the discipline of the ADF. This Act makes offences under the law as it applies in the Jervis Bay Territory, that is, ACT law, disciplinary offences as well.

4.20 Being a disciplinary law for the ADF, the High Court has determined that the DFDA is distinct from criminal law in two important ways. The first is that a conviction or acquittal under the DFDA is not a civilian criminal conviction and therefore may not allow for the entry of a plea of autrefois convict or autrefois acquit to a charge for substantially the same offence under criminal law. It will depend on the circumstances of each case. That is to say there is no ‘double jeopardy’ rule and a verdict under the DFDA does not prevent the matter being dealt with afresh under the criminal law.2

4.21 The second, more important point is that there is only jurisdiction under the DFDA where there is a nexus to Service discipline. Therefore, proceedings may be brought against a defence member or a defence civilian3 for a Service offence if, but only if, those proceedings can reasonably be regarded as substantially serving the purpose of maintaining or enforcing Service discipline.

4.22 Despite the formal existence of jurisdiction in every other respect, it may be that a particular offence is beyond the scope of just Service discipline. An offence may be so serious that a conviction would almost certainly mean imprisonment and dismissal from the ADF. In such cases the matter may be more appropriately dealt with under the criminal law.

2 Re Tracey; ex parte Ryan (1989) 166 CLR 518 paragraph 29.

3 Simplistically put, a defence civilian is defined under the DFDA as any person accompanying a part of the Defence Force outside Australia or on operations against the enemy who consents to be subject to Defence Force discipline while so accompanying that part of the Defence Force.
4.23 Members of the ADF are therefore subject to a number of overlapping jurisdictions. The DFDA applies to them everywhere and all the time. It may not apply to every offence however unless there is a nexus to Service discipline. It applies the same substantive law of the ACT however that the *Crimes at Sea Act* applies beyond the ‘adjacent area’. Within the ‘adjacent area’ though, the law of the adjacent state, or the Northern Territory, applies. The existence of eight similar but nonetheless different state and internal territory jurisdictions works against a uniform approach for the ADF to any issue regardless of location. This chapter will attempt to give some sense of the differences. Additionally, with respect to offences committed by ADF members while exercising powers under Part IIIAAA of the *Defence Act 1903* in an offshore call out, Jervis Bay Territory law applies exclusively; state law does not apply.

**General powers**

4.24 Members of the ADF are not constables and only have the powers granted to them by specific enforcement legislation. Otherwise, ADF members mostly have only the powers of an ordinary citizen, such as arrest and preventing a crime, whether conferred by statute or common law. Actions under the executive power, such as the conduct of armed conflict and peace operations, generally fall into a separate category, as discussed in chapter three.

4.25 There is one aspect of the executive power relevant to law enforcement. In the High Court case of *The King v Kidman* (1915) 20 CLR 425, Isaacs J said there is an implied executive power for a Commonwealth officer in the exercise of his duty to ‘thrust aside with all force necessary any man obstructing him in order to enable the exercise of that duty’. This would appear to provide a common law general use of force power for ADF members enforcing Commonwealth law to remove an obstruction.

4.26 Any greater power must derive from legislation that specifically grants that power, for example a remedy for this could be to make members of the ADF special constables under section 40E of the *Australian Federal Police Act 1979* for general or specific purposes. The following paragraphs describe the powers that a member of the ADF as an ordinary citizen has to enforce the law.

4.27 **Arrest.** Under the *Crimes Act 1914*, any person may exercise the power of arrest for indictable offences, which are offences against laws of the Commonwealth and territories carrying a prison sentence of greater than 12 months. The power does not extend to DFDA offences. A person making an arrest must take the arrested person to a constable.
The person making the arrest also must believe on reasonable grounds that:

(a) the person has committed or is committing the offence; and

(b) proceedings by summons against the person would not achieve one or more of the following purposes:

(i) ensuring the appearance of the person before a court in respect of the offence;

(ii) preventing a repetition or continuation of the offence or the commission of another offence;

(iii) preventing the concealment, loss or destruction of evidence relating to the offence;

(iv) preventing harassment of, or interference with, a person who may be required to give evidence in proceedings in respect of the offence;

(v) preventing the fabrication of evidence in respect of the offence;

(vi) preserving the safety or welfare of the person.

Section 3Z, Crimes Act

4.28 It is important to note that the power is not preventative and applies only to a person who has committed or is committing an offence. This power is available to members of the ADF. A member of the ADF would be able to apply it anywhere as this Act applies extra-territorially, subject to the sovereignty of the waters, vessel or aircraft where the arrest took place. Exercise of the power would depend upon whether an indictable offence
against Commonwealth law could occur where the arrest took place as well. The provision would also prevail over state legislation.\(^4\)

4.29 **Use of force in making an arrest.** The *Crimes Act* permits the use of necessary and reasonable force to effect an arrest and prevent the arrested person escaping. It also requires that a person making an arrest must not subject the arrested person to greater indignity than is necessary and reasonable. These powers are not as extensive as those available to a constable, which include intrusive searches and entry into premises. It may be best relied upon as a defence rather than a positive power.

4.30 **Using force to prevent a crime.** The use of force provisions in the *Crimes Act* that are available to ordinary citizens are only relevant when effecting an arrest, which can only occur after the offence has been committed. There is no general power to use force to prevent a crime, unless it involves self defence (SD) or a sudden and extraordinary emergency. Some of the jurisdictions that have a criminal code, Queensland, Western Australia, Victoria, the NT and Tasmania, do have provisions that allow for the use of some force to prevent a crime.

*For example, the Queensland provision states:*

> It is lawful for a person to use such force as is reasonably necessary in order to prevent the commission of an offence which is such that the offender may be arrested without a warrant…

**Section 266, Criminal Code Act 1899 (Qld)**

4.31 Western Australia has a substantially similar provision that does not distinguish between offences that require a warrant for arrest and offences that do not. Victoria’s *Crimes Act 1958* allows any person to use reasonable force to prevent the commission, continuance or completion of an indictable offence or to effect or assist in effecting a lawful arrest for any offence. The NT provision is more restrictive in that it is not possible to use force intended or likely to cause grievous bodily harm. The Tasmanian provision is more limited in that force may only be used to prevent a crime that would cause serious and immediate injury to any person or property. The ACT has the *Criminal Code Act 2002* but does not have a provision relating to the use of

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\(^4\) Section 109 *Commonwealth of Australia Constitution Act.*
force to prevent a crime. The common law jurisdictions of New South Wales and South Australia do not have equivalent provisions.

4.32 Even though the *Criminal Code* has created some uniform criminal law defences across the jurisdictions it does not include the defence of using force to prevent a crime. The effect of this is that in the maritime zones adjacent to the north and west of Australia and Tasmania there is a limited power for ordinary citizens to use force to prevent a crime, although the degree of force varies.\(^5\) Given the lack of uniformity of the power, it would appear to be difficult to plan on its use. In the absence of clear statutory authority, it would perhaps be most useful after the event as a defence where a member of the ADF has used force to prevent crime.

4.33 Sudden and extraordinary emergency. The defence of sudden and extraordinary emergency exists in the Commonwealth *Criminal Code* and the code jurisdictions other than Tasmania.\(^6\)

\(^5\) By virtue of the *Crimes at Sea Act*.

\(^6\) Section 33 *Criminal Code Act* (NT); section 25 *Criminal Code Act 1899* (Qld); section 25 *Criminal Code* (WA) and section 41 *Criminal Code Act* (ACT).
The Commonwealth Criminal Code states:

(1) A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in response to circumstances of sudden or extraordinary emergency.

(2) This section applies if and only if the person carrying out the conduct reasonably believes that:

(a) circumstances of sudden or extraordinary emergency exist; and

(b) committing the offence is the only reasonable way to deal with the emergency; and

(c) the conduct is a reasonable response to the emergency.

Section 10.3, Criminal Code Act

4.34 The common law states have an equivalent defence of necessity. It is more restrictive though in that it does not authorise homicide and requires a relationship of some sort, such as a duty to protect, between the person committing an otherwise unlawful act and any person it is intended to assist. This makes it akin to a broader concept of the defence of others. The defence also appears to only extend to unlawful acts that are not against the person of another, such as escaping from prison or driving under the influence.⁷ Although the Commonwealth Criminal Code provisions will eventually be uniform across Australia, this provision is best seen as only a defence and not a positive grant of power.

4.35 Self defence and the defence of property. It is important to mention the law relating to SD and the defence of property. Again, the law in this area is best seen as a defence to a charge and not a positive power to plan to use in civil law enforcement offshore. It is nonetheless relevant because it places many of the other use of force provisions in context. As the model for all jurisdictions, the Commonwealth Criminal Code is the best starting point.

(1) A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in self-defence.

(2) A person carries out conduct in self-defence if and only if he or she believes the conduct is necessary:

(a) to defend himself or herself or another person; or

(b) to prevent or terminate the unlawful imprisonment of himself or herself or another person; or

(c) to protect property from unlawful appropriation, destruction, damage or interference; or

(d) to prevent criminal trespass to any land or premises; or

(e) to remove from any land or premises a person who is committing criminal trespass;

and the conduct is a reasonable response in the circumstances as he or she perceives them.

(3) This section does not apply if the person uses force that involves the intentional infliction of death or really serious injury:

(a) to protect property; or

(b) to prevent criminal trespass; or

(c) to remove a person who is committing criminal trespass.
(4) This section does not apply if:

(a) the person is responding to lawful conduct; and

(b) he or she knew that the conduct was lawful.

However, conduct is not lawful merely because the person carrying it out is not criminally responsible for it.

Section 10.4, Criminal Code Act

4.36 In essence, it must be necessary to use force and that force must be reasonable. To be necessary the requirement to act must be immediate and have no alternative. To be reasonable, the force must be appropriate to the threat, hence lethal force may only be used where there is a threat to life. Importantly, reasonable non-lethal force may be used to protect property and prevent a trespass or remove a trespasser. Each of the state and territory jurisdictions is subtly different. The main distinction is the extent to which a person’s belief in the need to act was honest and reasonable. In essence there should be an honest assessment of the danger faced and that assessment must be reasonable.

4.37 The common law position, where relevant, is found in Zecevic v DPP (Vic) (1987) CLR 645. If the response of an accused goes beyond what he believed to be necessary to defend himself or if there were no reasonable grounds for a belief on his part that the response was necessary in defence of himself, then the occasion will not have been one which would support a plea of SD.

4.38 The common law at sea. Given that many of the defences discussed above are still found in common law for a number of jurisdictions, it is important to discuss the application of the common law at sea. In the case of the application of criminal law at sea, the Act positively applies all the law of the relevant jurisdiction, including unwritten law, and therefore common law. In this sense, the common law powers would act as defences to statutory offences, whether in their own right or as interpretations of statutory defences. Consequently all of the common law defences are available to the ADF at sea where they are relevant.

Universal jurisdiction at sea

4.39 Section 1 of Part VII of the UNCLOS sets out piracy, slavery and illegal broadcasting as matters on the high seas for which States have a form
of universal jurisdiction. Article 110 specifically provides for personnel from warships to board ships on the high seas upon reasonable grounds for suspecting that they are involved in such activities. The only matter for which there is domestic enforcement legislation which empowers the ADF is piracy. There is Commonwealth legislation on slavery and illegal broadcasting but it does not have offshore enforcement provisions.

THE CRIMES ACT AND PIRACY

4.40 General. Piracy is an ancient crime and pirates have been described as hostis humanes generis, or the enemy of the human race. Suppression of piracy is also a traditional naval role. The offence of piracy and the power of navies, in this case the ADF, to deal with it are regulated in modern form through the UNCLOS and the Crimes Act. Part IV of the Crimes Act implements Articles 100 to 107 of the UNCLOS concerning piracy. The definition in the Crimes Act is drawn from the UNCLOS Article 101. It means an act of violence, detention or depredation committed for private ends by the crew or passengers of a private ship or aircraft. It must however be directed against another ship or aircraft or the persons or property onboard. In the case of places beyond the jurisdiction of any State the act need not necessarily be against another ship or aircraft.

4.41 A warship or Government ship on non-commercial service cannot be treated as a pirate ship unless it has been taken over by its crew or passengers. Whilst the UNCLOS is concerned with piracy upon the high seas or beyond any jurisdictional reach, the Crimes Act piracy provisions treat ‘piratical acts’ within Australian territorial waters in the same way, although this does not include internal waters within the limits of states or the NT.

4.42 Australian Defence Force empowerment. Members of the ADF are empowered under Part IV of the Crimes Act, so too are members of the Australian Federal Police. However, there is no specific provision to protect members of the ADF from civil or criminal liability.

4.43 Geographical extent and exceptions. The Crimes Act itself applies extra-territorially. Part IV applies in Australia, including the territorial sea, internal waters outside of states or the NT, the high seas and any place beyond the jurisdiction of any country. This could conceivably include unclaimed areas of land and drying reefs, and outer space.

HUMAN RIGHTS LAW AT SEA

4.44 General. The requirement not to subject a person to greater indignity than is necessary and reasonable, as in the power to arrest discussed
above, requires an assessment of the standard of dignity required, and the extent to which a person may suffer indignity where it is necessary and reasonable. This is where human rights law can be important because it provides some guidance on the relationship between those who exercise authority and those who are subject to it.

4.45 There are two ways in which human rights law may be applicable to the ADF at sea. The first is by indirect reference through a specific provision of a statute. A number of provisions that relate to the ADF have requirements such as not subjecting a person to greater indignity than is necessary and reasonable, particularly with regard to persons in custody. The second is through human rights law itself, whether it be through domestic human rights legislation or through the provisions of international human rights law.
Indirect reference

The Crimes Act provides that:

A person who is under arrest or a protected suspect must be treated with humanity and with respect for human dignity, and must not be subjected to cruel, inhuman or degrading treatment.

Section 23Q - treatment of persons under arrest

4.46 This does not explicitly incorporate human rights law but it does require a reference to a standard of ‘humanity’, ‘human dignity’ and ‘cruel, inhuman or degrading treatment’. It should be interpreted consistently with international law. The High Court has also said that international human rights law is a legitimate influence on the common law, which could include common law interpretation of statute. Australia is party to the International Covenant on Civil and Political Rights (ICCPR). It states that ‘rights derive from the inherent dignity of the human person’ and is probably the starting point for legal interpretation of phrases such as ‘human dignity’. Indeed, section 23Q would appear to be consistent with Article 7 ICCPR concerning the right not to be subject to cruel, inhuman or degrading punishment.

4.47 Some of the other rights that the ICCPR recognises which may be relevant to maritime law enforcement are subject to domestic legal sanction such as the right to life, the right not to be subject to arbitrary arrest and detention and the right to habeas corpus (to seek release from unlawful detention).

4.48 Some other rights that an officer should take into account though would include the right not to be discriminated against, freedom of religion and the right of children to be protected. Freedom from discrimination would suggest that officers should be careful to avoid discriminating against people in their custody on the basis of such things as their race, colour, sex, language or religion.


9 Mabo v. Queensland (No.2) (1992) 175 CLR 1; cited with approval in Teoh’s Case at 362.
4.49 Freedom of religion includes the right to worship or make religious observances. Where possible, officers should grant those in their custody the opportunity to conduct their religious observances.

4.50 Should officers have a child or children in custody they should make special efforts to ensure that they are protected from any harm, be it mental or physical. The Convention on the Rights of the Child elaborates upon this issue. It requires that children are not to be separated from their parents against their will and must be protected from physical or mental violence.

Direct reference

4.51 Crimes (Torture) Act. The Crimes (Torture) Act 1988 implements the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and makes it an offence to inflict torture on a person. An ‘act of torture’ is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person. The act applies extra-territorially to public officials and there is no defence of necessity or superior orders.

4.52 Human Rights and Equal Opportunity Act. The Human Rights and Equal Opportunity Act 1986 partially implements the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child and other international human rights law. Under Division 3 of this Act, it is possible for the Commission established by the Act to inquire into a breach of human rights of its own initiative or upon the complaint of an individual. It has the power to compel witnesses and production of documents. It may make reports that include adverse findings and recommendations for compensation. The Human Rights and Equal Opportunity Act only applies within the territorial sea, including around the external territories.

International law remedies for individuals

4.53 There are two ways that a breach of international human rights law could have consequences for Australia. The first is through the doctrine of State responsibility.
It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law.

Mavromattis Palestine Concessions (Jurisdiction) Case Permanent Court of International Justice, Serial A, No.2, 1924

4.54 For this to happen, the complainant should exhaust local remedies in the Australian courts first. While international judicial action is still a relevant possibility, the more likely avenue of redress would be diplomatic exchange. An example would be the exchanges between Australia and Norway over the merchant vessel TAMPA incident (see historical example in chapter three).

4.55 The other possible action against Australia for breaches of human rights standards would be an adverse report of a United Nations committee, such as the International Covenant on Civil and Political Rights Committee. It could be in the form of general comments by the Committee on Australia’s general human rights performance or be an individual communication from a person ‘subject to its jurisdiction who claim to be a victim of a violation by that State party of any of the rights set forth in the Covenant’. Again a complainant must have ‘exhausted all available domestic remedies’.

Duty to rescue

4.56 The duty to rescue has been a point of considerable discussion since the TAMPA incident. The key requirement arises from Article 98 of the UNCLOS, which provides that:

a. Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:

   (1) to render assistance to any person found at sea in danger of being lost;
to proceed with all possible speed to the rescue of persons in distress, if informed of their need for assistance, in so far as such action may reasonably be expected of him;

after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.10

The International Convention on Maritime Search and Rescue further provides that:

Parties shall ensure that assistance be provided to any person in distress at sea. They shall do so regardless of the nationality or status of such a person or the circumstances in which that person is found.

Chapter 2.1.10, International Convention on Maritime Search and Rescue

4.57 The international law provisions above make it clear that there is an obligation to render assistance sufficient to relieve the distress being suffered in whatever circumstances, without endangering one’s own ship or those onboard it. This does not necessarily extend to bringing those rescued into Australia, or even to embark the distressed mariners onboard one’s own vessel. There is an obligation however to ensure that masters of ships embarking persons in distress at sea are released from their obligation to render assistance ‘with minimum further deviation from the ship’s intended voyage’.

4.58 The State with responsibility for the search and rescue region within which assistance is rendered has primary responsibility for ensuring coordination and co-operation so that survivors are disembarked from the assisting ship and delivered to a place of safety. International Convention for the Safety of Life at Sea makes it clear that this must be effected as soon as reasonably practicable.

10 Article 98, UNCLOS.
4.59 An indication as to whether the assistance rendered was sufficient could be whether those in distress suffered any further injury or death that could have been avoided. A failure to render assistance that showed ‘reckless indifference to the probability of causing the death of any person’ could be murder under section 12 of the Crimes Act (ACT). A lesser standard of criminal negligence could result in a charge of manslaughter under section 15 of the same Act. There are other offences that could relate to injuries suffered as a result of a failure to render assistance.

Coroners

4.60 Coroners of Australian states and territories generally have jurisdiction to investigate deaths, fires, explosions and/or disasters. Their investigations may extend into such events that have occurred outside their usual territorial jurisdiction where a body is brought back into the jurisdiction, or where there is a death of someone who is ordinarily resident in that jurisdiction. By way of example, there have been state coronial investigations into incidents involving suspected irregular entry vessels (SIEV), such as the NT Coronial Inquiry into the explosion on SIEV 36 in 2010.

4.61 Coroners generally have strong investigative powers in relation to such things as compelling witnesses and the production of evidence. Coroners do not normally have the powers of a criminal court, however and, while they may recommend prosecution, they do not convict or sentence. State and territory coronial laws do not apply to the deaths of members of the ADF where the bodies of those members have been dealt with under the Defence Force Regulations 1952. For example, if an ADF officer directs that the body of a member of the ADF be disposed of by virtue of his power under section 27 of the Defence Force Regulations, then section 28 makes it clear that state and territory coronial laws do not apply.

Evidence Collection

4.62 Evidence is any statement, record, testimony or other thing which tends to prove the existence of a fact. Particularly when conducting boarding operations, an ADF member may obtain evidence of the commission of an offence. This evidence may be used, or given to another body for use, in investigating the offence and/or proceedings for the prosecution of the offence. Evidence collection and recording is a specialised area and separate operational guidance and training should be provided to personnel required to undertake roles in areas where the gathering and retention of evidence will be part of their duties.
CHAPTER 5
FISHERIES PROTECTION

Executive Summary

- Australian Defence Force (ADF) members may exercise certain powers under Australian legislation to ensure the protection of fisheries.

- The key Commonwealth Acts under which members of the ADF conduct fisheries protection operations are the *Fisheries Management Act 1991* (FMA) and the *Torres Strait Fisheries Act 1984* (TSFA). The *Customs Act 1901* also grants some powers in relation to fisheries enforcement.

- The rights and powers concerning fisheries enforcement in Australia are subject to a number of International Agreements which have been incorporated into these Acts.

INTRODUCTION

5.1 There are two key Acts under which members of the ADF conduct fisheries protection operations. The first and most significant is the FMA. Most fisheries protection operations would occur under this Act as it covers most of the Australian Fishing Zone (AFZ) and the high seas. It also deals with a number of important international arrangements. The second is the TSFA, which has significant powers relating to fishing in the Torres Strait area.

5.2 The *Customs Act 1901* grants powers in relation to fisheries enforcement so that Customs officers are able to find more of their powers in one Act. As the *Customs Act* is slightly more restrictive than the FMA, ADF practice is not to use the *Customs Act* for fisheries purposes.

FISHERIES MANAGEMENT ACT

5.3 The FMA is concerned with balancing conservation and commercial exploitation of fish stocks in both Australia’s maritime zones and on the high seas. It is also concerned with efficiency and accountability in fisheries management through the Australian Fisheries Management Authority (AFMA).
5.4 **Australian Defence Force empowerment.** The FMA empowers all members of the ADF as officers for the purposes of the Act. There is no distinction between types of members of the ADF, such as between commanders of ships or aircraft and others, or between members of the permanent force or reserve force. A member of the ADF may only exercise powers under this Act when authorised to do so by the ADF.

5.5 An important element to note is that an ADF member who is exercising power under the FMA does not have to produce an identification card or written evidence of the fact they are a prescribed person if they are in uniform when purporting to exercise that power. Part 6 of the FMA deals with enforcement and section 84 is the main provision for the powers of officers. There are a number of powers of officers under the FMA that are not relevant to ADF operations, such as powers over Australians, and boats with an Australian character at sea, as well as powers under section 84 concerning land, premises and vehicles, and acts executed in accordance with warrants.

5.6 **Protection from liability.** The FMA states the following:

> An officer or a person assisting an officer in the exercise of powers under this Act or the regulations, is not liable to an action, suit or proceeding for or in respect of anything done in good faith or omitted to be done in good faith in the exercise or purported exercise of any power conferred by this Act or the regulations.

Section 90, FMA

5.7 This would appear to be a broad statement of protection from legal liability. The only limitation to that protection is the requirement to act in good faith. Where there is a restraint on liberty for the purpose of moving a boat, section 84(1BA) also protects officers, any person assisting them, AFMA and the Commonwealth by preventing criminal or civil proceedings in respect of that restraint.¹

5.8 **Geographical extent.** The primary focus of the FMA is the AFZ, being essentially those waters within 200 nautical miles (nm) of the territorial sea baseline of Australia and the external territories. The AFZ does not

¹ This section is subject to the jurisdiction of the High Court under section 75 of the Constitution.
include the coastal and internal waters of states and internal territories, being those waters within three nm of Australia’s territorial sea baseline and waters landward of that baseline. This section also deems the waters adjacent to the Jervis Bay Territory to be the coastal waters of New South Wales. The AFZ does not include waters within the Torres Strait Protected Zone or within the exclusive economic zone (EEZ) off Australia’s Antarctic Territory.

INTERNATIONAL ARRANGEMENTS

5.9 There are a number of international fisheries instruments that have effect through Commonwealth fisheries legislation or which affect fisheries enforcement practice. These instruments are detailed below.

Traditional fishing memorandum of understanding

5.10 Australia and Indonesia entered a Memorandum of Understanding (MOU) in 1974 regarding the activities of Indonesian traditional fishermen. The two Governments have modified the MOU through Supplementary Notes in 1988 and Guidelines in 1989. The MOU defines traditional fishermen as those who take fish and sedentary organisms by ‘methods which have been the tradition over decades of time’.

Only Indonesian traditional fishermen in paddle-powered or wind-powered boats and using nets and lines will be permitted to fish in the areas designated in the MOU. Vessels with motors or engines and fishing gear powered by motors or engines, such as compressors and hookah gear, will not be permitted in the area.

Paragraph 9 of Notes Supplementary to the Third Person Note on Indonesian Traditional Fishermen Visiting the Australian Fishing Zone of 1988

5.11 The MOU states that Australia will refrain from applying its law regarding fisheries to traditional fishermen in the MOU area. The MOU area includes the AFZ and continental shelf adjacent to Ashmore Reef, Cartier Islet, Scott Reef, Seringapatam Reef and Browse Islet, all off the North West Coast of Australia. It also allows landings by traditional fishermen on East, West and Middle Islets of Ashmore Reef only for the purpose of obtaining fresh water, and for vessels to take shelter within this island group. The MOU prohibits the taking of turtles, and limits the taking of sedentary species to the seabed adjacent to Cartier Islet, Browse Islet, Scott Reef and Seringapatam Reef. The MOU area is outlined below in figure 5-1.
Figure 5–1: Maritime boundaries between Australia, Timor Leste and Indonesia

5.12 The legal status of the memorandum of understanding. The MOU does not purport to be a Treaty. Notably, the MOU states only that Australia will refrain from applying its law regarding fisheries in the MOU area. The FMA still applies to the MOU area. The Commonwealth could rescile from the MOU and begin to enforce the law without having to amend the FMA.

The Niue Treaty

5.13 The *Niue Treaty* is an agreement between a number of Pacific Island Countries (PIC) for co-operative surveillance and enforcement. The PIC parties are Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Marshall Islands, Nauru, Niue, Palau, Papua New Guinea (PNG), Samoa, Solomon Islands, Tonga and Vanuatu. New Zealand (NZ), Tokelau and Tuvalu are signatories only. New Caledonia and Tahiti, through France, are notable exceptions geographically. Australia is party to this agreement.

5.14 For enforcement purposes, the *Niue Treaty* relies on subsidiary agreements to be made between member States. These subsidiary agreements allow for the exercise of national laws by officers, and with vessels, of the other member States party to the subsidiary agreement. Where such officers seize vessels, they must hand over the vessels, and anyone onboard, to the authorities of the coastal State as soon as possible.
Practically this is not of great significance, as there are no subsidiary agreements in force involving Australia. There are however some arrangements for ADF ships and aircraft to conduct surveillance, rather than enforcement, patrols on behalf of certain PIC.

5.15 **Australian Defence Force empowerment.** For ADF members to exercise powers on behalf of a State who is a member of a subsidiary agreement, they would need to be designated in writing by that State. They would also need to be empowered under the domestic legislation of that State. The converse would be true for officers of member States to enforce Australian fisheries law under a subsidiary agreement, and appointments would need to be made under section 4 FMA\(^2\) or section 3 TSFA\(^3\) as appropriate. ADF members enforcing Australian law from a vessel of another member State need to be designated in writing by Australia. Officers conducting enforcement under a subsidiary agreement need to carry the *Niue Treaty* identification card shown below in figure 5-2. Vessels would also need to fly the flag shown in figure 5-3 below whilst conducting *Niue Treaty* enforcement.

5.16 **Geographical extent.** Officers may exercise powers under *Niue Treaty* subsidiary agreements only within the territorial sea or archipelagic waters of the member State that confers them. There is no provision for enforcement in an EEZ. The area covered by the *Niue Treaty* is shown below in figure 5-4.

**The Pacific Fisheries Treaty**

5.17 The *Pacific Fisheries Treaty* is an agreement between the United States of America (USA) and a number of PIC to allow USA fishing vessels access to PIC fisheries in a regulated manner. The PIC parties are Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Marshall Islands, Nauru, NZ, Niue, Palau, PNG, Solomon Islands, Tonga, Tuvalu, Vanuatu, and Western Samoa. New Caledonia, through France, is a notable exception geographically. Australia is party to this agreement and the FMA makes provision for Treaty boats to fish within the AFZ.

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\(^2\) Unless the officer was also made a special constable of the Australian Federal Police, this would require an amendment to the legislation because of section 83 limiting the class of officers, other than police, Australian Defence Force and Customs, essentially to employees of the Commonwealth, States and Territories.

\(^3\) As for the *Fisheries Management Act*, except that the class includes people that the Papua New Guinea Minister may nominate.
TREATY ON COOPERATION IN FISHERIES SURVEILLANCE AND LAW ENFORCEMENT IN THE SOUTH PACIFIC REGION

THE HOLDER OF THIS CARD IS AUTHORISED TO ENFORCE THE FISHERIES LAWS OF THE COUNTRIES LISTED BELOW WHILE ON BOARD THIS CRAFT:

NAME OF HOLDER: _______________________
SIGNATURE: _________________________
ISSUED BY: __________________________
(Name of issuing officer)
SIGNATURE: _________________________
DATE: __________
THIS AUTHORISATION IS VALID UNTIL: __________

Figure 5–2: Niue Treaty regional identification card
Figure 5–3: Niue Treaty regional enforcement flag

Figure 5–4: Niue Treaty area
5.18 Practically this is not of great significance, as USA fishing vessels concentrate their efforts in the Central and Eastern South Pacific Ocean. It is worth considering the Pacific Fisheries Treaty arrangements in limited detail in the event that the ADF had to enforce its provisions.

5.19 **Australian Defence Force empowerment.** The Pacific Fisheries Treaty deals with enforcement in one paragraph of Part 5 of Annex 1 to the Treaty. Masters and each member of the crew are obliged ‘immediately [to] comply with every instruction and direction given by an authorised and identified officer of a Pacific Island party’. It is clearly a cooperative rather than coercive enforcement regime. Pacific Fisheries Treaty enforcement would be pursuant to the FMA. For this purpose members of the ADF would be authorised and identified officers of a Pacific Island party.

**The Fisheries Management (International Agreements) Regulations**

5.20 The Fisheries Management (International Agreement) Regulations 2009 prescribe the following three international instruments as international fisheries management measures:

- a. *Convention on the Conservation of Antarctic Marine Living Resources* (CCAMLR);

- b. Indian Ocean Tuna Commission; and

- c. Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean.

5.21 This means that the ADF, or other fisheries officers, may use section 84 powers under the FMA to enforce these measures subject to certain limitations discussed below.

**Con­ven­tion on the Conservation of Antarctic Marine Living Resources**

5.22 The *Convention on the Conservation of Antarctic Marine Living Resources* (CCAMLR) is a multilateral Convention. The stated objective of the Convention is the conservation of Antarctic marine living resources. Approximately thirty countries from all parts of the world are party to CCAMLR. It is important to note that the Antarctic Treaty, to which Australia is party, requires that a member State notify all other member States before deploying military personnel and equipment below latitude 60 degrees South.
5.23 Geographical extent. CCAMLR applies to the area south of latitude 60 degrees South and the Antarctic Convergence as shown in figure 5-5. The Antarctic Convergence is a naturally occurring geophysical barrier (it tends to limit the movement of marine life) where cold Antarctic waters meet relatively warmer waters from the north. The geophysical nature of the Convergence makes for the meandering CCAMLR boundary. The Antarctic Convergence is an area north of latitude 60 degrees South and defined in the Convention by a series of points of latitude and longitude the northernmost of which is latitude 45 degrees South. The points of the Convergence closest to Australia are latitude 60 degrees South.

Indian Ocean Tuna Commission

5.24 The Indian Ocean Tuna Commission is a result of the Agreement for the Establishment of the Indian Ocean Tuna Commission. The Agreement is concerned with ensuring the conservation of tuna and tuna-like species in the Indian Ocean and promoting their optimum utilisation, and the sustainable development of the fisheries. Its geographical extent is known as the area of competence of the Commission. This is the Indian Ocean and adjacent seas, north of the Antarctic Convergence, insofar as it is necessary to cover such seas for the purpose of conserving and managing stocks that migrate into or out of the Indian Ocean.
5.25 The Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean establishes the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean. Its stated aim is to ensure the long-term conservation and sustainable use, in particular for human food consumption, of highly migratory fish stocks in the Western and Central Pacific Ocean for present and future generations.
Article II of the Convention describes its geographical application follows:

the area of competence of the Commission (hereinafter referred to as ‘the Convention Area’) comprises all waters of the Pacific Ocean bounded to the south and to the east by the following line:

From the south coast of Australia due south along the 141° meridian of east longitude to its intersection with the 55° parallel of south latitude; thence due east along the 55° parallel of south latitude to its intersection with the 150° meridian of east longitude; thence due south along the 150° meridian of east longitude to its intersection with the 60° parallel of south latitude; thence due east along the 60° parallel of south latitude to its intersection with the 130° meridian of west longitude; thence due north along the 130° meridian of west longitude to its intersection with the 4° parallel of south latitude; thence due west along the 4° parallel of south latitude to its intersection with the 150° meridian of west longitude; thence due north along the 150° meridian of west longitude.

United Nations Fish Stocks Agreement

5.26 The essential purpose of the United Nations Fish Stocks Agreement (FSA) is to allow States who are members to board, in their own EEZ or on the high seas, the vessels of other States that are members of the FSA. The stated objective of the FSA is to ensure the long term conservation and sustainable use of straddling fish stocks, and highly migratory fish stocks, through effective implementation of the relevant provisions of the United Nations Convention on the Law of the Sea (UNCLOS), being Articles 63 and 64. It also implements UNCLOS Article 118, which creates a duty on States parties to co-operate ‘in the conservation and management of living resources in the areas of the high seas’. Section 87HA of the FMA provides for regulations to prescribe specific powers in respect of FSA boats but there are no current regulations.
Torres Strait Fisheries Act and the Torres Strait Treaty

5.27 The TSFA operates within the Torres Strait Protected Zone, which is defined by the *Torres Strait Treaty* (the Treaty) between Australia and PNG. The TSFA gives effect to the fisheries aspects of the Treaty, although the Treaty deals with a number of matters in addition to fisheries, including sovereignty and jurisdiction, petroleum exploitation, navigation and overflight, traditional activities and rights, protection of flora, fauna and the marine environment, and border controls. There are specific arrangements that include the Government of Queensland and the Fly River Provincial Government. There are powers under the TSFA ashore and over Australian boats that are not relevant to the ADF for the same reasons that they are not relevant with regard to the FMA. The Treaty predates the UNCLOS but anticipates many of its provisions and is consistent with them, particularly with regard to the status of the Torres Strait as a strait used for international navigation.

5.28 **Australian Defence Force empowerment.** Members of the ADF are officers for all purposes of the TSFA. Section 42 describes the powers of officers.

5.29 **Protection from liability.** Section 43B of the TSFA protects officers from criminal or civil liability in essentially the same terms as under section 90 of the FMA. Where there is a restraint on liberty for the purpose of moving a boat, section 42(2AAA) also protects officers, any person assisting them, AFMA and the Commonwealth by preventing criminal or civil proceedings in respect of that restraint.4

Geographical extent

5.30 **The Torres Strait protected zone.** Generally a line divides the Torres Strait Protected Zone between PNG zones to the north and Australian zones to the south. The zones have the character of an EEZ, although there are arrangements to apportion allowable catch between Australia and PNG that vary between parts of the Torres Strait Protected Zone. North of the line however there are a number of islands over which Australia has sovereignty. There are also some islands north of the line over which PNG has sovereignty. These islands have a three nm territorial sea, except for Pearce Cay (see chapter two).

4 It is subject to the jurisdiction of the High Court under section 75 of the Constitution.
5.31 Australia also has an area of seabed jurisdiction beneath PNG waters in a zone in the centre of the Torres Strait Protected Zone to the north of the line. South of the line there are a large number of islands over which Australia has sovereignty, and there are no islands over which PNG has sovereignty. These islands also each have a three nm territorial sea. The area covered by the Torres Strait Protected Zone is shown in figure 5-6.

5.32 Cross-boundary enforcement. In short, the Torres Strait Treaty provides for each country to enforce its own jurisdiction in its own parts of the Torres Strait Protected Zone. That is to say that there are no mutual enforcement powers. In the case of corrective action, it is to be taken by the member State whose nationality is borne by the vessel and not the member State in whose jurisdiction the offence is committed. Australia cannot enforce

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5 Australian Fisheries Management Authority (AFMA) Arrangements. Some AFMA officers are empowered under the Papua New Guinea (PNG) legislation to act in PNG zones. This power is apparently used very infrequently. Where it is used, it is to apprehend third country vessels where those vessels are affecting the Australian fishery as well. AFMA does not police PNG’s zones on a regular basis. Some PNG officers are also apparently empowered under Australian legislation.
the law of PNG, in PNG part of the Torres Strait Protected Zone, against PNG or third country vessels. The exceptions to this are as follows:

a. **Australian vessels.** Australia can act against Australian vessels (including vessels licensed by Australia) committing offences against PNG law in PNG part of the Torres Strait Protected Zone. The terms of the Treaty also make the reverse true for PNG vessels in Australian zones.

b. **Papua New Guinea territorial waters.** The TSFA allows an officer to bring or order a boat to a place in PNG territorial waters, including those outside the zone.

c. **Beyond the Torres Strait protected zone.** The Act has extra-territorial operation. Section 42(2) also allows for the powers to be exercised anywhere that FMA powers may be exercised, as well as in any other area of Australian jurisdiction.

d. **Australian islands.** Officers can exercise powers within the three nm territorial sea of the islands to the north of the line.

5.33 **Navigation and overflight.** The Torres Strait Protected Zone has complexities with regard to navigation and overflight under Article 7 of the Treaty. Within the Torres Strait Protected Zone and north of the line, each party grants to the other high seas freedoms to all waters below the low water line of those PNG and Australian islands north of the line. South of the line the same freedoms apply beyond the territorial sea of the Australian islands. The Treaty also specifically states that routes normally used for international navigation in the area between the countries (as opposed to just the Torres Strait Protected Zone) are international straits for the purposes of the law of sea. Prince of Wales Channel is a strait used for international navigation in accordance with UNCLOS Article 37.

**INTERCEPTING VESSELS – EXCLUSIVE ECONOMIC ZONE**

**Fisheries Management Act**

5.34 An officer may exercise the power to board a boat under the FMA in the circumstances set out below. There is no concept of a request to board in
the FMA; the Act simply states ‘an officer may require the master to stop the boat at such a place to allow the officer to board it’.

5.35 **Fishing in the Australian fishing zone.** An officer may board a boat in the AFZ, in Australia (including within state and territory coastal waters) or an external territory, upon having reasonable grounds to believe that the boat was being, is being, or is intended to be used for fishing in the AFZ. This includes sedentary organisms on the continental shelf that section 12 FMA treats as being within the AFZ. There is no requirement to believe that the boat is involved in an offence as such.

5.36 The definition of fishing in section 4(1) FMA is very broad. It includes searching for or taking fish, attempting to do so, any other activities that could reasonably be expected to have that result, using fish aggregating devices and associated electronic equipment, any operation at sea in support of or in preparation for fishing and using aircraft for fishing (except in relation to health or safety). The definition also includes processing, carrying or transhipping ‘fish that have been taken’, without specifying where they have been taken.

5.37 **Fishing concessions.** An officer may conduct a boarding where there is a fishing concession in force for a boat. Sections 84(1)(b) and 9 of the FMA operate to allow boarding even in the Torres Strait Protected Zone of boats with fishing concessions. There is no requirement that the officer believe that the boat has had involvement in an offence or that it has even been involved in fishing. It is enough that the boat has a concession to fish. The stated purpose of this power is to ascertain compliance with the concession. Under section 4(1) FMA a concession can be a permit, statutory fishing right or a foreign fishing licence. Permits under section 32 FMA relate only to Australian boats and so do not concern the ADF. Foreigners can have statutory fishing rights under section 21 FMA, and foreign fishing licences under section 34 FMA are self explanatory.

5.38 **Boat in Australian fishing zone after illegally fishing on the high seas.** Under the FMA an officer may board a boat in the AFZ, Australia or an external territory when there are reasonable grounds for believing

- that the boat has been on a fishing trip,

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6 Section 84(1)(aa)(i) FMA.
b. that it has contravened a measure established by an international fisheries management organisation during that trip, and

c. the appropriate authority of the country of nationality of the boat has authorised the exercise of powers in relation to the boat.

5.39 Under section 87HA, an officer may exercise all of the powers available under section 84 as if the foreign boat had been fishing illegally in the AFZ. An international fisheries management measure means a measure prescribed by the regulations to give effect to a measure established by an international fisheries management organization. Regulation 21 of the Fisheries Management (International Agreements) Regulations 2009 establishes that this means measures established by CCAMLR, the Indian Ocean Tuna Commission and the Western and Central Pacific Fisheries Commission. The boarding may also take place in internal waters, state coastal waters and in the internal or territorial waters of any external territory, in addition to within the AFZ. The provisions for boarding boats under an agreement with their flag State are discussed further below.

Torres Strait Fisheries Act

5.40 Section 42 of the TSFA provides very similar powers to officers as section 84 of the FMA. An officer may board upon having reasonable grounds to believe a boat has been, is being or is intended to be used for fishing in an area of Australian jurisdiction. Fishing has essentially the same definition as in the FMA. As with the FMA, there need be no belief that the fishing relates to an offence. The TSFA does not apply to private fishing from an Australian boat, which essentially means fishing that is not for commercial or scientific purposes. This takes into account one of the purposes of the Torres Strait Treaty, which is to protect the traditional way of life and livelihood of the traditional inhabitants of the Torres Strait Islands.

Continental shelf

5.41 Fisheries Management Act. The provisions of the FMA do not apply to the continental shelf as a whole. However section 12 of the FMA provides for the exercise of powers in relation to sedentary organisms (essentially bottom-dwelling marine life such as trepang) that are declared to be sedentary organisms for the purposes of the FMA. This allows the FMA provisions concerning fishing in the AFZ to extend to such organisms as if they were in the AFZ. By proclamation dated 12 December 1995 the FMA was declared to apply to trepang, every species of bivalve mollusc, gastropods, green snails, common trochus shells and giant trochus shells.
International straits are those which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.

**Article 37, UNCLOS**

5.42 International straits are still part of the territorial sea of the coastal State. Torres Strait is an important example of an international strait in Australia. The UNCLOS requires that all ships and aircraft enjoy the right of transit passage, which must be continuous and expeditious. States may not suspend transit passage.

5.43 Although States may pass laws with respect to the safety of navigation and regulation of maritime traffic, pollution, fishing, customs, fiscal, immigration and sanitary matters, such laws may not have 'the practical effect of denying, hampering or impairing the right of transit passage'. The coastal State has no competence to enforce its law in the case of ships in transit through straits.

5.44 There should be a distinction between ships actually exercising the right of transit passage and those that are not, but are hovering or not proceeding continuously and expeditiously or clearly looking like breaching Australian law. For example, this could include deploying fishing gear. This would require giving the benefit of doubt to those vessels that claim a right of transit passage until it can be demonstrated that they are not in fact engaging in transit passage.

**INTERCEPTING VESSELS - HIGH SEAS**

**Mothership apprehension**

5.45 The concept of mothership apprehension has reasonably venerable customary international law precedents that Article 111 of the UNCLOS has codified as part of the right of hot pursuit. It provides rights to pursue not only when a foreign ship has violated the laws of the coastal State, but also when one of its boats has. Article 111(4) also discusses hot pursuit of 'boats or other craft working as a team and using the ship pursued as a mother ship'. Mothership apprehension can then refer to a mothership and its boats, or two or more vessels working together as a team. Examples could include pair
trawlers, bunkering vessels or small boats returning from inside the AFZ to a larger vessel outside the AFZ.

**Fisheries Management Act**

5.46 Where a vessel is supporting a foreign boat in the AFZ in contravention of the FMA, that is to say acting as a mothership, an officer may board it pursuant to section 87 FMA. The foreign boat can be in or outside the AFZ. As with hot pursuit, an officer may only exercise section 84 FMA powers outside the territorial sea of another country. This provision only differs in practical terms from hot pursuit in that the mothership can be outside the AFZ when the pursuit commences.

**Vessels without nationality**

5.47 Article 110 of the UNCLOS states the action that may be taken in regard to vessels without nationality. Essentially it only provides for boarding to check documents to establish identity, and to search if suspicion remains as to that identity. Article 110 does not provide for any further enforcement action and such examination must in no circumstances be used for purposes other than those which warranted stopping the vessel. Article 110 only mentions ships suspected of being without nationality, flying a false flag or flying the flag of the visiting warship.

5.48 UNCLOS Articles 91 and 92 describe the nationality and status of ships. Article 92(2) particularly states that ships that fly more than one flag may be assimilated to the status of ships without nationality. The requirement to fly a flag is implicit in the two Articles and the need to carry documents of nationality is explicit in Article 91(2). Article 110(3) states that compensation shall not be payable where the ship has justified suspicion as to identity in some way. If a vessel did have a bona fide nationality but did not show it for some reason the boarding would therefore be acceptable. However Article 110(3) would suggest that the flag State would be entitled to seek compensation for loss or damage arising from any delay beyond that required to establish identity.

**Fisheries Management Act**

5.49 Section 87H FMA states that, ‘An officer may board and inspect a boat on the high seas that is equipped for fishing if the officer has reasonable grounds for believing that the boat does not have a nationality’. This may occur when a vessel actually has no nationality, it is hiding its markings or is otherwise concealing its identity. This provision draws on Article 21(17) of the FSA, which provides for boarding and inspection of vessels without nationality on the high seas. It states, ‘Where the evidence so warrants, the
State may take such action as may be appropriate in accordance with international law.’ This allows for a broad interpretation of the possible options but it would need to be consistent with UNCLOS Articles 91 and 92 concerning nationality and status of ships. If a vessel actually has a nationality and is an FSA boat, an officer should treat it as an FSA boat.

5.50 If an ADF officer boards a boat under this section, the officer must produce written identification for the master of the boat to inspect as soon as practicable after the officer has boarded.

Subject to an agreement

5.51 UNCLOS Article 110, which sets out the rights that may be exercised over foreign vessels on the high seas, commences with the words ‘Except where acts of interference derive from powers conferred by Treaty, …’. This exception recognises the right of sovereign nations to grant powers to other nations over its own flagged vessels upon the high seas. The word ‘Treaty’ should indicate any generic agreement between sovereign States, rather than requiring agreements of a certain degree of formality.

Fisheries Management Act – international agreements and arrangements

5.52 The FMA provides for enforcement action against any foreign vessel contravening international fisheries management measures established by an international fisheries management organisation, where such action is authorised by the country to which the vessel is flagged. Such authorisation can be given on an ad hoc basis or on the basis of a standing agreement or arrangement. The definition of an international fisheries management organisation in section 4(1) FMA is ‘a global, regional or subregional fisheries organisation or arrangement prescribed by the regulations’. In this situation an officer may exercise section 84 powers, discussed below, with respect to a boat on the high seas where:

a. the officer has reasonable grounds to believe the boat has been used, is being used, or is intended to be used, for fishing; and

b. the exercise of the powers in relation to the boat has been authorised by the appropriate authority of the country of nationality of the boat.

5.53 The authorisation of the flag State may restrict or modify the section 84 powers available. Regulations may also modify the section 84 powers
available for boarding foreign boats on the high seas, although there are no relevant regulations at the time of writing.

5.54 United Nations Fish Stocks Agreement. As discussed above, the FSA is a multilateral agreement that enables the boarding of vessels on the high seas consistently with the UNCLOS. The FSA also provides for cooperation between coastal and flag States in regard to unauthorised fishing in areas of coastal State jurisdiction. The FMA no longer has specific powers for FSA interceptions but instead simply provides for interceptions on the high seas, as discussed above, where there are reasonable grounds for believing a boat has been involved in fishing and ‘the exercise of the powers in relation to the boat has been authorised by the appropriate authority of the country of nationality of the boat’. The FSA could be a basis for seeking such authorisation.

5.55 The Regulations may specify particular requirements for the exercise of powers with respect to FSA boats; although at the time of writing the Fisheries Management (International Agreements) Regulations 2009 do not do so. It is important to note however that there are significant procedural requirements in the FSA for boarding foreign boats. It may be necessary to comply with them should a flag State make its authorisation (to board one of its boats) subject to these FSA requirements. Given that section 87HA makes boarding foreign boats on the high seas always subject to the authorisation of the flag State though, the actual requirements for a boarding will be a matter for agreement with each flag State. This is more flexible than the previous arrangement where the FMA did not require flag State consent but did have extensive particular requirements for FSA boarding activities, whereas now section 84 powers apply unless otherwise provided for.

Fisheries Management Act – Pacific Fisheries Treaty

5.56 An officer may board any vessel to which a licence has been issued under the Pacific Fisheries Treaty. There is no specific power to engage in any pursuit or to use force in order to compel a vessel to submit to boarding. There are other legal and administrative procedures in the Treaty for dealing with vessels that do not comply. This would suggest that the drafters of the Treaty did not consider that enforcing compliance through forceful measures was appropriate.

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7 Section 87HA(2) FMA.

8 See Articles 4 and 5 of the Pacific Fisheries Treaty.
POWERS OF BOARDING OFFICERS

General use of force provisions

5.57 A number of the statutes that empower the ADF have specific provisions that authorise the use of force either generally or in particular circumstances. Where the legislation is silent on the use of force it is necessary to refer to the general criminal law provisions. This part will also discuss the levels of suspicion or belief required to initiate the exercise of a power and the sanction for obstructing its exercise.

5.58 ADF members may exercise their powers under section 84 FMA without warrant. There must be reasonable grounds to believe that there is a connection to fishing, that an offence has been, is being or is intended to be committed, or that there is a fishing concession in force.

5.59 Section 87J FMA applies to all FMA boardings. Despite the provision being cast in limiting terms, the authorisation to use force is actually very broad. The first sub-section provides as follows:

- an officer must not use force in the exercise of the officer’s powers under a provision of section 84 (as it applies of its own force or because of sections 87G or 87HA) or under section 87H, unless it is necessary to do so:
  
  1. to ensure the safety of an officer, or
  2. to overcome obstruction of an officer in the exercise of that officer’s powers.

5.60 The powers the section refers to are those available under section 84 FMA, discussed below, as modified according to the power to board that the officer is exercising.

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**Force used must be reasonable**

(2) The force used must not be more than is reasonably required for the relevant purpose described in paragraph (1)(a) or (b).

Section 87J, Fisheries Management Act
5.61 Section 87J applies equally to the use of force over the person as it does to boarding a vessel. The issues arising from this provision are outlined below.

5.62 **Ensuring the safety of the officer.** This limb of the provision appears to provide for self defence (SD) although it is cast in broader terms than normal SD. It would appear to authorise actions in anticipation of a threat rather than only when a threat materialises. This may include ordering all persons on board a vessel to muster in a particular place onboard in order to better control what happens during the boarding operation and thus make it safer for the boarding party. There is a requirement to demonstrate that such an action is necessary. An officer may find it harder to justify if the boarding is simply to check compliance with a fishing concession, and there is no suspicion of an offence, than after the pursuit of a vessel suspected of fishing illegally.

5.63 **Obstruction of an officer in the exercise of that officer’s powers.** This provision appears self explanatory and provides authority to use force where SD or safety is not an issue. Again, the requirement for necessity suggests that if there is an alternative course of action available to using force, the officer should take it. For a possible example, a helmsman that refuses to let go of the ship’s wheel could be manhandled away from it, but only after reasonable persistence in attempting to persuade and a clear warning of the use of physical force, unless urgency demands otherwise.

**Pacific Fisheries Treaty**

5.64 The last few lines of Part 5 of Annex 1 to the *Pacific Fisheries Treaty* state:

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Such boarding and inspection shall be conducted as much as possible in a manner so as not to interfere unduly with the lawful operation of the vessel. The operator and each member of the crew shall facilitate and assist in any action by an authorised officer of a Pacific Island party and shall not assault, obstruct, resist, delay, refuse boarding to, intimidate or interfere with an authorised officer in the performance of his or her duties.
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Part 5 Annex 1, Pacific Fisheries Treaty

5.65 The provision is cast in terms of duties rather than rights. The effect of this is that an officer is able to do anything necessary to check compliance with the terms of a Treaty licence, so long as it does not interfere unduly with
the lawful operation of the vessel. There is no other specific power available to an officer and the onus is on the master and crew not to create difficulty for the officer. This sets up a regime based heavily on co-operation and only marginally on coercion. The powers of an officer during boarding, although not entirely reliant on consent, are limited to conducting an investigation rather than apprehension. An officer may conduct an ‘inspection of the vessel, gear, equipment, records, fish and fish products’. The master and crew of a vessel are obliged, as stated above, to comply with every instruction and direction of an officer ‘including to stop, to move to a specified location, and to facilitate safe boarding’. The provisions are also much less detailed than those that state the powers of an officer under Australian domestic law. Australia grants officers enforcing the Pacific Fisheries Treaty in the AFZ the powers normally available to them. Such a grant exceeds that contemplated in the Pacific Fisheries Treaty however and should be interpreted consistently with the Treaty.

5.66 Obstruction of officers. The FMA creates an offence for obstructing officers. Obstruction includes failing to facilitate boarding, refusing to allow an authorised search, refusing or neglecting to comply with a requirement made by an officer under section 84, stating a false name and address, using abusive or threatening language, assaulting, resisting or obstructing an officer in the exercise of FMA powers and impersonating an officer. This provision is important because it allows for an officer to arrest even where there is no offence relating to fishing as such.

Torres Strait Fisheries Act

5.67 As with the FMA, ADF members may exercise their powers under the TSFA without warrant. The grounds are slightly different, in that there must be reasonable grounds to believe that there is a connection to fishing or that an offence has been, is being or is intended to be committed. Section 43A of the TSFA is a general use of force provision in essentially the same terms as section 87J of the FMA.

5.68 Obstruction. Section 43 TSFA makes it an offence to obstruct an officer in the exercise of powers under the Act, including failing to facilitate boarding by reasonable means, refusing to allow a search or an inspection and refusing or neglecting to comply with a requirement of an officer. It is also part of the offence to use abusive or threatening language against an officer. The penalty can include a 12 month sentence of imprisonment.
SPECIFIC POWERS OVER PERSONS

Detention

5.69 In many cases in maritime law enforcement there is no requirement to bring a person before a judicial officer in Australia. This can be the case with fishing where any proceedings would generally only be against the master and some senior members of the crew. For example, the master was the only individual subject to prosecution following the South Tomi incident (see historical example in chapter eight). Even though there is no need to arrest, there is often still a requirement to detain a person or otherwise restrain their liberty to achieve a law enforcement purpose.

Fisheries Management Act

5.70 The power to require the master of a boat to take it to a specified place effectively involves the detention of the vessel, although not stated explicitly. A person onboard a seized boat though almost invariably must remain onboard that boat, because they are practically unable to go elsewhere until it arrives wherever an officer requires that boat to go. As stated above, where there is a restraint on liberty for the purpose of moving a boat, section 84(1BA) of the FMA also protects officers, any person assisting them, AFMA and the Commonwealth from criminal or civil proceedings in respect of that restraint, although it preserves the jurisdiction of the High Court under section 75 of the Constitution.

Torres Strait Fisheries Act

5.71 There is effectively a power to detain which derives from the power to require masters of boats to bring a boat to a place and remain in control of it. Section 42(2AAA) of the TSFA makes clear that any restraint on liberty resulting from that power to move a vessel is not unlawful.

Arrest

5.72 The power of arrest is not of great significance to the ADF in maritime law enforcement. The usual role of the ADF in fisheries protection is to bring suspected offenders to Australia for handing over to the relevant authorities. The powers that the ADF would normally require then would be powers to detain vessels and to move them. Arrest would only be likely to be relevant in the case of assaults and similar offences upon members of the ADF and other officers. An arrest would assert jurisdiction, and invoke powers to use a certain degree of force to control an offender. ADF policy is to avoid use of the power of arrest wherever possible.
Fisheries Management Act

5.73 An officer may arrest a person upon reasonable grounds for believing that a person has committed an offence under the Act.

Torres Strait Fisheries Act

5.74 The grounds for arrest without warrant under the TSFA are more limited. The officer must have reasonable grounds to believe that the person is committing or has committed an offence against the Act and that proceedings against the person by summons would be ineffective. There is no ground for arresting someone for intending or attempting to commit an offence.

Search

5.75 The power to search a person is most relevant in maritime law enforcement to find concealed actual or potential weapons in order to ensure the safety of those involved. The need to gather evidence can also be important as a secondary consideration. A further issue is searching to find objects that may assist in an escape. This would only be relevant where officers had to keep a person in close custody, or maintain custody ashore, as there are limited places to escape to at sea.

Fisheries Management Act

5.76 Search following detention in the territorial sea. There is a specific power to search a person and the person’s clothing under section 84(1)(aaa) of the FMA where the person is on a boat that is reasonably suspected of being used in an offence. The search can be for the purpose of finding out whether there is hidden a weapon, a thing capable of inflicting bodily harm or evidence as to the commission of an offence.

5.77 Section 84AA requires that the search must be by a person of the same sex as the person subject to the search. Where there is no officer of the same sex available, another person of the same sex may agree to conduct the search. If no person of the same sex is available or willing to do the search then there can be no search under this provision. There is no authority to remove a person’s clothing or require the person to do so or to use more force or subject the person to greater indignity than is necessary. An officer may keep any weapon or thing capable of inflicting bodily harm for as long as necessary for the purposes of the Act.
Torres Strait Fisheries Act

5.78 There are specific powers, in virtually identical terms to the FMA, to search a person and their clothing under section 42(1)(aa) of the TSFA where the person is on a boat that is reasonably suspected of being used in an offence.

Powers of investigation

5.79 The powers of investigation available to officers under the various Acts can be far more intrusive than those available to ordinary police. They are usually available without warrant and sometimes do not even require suspicion of an offence. They vary considerably depending on the nature of the vessel or aircraft subject to the boarding and where that boarding takes place. This makes for a very complicated range of provisions that can be very technical in nature.

Fisheries Management Act

5.80 Most of the general powers of investigation for an officer under the FMA derive from section 84. An officer may search a boat for fish, fishing equipment and records relating to fishing operations and seize, detain, remove or secure such things. An officer must give a written notice setting out the grounds for a seizure within seven days of the seizure.

There is an additional power to break open compartments, containers and other receptacles that the officer:

...has reasonable grounds to believe contain[s] anything that may afford evidence as to the commission of an offence...

Sections 84(1)(a)(i) and 84(1)(b), Fisheries Management Act

5.81 These powers also extend to ascertaining compliance with a condition of a fishing concession. An officer may also examine anything found following these actions, and in regard to concessions for particular types of equipment, require the concession holder to assist in measuring the equipment. Further, an officer may also require production of a fishing concession, Treaty licence or related evidence and take copies or extracts. An officer may also require a master of a fishing concession or a Treaty boat to give information concerning the boat, its crew or any person on board. In addition to being able to question the master as discussed above, an officer
may require a person on board a concession or Treaty boat or a boat engaged in fishing in the AFZ, or any person they reasonably suspect of having committed an offence, to give their name and address.

5.82 Pacific Fisheries Treaty. As described above, the powers of an officer during boarding under the Pacific Fisheries Treaty are limited to conducting an investigation rather than apprehension. An officer may conduct an ‘inspection of the vessel, gear, equipment, records, fish and fish products’. The provisions are much less detailed than those that state the powers of an officer under section 84 and, as previously stated, would need to be exercised consistently with the Treaty.

5.83 Boat on high seas without nationality equipped for fishing. Section 87H concerning boats on the high seas without nationality allows only for inspection of the boat. No other express powers are given. If an officer discovers that the boat is in fact an Australian boat then section 87G applies. If the boat is in fact without nationality, then the section repeats the requirements for an officer to give the master a report of the exercise of powers and to note the master’s statements. It also allows for the minimisation of duplication. The only additional requirement is for an officer to show written identification as soon as possible after boarding or to not remain on the boat. This could be said to be implicit in Article 110 of UNCLOS, through the requirement that only appropriately authorised officers can board and inspect. The requirement for written identification is notable for the ADF, because in all other cases under the FMA being in uniform is sufficient. This lack of consistency could present operational difficulties if not managed.

Torres Strait Fisheries Act

5.84 Section 42 of the TSFA is the main provision detailing the powers of officers, and this paragraph provides a summary of the powers in this section. The TSFA allows an officer to search, seize, detain, remove or secure for similar reasons to those provided for under the FMA. The power to require a master to remove gear from the sea, which includes the power to land that gear if it is necessary to ascertain the dimensions of the equipment, is more detailed than the equivalent FMA provision. It reflects the archipelagic geography of the Torres Strait to some extent. An officer may require the master of a boat that requires a licence or a Treaty endorsement to give information regarding the boat, crew or any person on board the boat.

5.85 An officer may also require a master to state whether he or she is the holder of a master fisherman’s licence, produce that licence and allow copies or extracts to be made. An officer may require a master to produce a licence to fish under the TSFA and allow copies or extracts to be made. In addition
to questioning a master as discussed above, an officer may require a person on board a boat that requires a licence or a Treaty endorsement to give their full name and usual place of residence. An officer has a more general power to require a person on board a boat at sea to state whether they have engaged in fishing on the boat during the current voyage of that boat. This is a notable departure from the FMA.

**Power over the vessel**

5.86 Unlike the powers of boarding officers over people, there is a degree of international law with regard to detaining and moving vessels, and to a lesser extent on destroying them.

**Fisheries Management Act**

5.87 Under section 84 of the FMA, an officer may, upon reasonable grounds for believing that there has been a contravention of the FMA, require a master to remain in control of a boat at a place, including a place at sea, or bring the boat to another place specified by the officer. An officer may also require a master to move a boat again and remain at another place. The FMA further provides that an officer may require a master to remain in control of a boat at a place in Australia, and the officer may bring a boat to a place in Australia or in a Territory and remain in control of the boat pending proceedings for contravention of the FMA. The power of an officer to require a master to bring a boat to a place and remain there is valid even if the boat has to travel, or is brought or escorted, across the high seas. An officer can also require a master to lift gear from the sea upon reasonable grounds for believing that it is being used for a contravention of the FMA.

5.88 Territorial, archipelagic and internal waters of a foreign State. Section 87HA(3) of the FMA allows an officer to bring or take boats to a place that is in the EEZ or territorial, archipelagic and internal waters of a foreign State as result of the exercise of section 84 powers to require a boat to go to and/or remain in a place. The appropriate authority of the flag State of the boat, and the coastal State of the territorial, archipelagic and internal waters concerned, must authorise the action. It would be unlawful in international law to exercise powers in any of the waters mentioned other than the EEZ without the consent of the foreign coastal State in question. The FSA itself does not specifically provide for such action, but its measures for co-operation in compliance and enforcement would seem to allow for agreements to take action in others’ territorial seas.

5.89 Escort across the high seas. As stated above, section 84 of the FMA allows an officer to bring or order a boat across the high seas when seizing, detaining or directing a boat. An officer can exercise this power
without actually boarding. These provisions reflect UNCLOS Article 111(7), which states that release of a ship arrested within the jurisdiction of a State cannot be claimed solely on the basis that the ship was escorted across the high seas. UNCLOS however states that the circumstances must render this necessary. It is difficult to conceive of a situation in which an officer, acting lawfully in all other respects, would require a vessel to cross the high seas unnecessarily.

5.90 **Destruction.** Section 106D of the FMA grants AFMA officers specific powers to destroy boats because they are unseaworthy, a quarantine risk or for other reasons. There is also power under section 185B of the Customs Act to move or destroy hazardous ships. This power is exercised by an ‘officer’ (which includes a person in the employ of Customs or a person authorised in writing by the Chief Executive Officer (CEO) to perform all functions of an officer of Customs).

5.91 A ship may be destroyed if the CEO of Customs is satisfied that the ship is unseaworthy or poses a serious risk to navigation, quarantine, safety or public health or poses a serious risk of damage to property or the environment. The CEO may also direct a vessel be destroyed if it is in such poor condition that its custody or maintenance would involve a cost to the Commonwealth greater than its value. There is no specific power for members of the ADF to destroy boats because they are unseaworthy or a quarantine risk or for any other reason. This would not necessarily prevent the sinking of an unseaworthy vessel that is already sinking or is imminently likely to sink in order to prevent a danger to navigation. Destruction in these circumstances could be defended under the doctrines of necessity or sudden and extraordinary emergency.

**Torres Strait Fisheries Act**

5.92 The TSFA does not specifically provide for escort across the high seas. Other powers over boats under the TSFA are very similar to those under the FMA with two notable exceptions. Section 42(1)(e) of the TSFA allows officers to detain PNG boats. However, they may not seize, remove or secure them. This provision gives effect to the Treaty requirement for Australia and PNG to hand over boats for prosecution from the other country believed to have committed an offence. There is also power under section 42(1)(g) to require a master to bring a boat to a place specified by an officer and remain in charge until the officer permits the master to depart from that place, or to remain in place pending proceedings in respect of a contravention.
CHAPTER 6

BORDER PROTECTION

Executive Summary

- The Australian Defence Force (ADF) has law enforcement powers to enable it to protect Australia’s borders. It has powers to deal with illegal immigration, illegal imports and exports and the prevention of unwanted disease in Australia.

- Members of the ADF are empowered to conduct border protection operations under the *Customs Act 1901* and the *Migration Act 1958*.

- Members of the ADF also have powers under the *Customs Act* to deal with offences under the *Quarantine Act 1908*.

THE CUSTOMS ACT, THE MIGRATION ACT AND THE QUARANTINE ACT

6.1 The *Customs Act 1901*, the *Migration Act 1958* and the *Quarantine Act 1908* deal with a range of matters including border control. The *Customs Act* deals with the control and taxation of imports and exports. The *Migration Act* deals with the immigration and emigration of people. The *Quarantine Act* is concerned with preventing unwanted diseases entering Australia.

6.2 The *Border Protection Legislation Amendment Act 1999* introduced essentially mirror provisions to the *Customs Act* and *Migration Act* concerning maritime law enforcement powers, although amendments to the *Customs Act* in 2009 have created some notable differences. This part will deal with quarantine powers together with customs powers because members of the ADF only have quarantine powers by virtue of the *Customs Act*. Regulation 167 of the Customs Regulations 1926 prescribes a number of Acts including the *Fisheries Management Act 1901* (FMA), the *Torres Strait Fisheries Act 1984* (TSFA) and the *Migration Act* which means that *Customs Act* powers may also be used to enforce them. The *Customs Act* has certain extra powers as well in relation to the seizure of narcotics. The *Migration Act* has a separate regime for excised offshore entry places. It has no powers in relation to the exclusive economic zone (EEZ), or for any other legislation.
Geographical extent

6.3 Customs Act. The *Customs Act* applies to Australia, which includes the territorial sea, but specifically does not apply to the external territories (Norfolk Island, the Heard and McDonald Islands, the Coral Sea Islands, the Australian Antarctic Territory, Christmas Island, the Cocos Islands, and the Ashmore and Cartier Islands) pursuant to section 4(1). Figure 6-1 shows Australia and external territories. These limitations relate more to the internal operation of Australian Customs and Border Protection Command (ACBPC) enforcement and do not directly affect ADF operations.

![Figure 6–1: Australia and external territories](image)

6.4 As the clear intention of Parliament was to enable ADF officers to exercise powers under the Act in all of Australia’s maritime zones, sections 184A, 184B, 184C and 185 of the *Customs Act* apply beyond the territorial sea of the Australian states and internal territories. The *Customs Act* section
184A(6) also grants powers with respect to offences in the EEZ against acts prescribed by the regulations, which currently includes the FMA and TSFA but not the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act).

### 6.5 Migration Act

The *Migration Act* applies to Australia and certain external territories and the territorial sea. The ‘prescribed [external] Territories’ are the Coral Sea Islands, Cocos (Keeling) Islands, Ashmore and Cartier Islands and Christmas Island. These geographical limitations are once again not critical to ADF operations as the offshore powers are clearly expressed to operate in all of Australia’s maritime zones.

### 6.6 The migration zone

The most important geographical aspect of the *Migration Act* for the purpose of border protection is the migration zone. The migration zone is central to defining when a person is in Australia unlawfully under the *Migration Act*, and to the offshore entry regime.

Migration zone means the area consisting of the states, the territories, Australian resource installations and Australian sea installations and, to avoid doubt, includes:

- (a) land that is part of a state or territory at mean low water; and
- (b) sea within the limits of both a state or a territory and a port; and
- (c) piers, or similar structures, any part of which is connected to such land or to ground under such sea;

But does not include sea within the limits of a state or territory but not in a port.

**Section 5, Migration Act**

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**Excised offshore entry regime under the Migration Act**

6.7 There are certain powers in the *Migration Act*, which are not duplicated in the *Customs Act*, that are most easily described as the offshore entry regime. The *Migration Amendment (Excision from Migration Zone) Act 2001* introduced a different unlawful immigration regime for the following places, defined as ‘excised offshore places’.
Excised offshore place means any of the following:

(a) the Territory of Christmas Island;
(b) the Territory of Ashmore and Cartier Islands;
(c) the Territory of Cocos (Keeling) Islands;
(d) any other external Territory that is prescribed by the regulations for the purposes of this paragraph;
(e) any island that forms part of a state or territory and is prescribed for the purposes of this paragraph;
(f) an Australian sea installation;
(g) an Australian resources installation.

Note: The effect of this definition is to excise the listed places and installations from the migration zone for the purposes of limiting the ability of offshore entry persons to make valid visa applications.

Section 5, Migration Act

6.8 In 2005, the Coral Sea Islands Territory was also defined in the Migration Regulations 1994 as an excised offshore place, along with the islands falling within the following prescribed areas:

a. all islands that:

(1) form part of Queensland; and
(2) are north of latitude 21 degrees South;

b. all islands that:

(1) form part of Western Australia; and
(2) are north of latitude 23 degrees South;

c. all islands that:

(1) form part of the Northern Territory; and
(2) are north of latitude 16 degrees South.

6.9 Under the Migration Amendment (Excision from Migration Zone) Act a different set of rules applied to unauthorised arrivals into an ‘excised offshore place’. Under these rules, unauthorised arrivals cannot apply for an
Australian visa and therefore cannot make an application for refugee status. Such people are defined by section 5 as an ‘offshore entry person’. People who land at such places unlawfully need not be brought into the Australian mainland, but may be taken offshore, including to another country which has been declared by the Minister for Immigration and Citizenship, for processing under section 198A (see below). Figure 6-2 displays excised offshore areas.

**Section 189 powers - detention of unlawful non-citizens**

6.10 Under section 189 of the *Migration Act*, it is a mandatory requirement that ‘an officer’ detain a person in an offshore entry place whom they reasonably suspect is an unlawful non-citizen. An ‘officer’ in this section does not include a member of the ADF. Instead, section 189(5) provides that a member of the ADF may detain a person in an offshore entry place whom they reasonably suspect is an unlawful non-citizen. They may also detain a person ‘in Australia but outside the migration zone’ whom they reasonably suspect is seeking to enter an offshore place and would be an unlawful non-citizen if they entered the migration zone. This effectively means that the detention may occur between the outer edge of the territorial sea and the low water line or the outer limits of a port. Also, civilian officers must detain if a person is in or is seeking to enter the migration zone outside of an offshore entry place.

6.11 **Section 198A powers.** Section 198A of the *Migration Act* allows members of the ADF to use a certain degree of force to remove people from offshore entry places and take them to countries declared by the Minister for Immigration and Citizenship to provide suitable access and protection for the people concerned.
Commanders of Commonwealth ships and aircraft and commissioned officers

6.12 Customs Act. Under section 184A of the Customs Act, officers with boarding officer (BO) powers (which includes all members of the ADF), may board a ship where the commander of a Commonwealth ship or aircraft reasonably suspects it is, will be or has been involved in an offence against the law relevant to that maritime zone. A boarding can also occur for the purposes of the Customs Act or a prescribed act, or to establish the identity of the ship, depending upon the maritime zone and the flag status of the ship. This chapter will address these categories below. The definition of ‘commander’ includes a commissioned officer, a warrant officer or a non-commissioned officer of the ADF.

6.13 Migration Act. Under Division 12A – ‘Chasing, boarding, etc. ships and aircraft’ of the Migration Act a commander of a Commonwealth ship or Commonwealth aircraft may make a request to board. Most of the powers in the Migration Act concerning powers of a BO and so on flow from the original request to board and cannot be exercised without such a request. A person who is a member of the crew of the requesting Commonwealth ship or
aircraft may then exercise the powers of a BO, such as search, seize, arrest, detain and so on, once onboard the subject ship or aircraft. Under the Migration Act, ‘Commander of a Commonwealth ship or aircraft’ includes a reference to a commissioned officer of the ADF and a reference to ‘crew’ includes a person acting under the command of the commissioned officer.

6.14 Aircraft. Only commanders of Commonwealth aircraft may exercise the power to request the pilot of another aircraft to land under either the Customs Act or Migration Act. This is prudent given that the power to intercept can arise from this request, and must be in accordance with the ‘Rules of the Air’ on intercepts. A certain degree of flying knowledge, training and skill would be necessary to conduct an intercept lawfully.

Members of the Australian Defence Force

6.15 Customs Act. Under the Customs Act any member of the ADF may exercise the powers of a BO, provided that the ship or aircraft is one that may be boarded.¹

6.16 Migration Act. As long as a request has been properly made, any member of the ADF may exercise the powers of a BO on subject ships and aircraft, other than ships without nationality, even if they are not crew members of the requesting Commonwealth ship or aircraft. This would allow for crew members of an ADF ship to exercise powers where a request has been made from an aircraft, even if the ADF ship was not involved in the original request and possible chase. It would also allow for ADF members ashore to exercise powers where a ship or aircraft had been brought to land.

Protection from liability

6.17 It is important to recognise that ADF members enjoy no particular common law or general statutory protection from civil and criminal liability for acts or omissions that occur in civil law enforcement tasks.

¹ For ships, under section 184A generally, or section 184B(3) after a hot pursuit, or it is an Australian ship (section 185(1)(c)); for aircraft under section 184D.
If any person commits …a wrongful act or one not justifiable, he cannot escape liability for the offence, he cannot prevent himself being sued, merely because he acted in obedience to the order of the Executive Government or any officer of State.

Shaw Savill and Albion Co Ltd v The Commonwealth (1940) 66 CLR 344 per Starke J at 353 citing Raleigh v Goschen (1898) 1 Ch 73 at 77

6.18 There are inherent legal risks in using force or any other sort of coercive power and the Commonwealth can be vicariously liable for the torts of individual members. Therefore, provisions have been made in the legislation to provide a limited level of protection from liability for Commonwealth officers carrying out their duties.

**HISTORICAL EXAMPLE – MERCHANT VESSEL TAMPA/OPERATION RELEX**

The *Border Protection (Validation and Enforcement Powers) Act* created a ‘validation period’, defined in section 4 to be the period between 27 August and the day the Act commenced on 27 September 2001.

Section 5 of the *Border Protection (Validation and Enforcement Powers) Act* states:

This Part applies to any action taken during the validation period by the Commonwealth, or by a Commonwealth officer, or any other person, acting on behalf of the Commonwealth, in relation to:

(a) the MV Tampa; or

(b) the Aceng; or

(c) any other vessel carrying persons in respect of whom there were reasonable grounds for believing that their intention was to enter Australia unlawfully; or
Section 6 of the *Border Protection (Validation and Enforcement Powers) Act* states that all action under section 5 during the validation period ‘is taken for all purposes to have been lawful when it occurred’. It then goes on to state that no proceedings, civil or criminal, may be instituted or continued in any court in relation to such action against the Commonwealth, a Commonwealth officer or any person who acted on behalf of the Commonwealth. The Act is subject to the jurisdiction of the High Court under section 75 of the Constitution.

6.19 Restraining liberty. Where a member detains a ship or aircraft under the mirror provisions of the Customs and Migration Acts, any ‘restraint on the liberty of any person found on the ship or aircraft that results from the detention of the ship or aircraft is not unlawful’. No proceedings, civil or criminal, may be instituted or continued in any court against the Commonwealth, the officer or any person assisting the officer in detaining the ship or aircraft. The only effective limitation is that the officer be detaining the ship or aircraft ‘under this section’. Importantly, this would not include detentions effected under section 189 of the *Migration Act*.

6.20 Moving people. There are mirror provisions under section 185(3AA) of the *Customs Act* and section 245F(9A) of the *Migration Act* for moving people from detained ships and aircraft either into the migration zone or to a place outside Australia. There is also a power to place a person on a ship or aircraft, restrain them and remove them for this purpose.

6.21 Again the same protection applies from the institution or continuation of proceedings, civil or criminal, against the Commonwealth, an officer or any person assisting the officer. There is also a requirement to act in good faith and to use ‘such force as is necessary and reasonable’. In this case the interference is with the rights of a person directly rather than a vessel or aircraft, and the power to place, restrain and remove is only limited by the requirement that it be done for the purpose of moving them under the relevant subsection.

6.22 Searches of the person. The sections 185 and 245 of the *Customs Act* and *Migration Act* also allow for searches of people and property under their immediate control. The person must be on a detained ship or aircraft or have been placed on a ship or aircraft pursuant to the power to move them under the *Customs Act*. Similar powers exist in section 245F of the *Migration Act*. There is no requirement for a reasonable suspicion of anything, but only
to see if the person is carrying or hiding a weapon or a thing that may help
them escape. The search can include the person’s clothing. An officer may
take or retain any weapon or escape tool ‘for such time as he or she thinks
necessary for the purposes of this Act’.

6.23 There is protection from civil and criminal liability under section
185AA(6) of the *Customs Act* for the officer conducting the search or any
person who conducts a search at the request of an officer. In the case of the *Migration Act*, the protection from legal liability is somewhat more limited.
The protection is not for officers themselves but only for people acting at their
request. It appears to be a significant shortcoming for officers when
compared to the other protection from liability provisions.

6.24 **General protection from liability.** There are no other general
provisions protecting members of the ADF from liability in either the *Customs
Act* or the *Migration Act*.

**Intercepting aircraft**

6.25 There are particular powers in relation to aircraft under the Migration
and Customs Acts. They only apply to foreign aircraft when over Australia
(that includes within the airspace over the territorial sea).

6.26 **Migration Act.** Under section 245E of the *Migration Act* and section
184D of the *Customs Act* if a Commonwealth aircraft cannot establish the
identity of an aircraft then it may request the identity of the aircraft, the
identity of all persons on board, the flight path, and flight plan. If the aircraft
does not comply, or the commander reasonably suspects that the other
aircraft is or has been involved in a contravention, or attempted
contravention, of the Act, then he or she may request it to land at the nearest
proclaimed airport or nearest suitable landing field. The same boarding
powers then apply upon landing as they would for a vessel. Any reasonable
means may be used to make the request. A request is still made even if the
pilot did not receive or understand the request.

6.27 **Customs Act.** The *Customs Act* provisions are essentially the same
as in the *Migration Act* with the exception that there are further grounds
under section 184D upon which an aircraft commander can request an
aircraft to land.
These are:

(a) that the commander reasonably suspects that the aircraft is involved in a contravention or attempted contravention of s.72.13 [importing/exporting unmarked plastic explosive offence] or Division 307 of the Criminal Code [plant and drug import/export offences]. Note: there is no provision for contraventions of prescribed acts so the contravention can only relate to the Customs Act or the relevant sections of the Criminal Code.

(b) that the commander reasonably suspects that the aircraft is carrying goods that are either:

(i) directly or indirectly connected to a terrorist act, whether that act is occurring, has occurred or is likely to occur, or

(ii) prejudicing or likely to prejudice Australia’s defence or security or international peace and security, whether because of the existence or the shipment of the goods.

Section 184D(3), Customs Act

INTERCEPTING VESSELS

Territorial sea

6.28 The border protection powers against foreign ships may be exercised anywhere below the low water line within the outer limit of the territorial sea, which includes internal waters.

6.29 Customs Act. Under the Customs Act section 184A, an officer may board a ship for the purpose of the Act or a prescribed Act, or to determine whether there is a contravention or attempted contravention of section 72.13 (importing/exporting unmarked plastic explosive offence) or Division 307 of the Criminal Code (plant and drug import/export offences). There is no requirement for suspicion of an offence or doubt as to identity. An officer may also board a ship where a commander of a Commonwealth ship or aircraft reasonably suspects that the ship has been involved in a contravention or attempted contravention of these provisions of the Criminal Code.
6.30 **Migration Act.** Under the *Migration Act* section 245B, a commander of a Commonwealth ship or aircraft may request the master of a ship to permit the commander, a member of the commander’s crew, or an officer for the purposes of the Act, to board that master’s ship. The request must be for the purposes of the Act. There is no requirement for suspicion of an offence or doubt as to identity.

6.31 These provisions are much more permissive than most provisions concerning police powers that generally require reasonable belief or suspicion before any interference with liberty can occur. The 1982 *United Nations Convention on the Law of the Sea* (UNCLOS) provisions on the territorial sea and innocent passage do not set any standard of belief for requesting to board a vessel. The main requirement is that ‘The coastal State shall not hamper the innocent passage of foreign ships through the territorial sea except in accordance with this Convention’. Article 21 allows for the coastal State to make laws relating to innocent passage in respect of customs, immigration and sanitary matters. Therefore, so long as any request to board was legitimately for the purpose of enforcing customs, quarantine (under the sanitary category) or immigration legislation it would be consistent with the UNCLOS. It is notable that under section 7A of the *Migration Act*, the executive power to expel those who have unlawfully entered Australia’s borders also applies in the territorial sea.

**International straits**

*International straits are defined as those straits:*

> which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.

*Article 37, UNCLOS*

6.32 Article 34 of the UNCLOS makes it clear that international straits are still part of the territorial sea of the coastal State. Torres Strait is an important example of an international strait in Australia. Article 38 requires that all ships and aircraft enjoy the right of transit passage, which must be continuous and expeditious. States may not suspend transit passage. Although States may pass laws with respect to the safety of navigation and regulation of maritime traffic, pollution, fishing, customs, fiscal, immigration and sanitary matters, such laws may not have ‘the practical effect of denying, hampering or impairing the right of transit passage’. The coastal State has no competence to enforce its law in the case of ships in transit through straits.
6.33 There should be a distinction between ships actually exercising the right of transit passage and those that are not but are hovering or not proceeding continuously and expeditiously, or clearly looking like they will breach Australian law. For example, this would include demonstrating the characteristics of a suspected irregular entry vessel (SIEV). This would require giving the benefit of doubt to those vessels that claim a right of transit passage until it can be demonstrated that they are not in fact engaging in transit passage.

Contiguous zone and near installations

6.34 The contiguous zone is not part of the territorial sea and may not extend more than 24 nautical miles (nm) from the baselines from which the territorial sea is measured. The contiguous zone purpose is essentially for border control. Article 33 provides for the coastal State to exercise the control necessary to:

a. prevent infringement of its customs, fiscal (taxation), immigration or sanitary (health and quarantine) laws and regulations within its territory or territorial sea; and

b. punish infringement of its customs, fiscal (taxation), immigration or sanitary (health and quarantine) laws and regulations committed within its territory or territorial sea.

6.35 It is important to explain the ‘prevent or punish’ nature of the contiguous zone. The coastal State can use the contiguous zone to prevent a vessel actually approaching the land territory, rather than apprehending it and bringing it ashore for judicial processes. This means that the coastal State may take action to prevent vessels entering its territorial sea and then committing offences. The offences cannot actually arise from acts committed in the contiguous zone. They can only arise from acts committed in the territorial sea, internal waters or ashore. Despite concerns over illegal immigration by sea, this would perhaps be most critical in the case of quarantine offences, where the aim would be to prevent a dangerous disease reaching the shore.

6.36 The coastal State may also act to punish infringements against financial, immigration, sanitary and customs offences that have occurred in the coastal State, including the territorial sea, after the SIEV has left the territorial sea and is still in the contiguous zone. The main advantage of this provision is that the coastal State does not have to establish hot pursuit from the territorial sea into the contiguous zone in order to apprehend the SIEV.
6.37 Migration Act - foreign ships in the contiguous zone or near installations. Under section 245B of the Migration Act, a commander may make a request to board a foreign ship in the contiguous zone or within 500 metres of an Australian sea or resources installation. The 500 metre safety zones around sea or resource installations are effectively synonymous with the contiguous zone for these purposes. The commander may make the request to board a vessel either to establish its identity (where there is uncertainty), or if the commander reasonably suspects the master’s ship is, will be or has been involved in a contravention, or an attempted contravention, in Australia, of the relevant act.

6.38 Customs Act – foreign ships in the contiguous zone. Under the Customs Act, an officer may board a foreign ship in the contiguous zone where the commander of a Commonwealth ship or aircraft wishes to establish the identity of the ship or reasonably suspects the ship has been involved in a contravention or attempted contravention of the Act, a prescribed Act, section 72.13 (importing/exporting unmarked plastic explosive offence) or Division 307 of the Criminal Code (plant and drug import/export offences).

6.39 Customs Act – near installations. Under section 184A(4A) of the Customs Act the power to board ships near installations is virtually the same as for the contiguous zone with the exception that any contravention or attempted contravention can only be one that occurs in the 500 metre safety zone established around Australian sea installations or resources installations. Such installations are deemed to be part of Australia under Customs Act section 5C, which is discussed further in chapter 11.

6.40 Timor Sea. Both the Migration Act and the Customs Act define Australian sea or resource installations as installations attached to the Australian seabed. The acts explicitly exclude the seabed of the Joint Petroleum Development Area (JPDA) from the definition of Australian seabed. It is therefore not possible to assimilate any powers to the safety zones around JPDA installations. Notably, installations within the JPDA are not part of the migration zone either.

Nothing in this Article prejudices the right of either East Timor or Australia to apply customs, migration and quarantine controls to persons, equipment and goods entering the JPDA without the authority of either country.

Article 15(d), Timor Sea Treaty
This could at least provide international law legitimacy to actions with regard to entry into the JPDA. Figure 6-3 shows the JPDA.

![Figure 6-3: The joint petroleum development area](image)

**6.41 Torres Strait protected zone.** There is no contiguous zone as such in the Torres Strait Protected Zone. The *Torres Strait Treaty* exhaustively prescribes the rights of both Papua New Guinea (PNG) and Australia in the zone. It does provide for the enforcement of customs, immigration and quarantine laws but effectively this may only occur within the territorial seas described in the treaty. Enforcement within the Torres Strait would also be subject to the rights of transit passage through international straits discussed above. This makes enforcement of border protection laws difficult around the
Torres Strait islands as it may only occur within the territorial seas (in places only 3 nm in breadth), and then only against vessels that are clearly not exercising the right of transit passage.

6.42 In the case of a people smuggling ship that was actually seeking to enter the migration zone, but claiming the right of transit passage, it would not be possible to interfere with its voyage unless, for example, it was clearly heading for the low water line or plainly physically incapable of conducting a passage safely to anywhere but the low water line. The Torres Strait protected zone is shown at figure 6-4.

Mothership apprehension

6.43 United Nations Convention on the Law of the Sea. The concept of mothership apprehension has reasonably venerable customary international law precedents that Article 111 of the UNCLOS has codified as part of the right of hot pursuit. It states that rights to pursue occur not only when a foreign ship has violated the laws of the coastal State, but also when one of its boats has. Article 111(4) also discusses hot pursuit of ‘boats or other craft working as a team and using the ship pursued as a mothership’. Mothership apprehension can then refer to a mothership and its boats, or two or more vessels working together as a team, although there is no requirement that this other ship actually be in the territorial sea or the contiguous zone.

6.44 Customs Act. Under section 185A(5) of the Customs Act an officer may board a foreign ship that is outside the outer edge of the contiguous zone and outside a foreign territorial sea. For this to occur, the commander of a Commonwealth ship or aircraft must reasonably suspect that the foreign ship is being, or was being, used in direct support of, or in preparation for, a contravention of the Act, a prescribed act, section 72.13 (importing/exporting unmarked plastic explosive offence) or Division 307 of the Criminal Code (plant and drug import/export offences). The contravention has to involve another ship, whether foreign or Australian. The boarding must occur as soon as practicable after the contravention happens. This would assist to make the evidential connection between the two ships. The power is not limited with regard to the size or number of other vessels acting in contravention.


6.45 **Migration Act.** The *Migration Act* mothership provisions are reasonably similar to those in the *Customs Act*, although there is a ‘request to board’ requirement under section 245. A commander of a Commonwealth ship or aircraft may make a request to board a foreign ship upon reasonable suspicion that it ‘is being or was used in direct support of, or in preparation for, a contravention in Australia’ of the Act. The contravention must involve another ship, whether foreign or Australian. A further requirement is that the request must be made as soon as possible after the contravention happens. The foreign ship must be outside the contiguous zone and foreign territorial seas and, additionally, not within 500 metres of an Australian resource or sea installation.

**Vessels without nationality**

6.46 Article 110 of the UNCLOS states the action that may be taken in regard to vessels without nationality. Essentially it only provides for boarding to check documents to establish identity, and to search if suspicion remains as to that identity. Article 110 does not provide for any further enforcement action and it is clear that such examination must in no circumstances be
used for purposes other than those which warranted stopping the vessel. Article 110 only mentions ships without nationality.

6.47 Articles 91 and 92 of the UNCLOS describe the nationality and status of ships. Article 92(2) particularly states that ships that fly more than one flag may be assimilated to the status of ships without nationality. The requirement to fly a flag is implicit in the two articles and the need to carry documents of nationality is explicit in Article 91(2). Article 110(3) states that compensation shall not be payable where the ship has justified suspicion as to identity in some way. If a vessel did have a bona fide nationality but did not show it for some reason the boarding would therefore be acceptable. However Article 110(3) would suggest that the flag State would be entitled to seek compensation for loss or damage arising from any delay beyond that required to establish identity. If a ship is actually without nationality, then there will be no flag State with standing to take action in international law over any enforcement activities, although other interests such as the ship or cargo owner may seek to recover their losses in a national court.

6.48 **Customs Act and Migration Act.** Both the Acts are applicable where a ship is outside the territorial sea of a foreign country, and:

a. is not flying the flag of a country, or  

b. flying a flag that the commander of a Commonwealth ship or aircraft reasonably suspects it is not entitled to fly, or  

c. the commander of a Commonwealth ship or aircraft reasonably suspects it is not entitled to fly any flag or has been flying the flag of more than one country.

6.49 Under section 184A(9) of the *Customs Act*, an officer may board the vessel except in situations where other powers are available to board (such as where there is a reasonable suspicion the vessel has been involved in a contravention of a relevant law, is acting as a mothership or the ship is covered by an agreement). Under section 245B(7) of the Migration Act, the commander may make a request to board the ship but only when that foreign ship is beyond the outer edge of Australia’s contiguous zone. This power cannot be used, if a request to board can be made where the vessel is a mothership or if it is covered by an agreement.

**Subject to an agreement**

6.50 **United Nation Convention on the Law of the Sea.** UNCLOS Article 110, which sets out the rights that may be exercised over foreign vessels on the high seas, commences with the words, ‘Except where acts of
interference derive from powers conferred by treaty, ...'. This exception recognises the right of sovereign nations to grant powers to other nations over its own flagged vessels upon the high seas. The word ‘treaty’ should indicate any generic agreement between sovereign States, rather then requiring agreements of a certain degree of formality.

### 6.51 Migration Act
Section 245B(6) of the Migration Act allows a commander to make a request to board a foreign ship subject to an agreement or arrangement with its flag State. The commander must reasonably suspect that the ship is entitled to fly the flag of the country concerned. The use of both ‘agreement’ and ‘arrangement’ indicate that varying levels of formality would be acceptable in any understanding reached with a foreign State, including ad-hoc arrangements for particular incidents. The foreign ship must be outside the contiguous zone and foreign territorial seas and not acting as a mothership (else section 245B(5) can be used). In such cases Australian jurisdiction would apply by its own force and acting pursuant to an agreement with a country could unnecessarily complicate matters. It is notable that the commander may make the request where the foreign ship is inside a 500 metre zone around an installation.

### 6.52 Customs Act
Section 184A(8) of the Customs Act is similar to the Migration Act except that it provides more simply that an officer may board a ship when the commander reasonably suspects that the foreign ship meets the criteria. The Customs Act does not permit these powers to be exercised in regard to foreign ships committing contraventions in the EEZ or acting as motherships for offences in the territorial sea or EEZ.

#### POWERS OF BOARDING OFFICERS

### 6.53 The border protection legislation prescribes the powers of officers following a boarding under section 245F of the Migration Act and section 185 of the Customs Act. The powers may be exercised without a warrant and upon reasonable suspicion, rather than belief. There are separate powers under section 245G and 185A respectively, for ships without nationality.

#### General use of force

### 6.54 The legislation allows an officer:

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4 Advice should be sought from Border Protection Command as to current agreements that would enable the exercise of border protection powers on ships subject to an agreement on the high seas.
...to use such force as is necessary and reasonable in the exercise of a power under this section.

Section 245F(10) Migration Act and section 185(3B) Customs Act

6.55 The explanatory memorandum for both Acts states that:

This is a declaratory provision, removing any doubt that officers can use such force as is necessary in the circumstances where there is resistance and opposition to the exercise of powers under [this section].

Customs and Migration Acts Explanatory Memorandum

6.56 These provisions resolve some of the ambiguity that relates to the use of force for law enforcement purposes, as opposed to self defence (SD). It is useful to the ADF that the test for both purposes uses the same words.

Specific use of force provisions

6.57 Apart from the general provision on use of necessary and reasonable force, the section has two specific sub-sections on the use of force. Both have effect despite the general provision on the use of force and the specific power of arrest, and both have effect in addition to each other, that is, in a complementary fashion.

Limit on the use of force to arrest or detain persons on ships or aircraft

6.58 The Migration Act and the Customs Act draw upon section 3ZC of the Crimes Act. The relevant sections state that an officer:

Must not use more force, or subject the person to greater indignity, than is necessary and reasonable to make the arrest or detention or to prevent the person escaping after the arrest or detention.

Section 185(3D)(a) Customs Act and section 245F(12)(a) Migration Act
6.59 This aspect of the provision essentially restates the power of an ordinary citizen. The second limb though repeats the power that is available to a constable under section 3ZC of the Crimes Act and states that an officer:

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Must not do anything likely to cause the person grievous bodily harm unless the officer believes on reasonable grounds that doing the thing is necessary to protect life or prevent serious injury of another person (including the officer).
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Section 185(3D)(b) Customs Act and section 245F(12)(b) Migration Act

6.60 This section does not authorise the use of lethal force. An officer cannot intend to use lethal force under this provision but, if the effect is unintentionally lethal, then the defence of SD or defence of others in the general criminal law could be available.

6.61 Limit on the use of force to arrest a fleeing person. Section 245F(13) of the Migration Act and section 185(3E) of the Customs Act concern the use of force to arrest a fleeing person and are again drawn from section 3ZC of the Crimes Act. In the case of an officer calling on a person who is fleeing to escape arrest to surrender, the officer must not do anything likely to cause the person grievous bodily harm unless the person cannot be apprehended in any other way. This authorises a limited degree of force in the execution of an arrest. This would include lower levels of force, such as manhandling, to restrain a difficult person during their arrest and cover situations where the level of force unintentionally exceeds lower levels.

6.62 The second limb of the sub-section concerns using force causing grievous bodily harm where:

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The officer believes on reasonable grounds that doing the thing is necessary to protect life or prevent serious injury of another person (including the officer).
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Section 185(3E)(b) Customs Act and section 245F(13)(b) Migration Act

6.63 This provision mirrors that in the previous provision concerning arrest. It is somewhat different in that it concerns the use of force on a person fleeing to escape arrest, rather than effecting the arrest itself or re-apprehending someone. Nonetheless, the provision makes clear that such
force can be lawful even if the person subject to the act is fleeing, which could otherwise make the defence of SD and defence of others more problematic.

6.64 Limit on use of force to board or search ships or aircraft. There is a limited authority for officers to be able to damage goods, ships or aircraft by forcing part of them open. It is expressed in the negative so that an officer may not do so unless a person apparently in charge has been given an opportunity to open the part or goods concerned. The power also applies where ‘it is not reasonably practicable to give that person such an opportunity’. These provisions under sections 245F(11) and 185(3C) of the Acts are modelled after section 3U of the Crimes Act in order to make the powers effectively the same. The effect is to allow an officer to proceed where the person apparently in charge is restrained for some reason, is not present or easily locatable, is incapacitated or is clearly unco-operative. The provision is sufficiently broad to cater for other less obvious circumstances. Notably, the provision is stated to have effect despite the paragraphs in the section concerning the power to board, search and examine, and the use of necessary and reasonable force generally.

POWERS OVER PERSONS

Detention and restraint on liberty

6.65 In the case of illegal immigration, even though there may be no need to arrest a person seeking to enter Australia unlawfully, there is often still a requirement to detain a person or otherwise restrain their liberty to achieve a law enforcement purpose.

6.66 Where an officer detains a ship or aircraft under the border protection provisions, there are two options with regard to the detention of the people on board. An officer may detain any person found on a detained ship or aircraft and bring them into the migration zone. Alternatively, he or she may move the person to a place outside Australia, but this is not characterised as detention. The detention of persons is also distinct from the detention of the ship. The legislation makes clear that any restraint on the liberty of a person onboard a detained ship or aircraft is not unlawful. A person on a detained ship or aircraft is not automatically detained and may be permitted to leave.

6.67 Migration Act - section 189 - detention. There is a particular power for members of the ADF to detain under section 189 of the Migration Act separately to the mirror provisions of the Customs Act and Migration Act, as described above. Section 189 grants a discretionary power to ADF officers to detain potential irregular immigrants in excised offshore places, or persons in Australia seeking to enter offshore places who would be unlawful non-
citizens once in the migration zone. The words ‘in Australia’ is interpreted under section 15B of the Acts Interpretation Act 1901 to include areas within the territorial sea. In respect of the territorial sea, this power overlaps with the mirror provisions discussed above. Under the mirror provisions of sections 245F(8) and 245F(9) of the Migration Act, it is possible to detain a ship or aircraft without detaining a person onboard within the meaning of immigration detention in section 5(1) of the Migration Act. To detain under section 189 however means there is an immigration detention within the meaning of section 5, which carries associated legal rights under section 256 which may require the person to come ashore. There is no way of practically distinguishing which power applies, however. It would be open for a person to argue that the detention of their vessel amounted to a detention of the person under section 189, rather than a mere restraint on their liberty under the mirror provisions of section 245F.

Arrest

6.68 The power of arrest is not of great significance to the ADF in maritime law enforcement. The usual role of the ADF is to bring suspected offenders to Australia for handing over to the relevant authorities. Drug offences would usually directly involve the Australian Federal Police and the ACBPC. Government policy with regard to border protection requires the ADF to take potential irregular immigrants to an immigration processing centre, but not to arrest them.

6.69 There is little history of ADF use of powers with regard to quarantine. The powers that the ADF would normally require would be powers to detain people and vessels and to move them. Arrest would only be likely to be relevant in the case of assaults and similar offences upon members of the ADF and other officers. An arrest would assert jurisdiction, and invoke powers to use a certain degree of force to control an offender.
6.70 The mirror provision on arrest in both Acts states that an officer may:

arrest without warrant any person found on the ship or aircraft if:

(i) in the case of a person found on a ship or aircraft that is in Australia—the officer reasonably suspects that the person has committed, is committing or attempting to commit, or is involved in the commission of, an offence, either in or outside Australia, against this Act; and

(ii) in the case of a person found on a ship that is outside Australia—the officer reasonably suspects that the person has committed, is committing or attempting to commit, or is involved in the commission of, an offence in Australia against this Act.5

Section 245F(3)(f) Migration Act and section 185(2)(d) Customs Act

6.71 Arrest in the contiguous zone. A literal interpretation of the words 'attempting to commit' used in section 245F(3)(f) of the Migration Act and section 185(2)(d) of the Customs Act can create some difficulty with regard to the contiguous zone regime. No offence can take place against the law of the coastal State if such laws cannot apply beyond the territorial sea. No arrests of the person can therefore take place in the contiguous zone for border protection offences where the alleged offender has not yet entered the territorial sea.6

6.72 In so far as an arrest is pursuant to a law relating to an overlapping zone, that is the EEZ or continental shelf, there is no difficulty with an arrest in the contiguous zone. With regard to criminal offences on foreign vessels in the contiguous zone, in essence, unless the alleged offender is Australian,

5 Note: for the Customs Act – against a prescribed act or section 72.13 (importing/exporting unmarked plastic explosive offence) or Division 307 of the Criminal Code (plant and drug import/export offences).

6 Border Protection Legislation Amendment Bill Explanatory Memorandum paragraph 41 - Background to Law of the Sea Convention Amendments. For these purposes, ‘border protection offences’ do not include crimes such as piracy or slavery which would permit Australia to act within the contiguous zone.
there is consent from the flag State of the vessel or there is an effect on an Australian, such as an assault, international law will not permit the exercise of jurisdiction.

Search

6.73 The power to search a person is most relevant in maritime law enforcement to find concealed actual or potential weapons in order to ensure the safety of those involved. The need to gather evidence may also be important as a secondary consideration if the ADF members are undertaking the initial investigation of an offence (for example, a Customs officer is not present at the boarding), although it may not be a consideration at all in the case of moving potential irregular immigrants to an immigration processing centre. A further issue is searching to find objects that may assist in an escape. This would only be relevant where officers had to keep a person in close custody, or maintain custody ashore, as there are limited places to escape to at sea.

6.74 Concealed weapons and escape tools. Under both the Customs Act and the Migration Act, officers have a specific power to search a person for the purpose of finding concealed actual or potential weapons or potential escape tools. For the Migration Act, this can only be of a person who is on a ship or aircraft that has been detained by an officer, whereas under the Customs Act this may be of a person who is on a ship or aircraft that has been boarded by an officer, as well as a person that is suspected on reasonable grounds of having landed or left from a boarded ship or aircraft.

6.75 For both Acts, this also includes searches of people that have been placed on a ship or aircraft in order to move them. There is no requirement under section 245FA of the Migration Act and section 185AA of the Customs Act to suspect an offence or even any threat. It allows an officer to search a person’s clothing and property under their immediate control for actual or potential weapons or potential escape tools. This would appear to equate to an ordinary search in terms of section 3ZF of the Crimes Act because it permits a search of property under a person’s immediate control.

6.76 Evidence. In the case of the Customs Act only, the power to search a person extends to searching for a document or other thing carried or hidden on the person, or in their clothing or property, which may afford evidence of the following matters:

a. When on a ship in Australia (that is, within the territorial sea) - of the commission of an offence, in or outside Australia, against the Customs Act, a prescribed act or section 72.13 (importing/exporting unmarked plastic explosive offence) or
Division 307 of the Criminal Code (plant and drug import/export offences).

b. When on a ship outside Australia (that is, outside the territorial sea) – of the commission of an offence in Australia, against the Customs Act, a prescribed act or section 72.13 (importing/exporting unmarked plastic explosive offence) or Division 307 of the Criminal Code (plant and drug import/export offences); or on offence in the EEZ against a relevantly prescribed act such as the Fisheries Management Act.

c. When on an aircraft in Australia – of the commission of an offence, in or outside Australia, against the Customs Act or section 72.13 (importing/exporting unmarked plastic explosive offence) or Division 307 of the Criminal Code (plant and drug import/export offences), but not a prescribed Act.

6.77 Clothing and same-sex searches. Both Acts specify that clothing may not be removed except for outer garments, as with the Crimes Act, such as shoes, gloves, coat or jacket. Notably, outer garments in this provision may include a head covering rather than hat. It would be a question of fine balance as to whether removing the turban of a Sikh or the head covering of a Muslim woman subjected them to greater indignity than was necessary. An officer may take possession of any weapon or relevant thing and retain it for such time as he or she thinks is necessary for the purpose of the act. This would most likely be for as long as it was necessary to ensure safety or prevent an escape.

6.78 The search must be by a person of the same sex as the person subject to the search. Where there is no officer of the same sex another person of the same sex may agree to conduct the search. If no person of the same sex is available or willing to do the search then there can be no search under this provision.

6.79 Following arrest. There is no other specific provision that allows for searches of persons under the border protection legislation. Section 3ZC of the Crimes Act would be relevant to a search in the case of an arrest. The authority to use necessary and reasonable force and the requirement not to subject a person to greater indignity than necessary could permit a limited power to search a person. It would most likely be limited to a frisk search unless compelling circumstances made a more intrusive search necessary. The use of a searcher of the same gender where it was possible would probably be necessary to be reasonable, unless it was an ‘in extremis’ situation.
6.80  **To overcome an obstruction.** The power to use necessary and reasonable force to overcome an obstruction to the exercise of an officer’s power would also probably authorise a limited search. This could apply if the officer had reasonable grounds to believe that a crew member had concealed something like a key in their clothing that was necessary to take control of, or conduct a proper search of, the vessel. An example could be that the keys opened a critical compartment on a ship such as the wheelhouse, engine room or main hold, and there was no other safe means to gain access. The overwhelming requirement would be that the search was necessary and reasonable.

6.81  To fulfil these requirements almost certainly means that there must be no alternative course of action and that the person subject to the search suffers no greater indignity than is necessary. The requirement for a search by a person by the same gender would also apply except in the most extreme situations. The power to search for weapons and escape tools discussed above would likely be adequate for this purpose in most cases.

### Place back onboard

6.82  Section 185AB of the *Customs Act* and section 245FB of the *Migration Act* concerns placing people back onboard ships where the ship has been detained and the person subsequently leaves the ship. These provisions remove any doubt about powers over people who jump off ships into the sea after the ship has been detained. The provisions allow reasonable means, including reasonable force, to place such people back onboard. However, there is no requirement for the action to be necessary. The officer must be satisfied that it is safe to return the person to the ship. A person who made it to the migration zone not at an offshore entry place would be entitled to seek a protection visa and could not be summarily placed back onboard or deported under *Migration Act* section 198A.

### Moving and removing people

6.83  Following the power to detain discussed above, sections 245F(9A) and 185(3AA) of the Acts allow an officer to place a person on a ship or aircraft, restrain them onboard that ship or aircraft and then remove them from that ship or aircraft. The power applies within or outside Australia for the purpose of bringing a person into the migration zone or taking them to a place outside of Australia. This provision seeks to put beyond doubt the power of officers to perform these actions. It followed the stand off in Her Majesty’s Australian Ship (HMAS) MANOORA at Nauru in 2001 when certain suspected illegal immigrants would not leave the ship for the detention camp in Nauru.
6.84 Migration Act - section 198A powers. As described above, there are powers under section 198A of the Migration Act to allow members of the ADF to use such force as is necessary and reasonable to remove people from offshore entry places and take them to countries declared by the Minister for Immigration and Citizenship for this purpose. This includes the power to place and restrain a person on, and remove a person from, a vehicle or vessel.

6.85 The Refugee Convention. Article 33 of the Convention Relating to the Status of Refugees 1951 (Refugee Convention) states:

Prohibition of expulsion or return (refoulement). No Contracting State shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

Article 33 of the Refugee Convention

6.86 The obligation applies as soon as a refugee enters the territory of a party, which would include the territorial sea. It does not prevent action to take refugees to another country, as happened with the ‘Pacific Solution’ of taking unlawful boat arrivals to Papua New Guinea and Nauru. It also does not prevent taking such arrivals back to their last place of departure either, if there is no threat to their life or freedom on account of ‘race, religion, nationality, membership of a particular social group or political opinion’.

6.87 Her Majesty’s Australian Ships and Royal Australian Air Force aircraft. Power is available to eject people from HMA Ships and Royal Australian Air Force (RAAF) aircraft where they have not been detained under the border protection provisions. There is a specific power under section 82 of the Defence Act to remove people from Defence land and aircraft. There is no equivalent statutory authority for Commanding Officers of HMA ships, although there is nineteenth century case law permitting the master of a vessel to exercise control using necessary force, including removal, over people onboard his or her ship:
The captain has absolute control over the passengers and crew...The power of the captain is only limited to the necessity of the case.

King v Franklin (1858) 1 F & F 360 / 175 ER 1858-67 NP

Powers of investigation

6.88 Under the Customs Act and the Migration Act, an officer may board and search a ship or aircraft and search, examine and secure any goods found. An officer may require all persons found onboard to answer questions and produce documents in relation to:

(a) the ship or aircraft, its voyage or flight and its cargo, stores, crew and passengers;

(b) the identity and presence of those persons on the ship or aircraft;

(c) a contravention, an attempted contravention or an involvement in a contravention, either in or outside Australia, of this Act;7

Section 245F(3)(d) Migration Act and section 185(2)(c) Customs Act

6.89 An officer may copy or take extracts from any document found or produced by a person as required above. There is a power under section 245F(5) of the Migration Act and section 185(2B) of the Customs Act to use a dog to assist searching a ship or aircraft. This could be relevant to the ADF in the case of an aircraft landing at a RAAF base with a dog section or when working with ACBPC dogs.

6.90 Examining goods. Sections 245F(6) and (7) of the Migration Act and sections 185(2C) and (2D) of the Customs Act permit an officer to do whatever is reasonably necessary to permit examination of goods. This

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7 [or, for Customs - section 72.13 (importing/exporting unmarked plastic explosive offence) or Division 307 of the Criminal Code (plant and drug import/export offences), but not a prescribed act.]
includes arranging for another officer (as defined for the relevant section) or a person with the necessary experience, such as an expert, to examine the goods. This definition could also include a person found onboard the vessel or aircraft in question with appropriate knowledge of what is onboard. There is no explicit power to compel a person to assist in the search, therefore any assistance a person found onboard provided to a search, beyond answering questions and producing documents, would have to be consensual.

6.91 There is also a list within the section of examples of what may be done in examining goods, including opening any package, using a device such as an X-ray or ion scanner, testing or analysing, measuring or counting, using a dog, and reading either directly or electronically (scanning). This list is not meant to limit the generality of the power to examine goods. Not all of these examples would be relevant to the ADF but provide a useful indication of the comprehensive nature of the power.

Seizure of narcotics - Customs Act

6.92 Section 185(2)(e) of the Customs Act confers the power to seize without warrant any narcotic goods found on a ship or aircraft after a boarding. The Migration Act does not mirror this power. This provision goes further than international law permits on this point although, given international attitudes to narcotics traffic, the likelihood of any international protest in response would be remote in a genuine case. The Customs Act defines ‘narcotic goods’ as those goods that consist of a narcotic substance, as defined in Schedule VI to the Act or by the regulations.

POWERS OVER VESSELS

6.93 The border protection power to move ships derives from Migration Act section 245F(8) and Customs Act section 185(3). An officer may detain and bring a ship or aircraft, or cause it to be brought, ‘to a port or other place that he or she considers appropriate’. Where there is an order to move or destroy it, the ship or aircraft need not be brought to a port or other place. In the case of a foreign ship that is in Australia, an officer may detain a foreign ship or aircraft, upon reasonable suspicion that it has been, or is, involved in a contravention of the Act, either in or outside Australia. In the case of a foreign ship that is outside Australia, the officer may detain such ships only

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8 Or, for Customs, a prescribed act or section 72.13 or Division 307 of the Criminal Code.
where the contravention of the Act\(^9\) is in Australia, or, notably, will be in Australia.

6.94 In the case of Australian ships, the power applies to past, present and intended contraventions, in or outside of Australia.\(^10\) It does not limit where a ship or aircraft may be brought.

6.95 The contiguous zone. It is consistent with the UNCLOS for Australia to detain vessels in the contiguous zone for the purpose of steering them away and releasing them again upon leaving the zone.

6.96 Detaining, as opposed to arresting, a vessel for the purpose of bringing it ashore is not consistent though. Such an act would be constructive arrest and contrary to the purpose of the contiguous zone. However the situation under Australian domestic law is different in that it does permit apprehension of such vessels in the contiguous zone for the purpose of bringing the vessel to the migration zone for immigration processing. In the case of SIEV, the state of their seaworthiness may be sufficient to bring them in any event.

6.97 Such vessels in recent years have apparently sought detection by Australian ships in order to be brought in by them so the issue may not be significant. There have been earlier instances though of SIEV seeking to evade detection in order to land on the coast and disperse their human cargo into the general population. There may be an operational desire to apprehend such vessels in the contiguous zone in case they subsequently evaded officials and managed to reach the shore.

6.98 Destruction. There are provisions for moving and destroying a ship where an officer has detained it upon suspicion that it is, or has been, involved in a contravention in Australia. It does not apply to prospective offences. The power is not available directly to members of the ADF. The Secretary of the Department of Immigration or the CEO of ACBPC must order the movement or destruction, although a member of the ADF may put the order into effect. To make an order under section 245H of the *Migration Act* or section 185B of the *Customs Act* the Secretary, CEO or delegate must believe that the ship is unseaworthy, poses a serious risk to navigation, quarantine, safety or public health, or poses a serious risk of damage to

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\(^9\) Or, for Customs, a prescribed act or section 72.13 or Division 307 of the *Criminal Code*; or an EEZ related prescribed act.

\(^{10}\) For Customs, the contravention can be of any act.
property or the environment. Additionally, the CEO of ACBPC may direct destruction, or movement and destruction, upon reasonable grounds for believing that the vessel is in such poor condition the cost of custody or maintenance by the Commonwealth would be likely to be greater than its value.
CHAPTER 7
ENVIRONMENT PROTECTION

Executive Summary

- The Australian Defence Force (ADF) has limited enforcement powers under the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act) to protect the marine environment of Australia’s offshore maritime zones.

- There is limited power for persons in command of Commonwealth ships or aircraft under section 403, EPBC Act.

THE ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT 1999

Introduction

7.1 The objectives of the EPBC Act are to:

a. provide for the protection of the environment, especially those aspects of the environment which are matters of national environmental significance;

b. promote ecologically sustainable development through the conservation and sustainable use of natural resources;

c. promote the conservation of biodiversity;

d. promote a co-operative approach to the protection and management of the environment involving Government, the community, and landholders and indigenous peoples;

e. assist in the co-operative implementation of Australia’s international environmental responsibilities;

f. recognise the role of indigenous people in the conservation and ecologically sustainable use of Australia’s biodiversity; and
g. promote the use of indigenous peoples’ knowledge of biodiversity with the involvement of, and in co-operation with, the owners of the knowledge.

7.2 **Australian Defence Force empowerment.** Unless otherwise appointed as an ‘authorised officer’ under the Act, there is limited power for persons in command of Commonwealth ships or aircraft under section 403 EPBC Act, which concerns the ‘Boarding of vessels, etc’. Members of the ADF are not automatically ‘authorised officers’ under the Act. The range of enforcement powers available to authorised officers is considerably greater and comparable with those of officers under the *Fisheries Management Act 1991* (FMA).

7.3 Members of the Australian Federal Police (AFP) and Australian Customs and Border Protection Service officers are ex-officio authorised officers under the *EPBC Act*. The relevant Minister for the Environment may also appoint certain other persons in writing as an ‘authorised officer’; these appointments could include members of the ADF.

7.4 There are proposed changes to the *Customs Regulations 1926* to make the *EPBC Act* a prescribed Act under the *Customs Act 1901*. This would mean that ADF members could use *Customs Act* powers in respect of *EPBC Act* offences. This would substantially broaden the powers available to ADF members for environmental matters.

7.5 **Geographical extent and exceptions.** The *EPBC Act* applies to vessels or aircraft that are within areas of ‘Australian jurisdiction’.

A **Australian jurisdiction:**

*means the land, waters, seabed and airspace in, under or above:*

(a) *Australia; or*

(b) *an external territory; or*

(c) *the exclusive economic zone; or*

(d) *the continental shelf.*

**Section 5(5), EPBC Act**
Certain provisions of the *EPBC Act* may also apply beyond the outer limit of the continental shelf to Australian citizens, residents, corporations, aircraft and vessels (and their crews), as well as the Commonwealth and its agencies.

### 7.6 Intercepting aircraft

Section 403(4) of the *EPBC Act* grants a power to persons in command of Commonwealth ships and aircraft to ‘require the person in charge of the aircraft to which the *EPBC Act* applies to bring the aircraft to the nearest airport in Australia or an external territory to which it is safe and practicable to bring the aircraft’. The airport does not have to be proclaimed, as it does for border protection, but there is no provision for using just a landing field. The person in command of the Commonwealth ship or aircraft must suspect on reasonable grounds that the aircraft has been used, or otherwise involved, in an offence against the *EPBC Act* or regulations and the requirement must be transmitted by means of an international signal code or other internationally recognised means of communication with an aircraft. The power may only be exercised against foreign aircraft when they are in the Australian jurisdiction (as described above), but may be exercised against an Australian aircraft whether it is in the Australian jurisdiction or not.

### 7.7 Intercepting vessels

There is no specific power under the *EPBC Act* for ADF members to board a vessel under section 403 of the *EPBC Act*. Boarding powers have to be exercised by authorised officers rather than persons in command of Commonwealth ships and aircraft. Persons in command of Commonwealth ships and aircraft have the limited power of bringing a vessel to the nearest port in Australia or an Australian external territory to which it is safe and practicable to bring the vessel, where they suspect on reasonable grounds that it has been used in the commission of an offence against the *EPBC Act* or regulations.

Alternatively, the commander may require the person in charge of the vessel to bring that vessel to such a port ‘by means of an international signal code or other internationally recognised means of communication with a vessel’. The commander of the Commonwealth ship would have to form an independent suspicion of the use of the vessel from that of an authorised officer. The power may only be exercised against foreign vessels within the Australian jurisdiction (as described above), but may be exercised against an Australian vessel whether or not it is in the Australian jurisdiction. It is important to note that the use of the vessel must have already occurred, that is the vessel ‘has been used or otherwise involved in the commission of an offence’. There is no power to act in respect of offences that may be about to be committed.
7.9 Power of arrest. It would be possible to use the power of arrest under section 3Z of the *Crimes Act 1914* for offences under the *EPBC Act*.

Power of authorised officers

7.10 Powers of boarding of authorised officers. If an authorised officer suspects on reasonable grounds that there is in, or on, a vehicle, vessel, aircraft or platform, to which section 403 applies, any evidential material in relation to an offence against the *EPBC Act* or regulations, the authorised officer may, with such assistance as he or she thinks necessary:

(a) board the vehicle, vessel, aircraft or platform at any reasonable time for the purpose of exercising, and may exercise, the powers of an authorised officer under section 406; and

(b) in the case of a vehicle, vessel or aircraft—stop and detain the vehicle, vessel or aircraft for that purpose.

Section 403(2) EPBC Act

7.11 Powers of investigation of authorised officers. An authorised officer who boards a vessel, aircraft or platform for the purpose of exercising his or her powers under section 403 may require a person on the vessel, aircraft or platform to:

(a) answer a question asked by the authorised officer; or

(b) give the authorised officer information requested by the authorised officer; or

(c) produce to the authorised officer records or documents kept on the vehicle, vessel, aircraft or platform.

Section 403(2A) EPBC Act

7.12 An authorised officer may also:

a. inspect and search the vessel, aircraft or platform; and
b. take photographs (including a video recording), and make sketches, of any substance or thing on the vessel aircraft or platform; and

c. inspect, take extracts from, and make copies of, any document that is, or that the authorised officer suspects on reasonable grounds is, evidential material in relation to an offence against the *EPBC Act* or the regulations, in relation to a contravention of a civil penalty provision or in relation to both; and

d. in the case of an authorised officer who boards a vessel under section 403, search, without warrant:

(1) a person on the vessel; and

(2) the person’s clothing;

e. to find out whether there is hidden on the person or in the clothing:

(1) an eligible seizable item, which means anything that would present a danger to a person or that could be used to assist a person to escape from lawful custody; or

(2) a thing that may be evidential material in relation to an offence against the *EPBC Act* or the regulations; and

f. inspect, and take samples of, any other evidential material in relation to an offence against the *EPBC Act* or the regulations; and

g. take measurements of, and conduct tests on, the vessel, aircraft or platform or any substance or thing on the vessel, aircraft or platform; and

h. exercise powers of seizure; and

i. take onto the vessel, aircraft or platform any equipment or material necessary for the purpose of exercising any of the above powers.

7.13 For the purpose of exercising these powers, section 406(3) of the *EPBC Act* allows an authorised officer to break open any hold or
compartment, or any other container or other receptacle (including any place that could be used as a receptacle), on a vessel, aircraft or platform.

**Relevant offences under the Environment Protection and Biodiversity Conservation Act**

**7.14** The offences of most relevance to ADF members in command of Commonwealth vessels and aircraft likely to be involved in assisting in enforcement operations under the *EPBC Act* are those under Part 13 related to the killing, injuring or interfering with cetaceans as well as the killing, injuring, taking or trading of listed marine species. Listed marine species include sea snakes, eared seals, true seals, crocodiles, dugongs, marine turtles, leatherback turtles, seahorses, sea-dragons and pipefish, ghost pipefish and birds that occur naturally in Commonwealth marine areas. It is also an offence under section 239 of the *EPBC Act* for a master of a foreign whaling vessel to bring the vessel into a port in Australia or an external territory of Australia without the written permission of the Minister for the Environment.

**7.15 Protection from liability.** Section 498A(1) of the *EPBC Act* provides protection for actions taken under Part 17 of the Act, dealing with enforcement, by authorised officers. This protection does not extend to persons in command of Commonwealth ships or aircraft (unless they are also authorised officers). There is some protection however, where members of the ADF assist an authorised officer or ranger under section 498A(2).

*This section provides:*

‘A person requested by an authorised officer or ranger to assist the officer or ranger in the exercise or purported exercise of any power conferred on the officer or ranger by this Part, or by regulations made for the purposes of this Part or Division 5 of Part 15, is not liable to any proceedings relating to an act done, or omitted to be done, in good faith for the purpose of assisting the officer or ranger.’

**Section 498A(2), EPBC Act**

**7.16** The phrase ‘not liable to any proceedings’ would suggest that a person could not be made a party to either a criminal or civil action. The only apparent limitation to this protection is that the person assisting must act in good faith.
7.17 Section 403(5B) also states that a restraint on liberty of a person on a vessel as a result of an authorised officer exercising powers over that vessel is not unlawful. No criminal or civil proceedings can be brought in any court, except the High Court, against the authorised officer or any person assisting that officer or the Commonwealth in respect of the restraint on liberty. This helps to clarify the situation where a vessel is detained or moved by order of an officer but the people on the vessel are not also detained.
CHAPTER 8

HOT PURSUIT AND FIRING AT OR INTO VESSELS AND AIRCRAFT

Executive Summary

- Article 111 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) recognises the right of hot pursuit and specifies conditions that must be met when exercising the right.

- There is no provision for hot pursuit under the Offshore Petroleum and Greenhouse Gas Storage Act 2006.

- The UNCLOS is silent on the question of firing at or into a vessel. This issue is in the realm of customary international law.

HOT PURSUIT

International law

8.1 Article 111 of the UNCLOS recognises the right of hot pursuit and specifies conditions that must be met when exercising the right. In essence, ships or aircraft of the coastal State may pursue a foreign ship from the coastal State’s maritime zones onto the high seas where there is good reason to believe the foreign ship has violated the laws and regulations of the coastal State and has failed to comply with a request to stop. The right of hot pursuit is an exception to the freedom of the high seas, which can dramatically extend the jurisdictional reach of the coastal State. The right ceases when the ship enters the territorial sea of its own State or of a third State.

8.2 Hot pursuit has customary international law precedents although it was probably not settled in international law until the UNCLOS. Customary international law is still relevant to hot pursuit as Article 111 does not deal with all aspects of hot pursuit. Further, the international law on hot pursuit could evolve to accommodate changes in technology and the development of multinational hot pursuit.

8.3 Requirements under Article 111 of the United Nations Convention on the Law of the Sea. Article 111 specifies a number of detailed requirements to validly exercise the right of hot pursuit. There are seven key points to take from that Article:
a. The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have ‘good reason to believe’ that the ship has violated the laws and regulations of that State.

b. Hot pursuit must be commenced when the foreign ship or one of its boats\(^1\) is within:

1. the internal waters, archipelagic waters or territorial sea of the pursuing State, where the potential violation is of one of the laws and regulations of that State applicable in the maritime zone concerned;

2. the contiguous zone, if there has been a violation of the rights for the protection of which the zone was established (for example, to prevent or punish a violation of customs, fiscal, immigration or sanitary laws or regulations within the territorial sea); and

3. the exclusive economic zone (EEZ) or over the continental shelf, for violations of the coastal State’s laws applicable in the EEZ or on the continental shelf (including laws relating to safety zones around continental shelf installations).

c. Hot pursuit is not deemed to have begun until the pursuing ship has satisfied itself by any practicable means that the ship pursued or one of its boats is within (as the case may be) the territorial sea, the contiguous zone or the EEZ, or above the continental shelf.

d. The 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 ship.

e. Hot pursuit may only be continued outside the maritime zone in which it commenced (the territorial sea, the contiguous zone or the EEZ) if the pursuit has not been interrupted.

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\(^1\) This phrase accommodates the possibility that a ‘mothership’ may wait outside a maritime zone, but send out smaller vessels which engage in illicit activities within a maritime zone.
f. The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own State or of a third State.

g. The right of hot pursuit may be exercised only by warships or military aircraft or by other ships/aircraft clearly marked and identifiable as being on Government service and so authorised.

8.4 These requirements seek to ensure accurate identification and also balance the right of hot pursuit with the freedom of the high seas. Article 111(1) makes clear that the pursuing ship or aircraft does not have to be within the coastal State’s maritime zones when the pursuit commences.

8.5 Article 111(6) allows for the handover of a hot pursuit from an aircraft to a ship or another aircraft. It does not specifically refer to ships handing over to other ships or aircraft, this must be inferred. Prior to the UNCLOS, there was customary international law precedent for handovers between ships and in the UNCLOS there is no explicit rejection of such precedent.

8.6 **Signal to stop.** With regards to the necessity to give a signal to stop, the UNCLOS states:

> The 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 ship.

*Article 111(4), UNCLOS*

8.7 An opinion of the International Law Commission which has assumed the status of customary international law holds:

> To prevent abuse, the Commission declined to admit orders given by wireless, as these could be given at any distance.

*1956 Year Book of the International Law Commission, page 285*

8.8 The use of radio as a means to make the order to stop was unanimously rejected in the conferences and preparatory documents for the 1958 Convention on the High Seas. However international law on this point could evolve. Given the age of the International Law Commission opinion and its pre-UNCLOS status, it may be possible in time to argue that
customary international law had developed through State practice to allow remote means of conveying a request to stop. It is too early to make this assessment though as the lawfulness of a request to stop made by radio was raised in the International Tribunal for the Law of the Sea (ITLOS) in the VOLGA case \(^2\) by Russia, with regard to a pursuit by Her Majesty’s Australian Ship CANBERRA in February 2002. The court declined to deal with it as the case dealt only with prompt release, not with the merits of the apprehension.

8.9 The SAIGA case. In 1999, ITLOS considered some of these requirements in the merchant vessel SAIGA case.\(^3\) It did not directly consider whether a radio message alone could be a sufficient signal. It did find that the requirements of Article 111 were cumulative, ‘each of them has to be satisfied for the pursuit to be legitimate under the Convention’. It made clear that a visual or auditory signal to stop must be given at the commencement of the pursuit for any subsequent action to be valid, and that it must be received by those onboard the subject vessel.

8.10 In the case of the SAIGA, the Guinean patrol boat’s signal to stop given by siren and blue revolving lights when it came into visual and hearing range was not sufficient for two reasons. It was not given at the commencement of the pursuit and was not heard or seen by those onboard the SAIGA. The case makes the point that, in international law, a signal to stop is not valid if the master or crew do not hear or see it.

Hot pursuit under Australian legislation

8.11 The following acts each provide for a right of hot pursuit:

- a. *Customs Act 1901*
- b. *Migration Act 1958*
- c. *Torres Strait Fisheries Act 1984 (TSFA)*; and
- d. *Fisheries Management Act 1991 (FMA)*.


\(^3\) The “MV Saiga” (No.2) Case International Tribunal for the Law of the Sea, Year 1999, Judgment, 1 July 1999 (Saint Vincent and the Grenadines v.Guinea).
8.12 Additionally, section 457 of the *Environmental Protection and Biodiversity Conservation Act 1999* provides for a power to pursue which is available to the Australian Defence Force (ADF) if they are appointed as “authorised officers”. Most of the legislation that empowers the ADF to conduct hot pursuit makes it an offence to fail to comply with a request to board a vessel (for example, see section 108(1)(a) of the FMA or section 184A(12) of the *Customs Act*).

8.13 **Customs Act.** The *Customs Act* permits pursuit to enforce the provisions of that Act as well as the provisions of Division 307 of the Commonwealth *Criminal Code* (which concerns drug and plant import and export offences), the *Quarantine Act 1908*, the *Migration Act*, and the FMA. These provisions do not apply to Australian ships or to ships without nationality. This is somewhat more restrictive than the FMA. Section 184B of the *Customs Act* confers upon the commander of a Commonwealth ship or aircraft (the commander) the power to chase a foreign ship to any place outside the territorial sea of a foreign country. Hot pursuit may only commence where:

a. a commander of a Commonwealth ship or aircraft has given a visual or auditory signal to the foreign ship to stop, or bring the ship to a position to enable boarding;

b. the signal was given in such a way that it could be seen or heard by the foreign ship, and

c. at the time of the signal, the foreign ship was in a position that it could have been boarded under the section 184A powers, regardless of the position of the Commonwealth ship or aircraft.

8.14 The Commonwealth ship or aircraft that conducts the chase does not have to be the one that gave the signal. A visual or auditory signal is still made even if no one on board the foreign ship saw, heard or understood the signal. A commander of a Commonwealth ship or aircraft may also chase a foreign ship if it could have been boarded under the mothership provisions (in relation to either offences in the EEZ or Australia). Additionally, section 184B(3) of the *Customs Act* does not distinguish between motherships and the ships they are supporting within the relevant zone. Overall, in this respect, the *Customs Act* provisions are more consistent with UNCLOS Article 111 and the SAIGA case than the other hot pursuit provisions in Australian legislation.

8.15 **Migration Act.** Section 245C of the *Migration Act* characterises hot pursuit as the power to chase foreign ships for boarding and only permits hot
pursuit to enforce the provisions of that Act. These provisions do not apply to Australian ships or to ships without nationality, except under section 245G which allows for boarding of ships without nationality on the high seas.

8.16 Section 245B of the Migration Act confers upon the commander of a Commonwealth ship or aircraft the power to request to board a ship. Hot pursuit may only be commenced where the master of a ship has not complied with such a request. The commander may then chase that ship to any place outside the territorial sea of another country. The ship or aircraft that conducts the chase does not have to be the one that made the request.

8.17 Under section 245B of the Migration Act the commander may use ‘any reasonable means’ to make a request and the request is still made if there is no master on the ship or if the master did not receive or understand the request. The commander may use any reasonable means to make the request. The request is still deemed to be made if the master did not receive or understand the request or there was no master to receive the request. The commander may also pursue a mothership without first making a request to board if a request could have been made under the mothership provisions. This allows for the situation where a mothership flees before a request can be made. Presumably this could occur when officers apprehend the vessel it is supporting thus warning the mothership to flee before a request could be made.

8.18 Fisheries Management Act. Section 87 of the FMA allows for an officer to exercise powers conferred by section 84 of the FMA outside the Australian Fishing Zone (AFZ) after hot pursuit of a boat from within the AFZ, but not within the territorial sea of another country. This is generally consistent with UNCLOS Article 111. There are no express provisions in the FMA concerning the requirements of an officer when requesting to board a vessel. Domestically it may be easier to prosecute a charge under the FMA of failing to comply with a request to board because the requirements of a valid request are less detailed, although they should be interpreted consistently with international law.

8.19 Interruption and termination. Article 111(1) of the UNCLOS provides simply that the right of hot pursuit continues as long as the ‘pursuit has not been interrupted’. Under section 87 of the FMA, the right of hot pursuit also ceases when the pursuit is terminated or interrupted. This would suggest circumstances where the officer chooses for whatever reason to end the pursuit, when the officer becomes uncertain of the target or when the officer is unable to continue the pursuit. The FMA however allows for the pursuit to continue even if the pursuing officer or officers lose sight of the person or boat, including from radar screens and other sensing devices. The
Customs Act and Migration Act provisions also provide that a chase may continue:

…even if all of the Commonwealth ships and Commonwealth aircraft involved in the chase lose sight of the chased ship or lose trace of it from radar or other sensing devices.

Section 245C(4) Migration Act and section 184B(4) Customs Act

8.20 Some ambiguity remains in both the FMA and the border protection provisions as to when lost contact is merely temporary as opposed to interrupted. This is perhaps inevitable if the law is to take account of environmental effects. It gives some room for practical difficulties such as the target entering a rain squall or fog, or temporary unserviceability of the officers’ sensing equipment. Such situations are not necessarily an interruption of the chase. Factors that would be relevant to distinguishing loss of contact from interruption should include the intention of the commander to continue the pursuit, rather than engage in another task, the extent of the loss of contact, and, in the circumstances, whether this could raise a reasonable doubt as to the positive identification of the fleeing vessel. Some interpretation will be necessary in order to determine when a pursuit has been interrupted instead of the trace being temporarily lost.

Hot pursuit into foreign territorial seas and the France/Australia maritime co-operation Treaty

8.21 While Australian domestic legislation may expressly limit hot pursuit to waters outside of foreign territorial seas (for example, section 184B Customs Act or section 87 FMA), it may be possible in international law to continue a hot pursuit into foreign territorial seas of a third State by agreement or arrangement with that particular State. For example, the Treaty between the Government of Australia and the Government of the French Republic on cooperation in the maritime areas adjacent to the French Southern and Antarctic Territories, Heard Island and the McDonald Islands which states:
8.22

In cases of hot pursuit commenced in accordance with Article 111 of the Convention, in relation to the Area of Cooperation, including hot pursuit commenced during activities pursuant to Article 1(5) and Annex III, such hot pursuit by a vessel or other craft authorised by one of the Parties may continue through the territorial sea of the other Party, provided that the other Party is informed, and without taking physical law enforcement or other coercive action against the vessel pursued during this phase of the hot pursuit.

Article 4 France/Australia Maritime Co-operation Treaty

8.23 This allows for a pursuit to continue through the French territorial sea provided that no other apprehension action is taken by the ADF. Such a pursuit would also have to meet the stricter requirements of Article 111(4) for visual or auditory signals to be made at the commencement, as opposed to the less prescriptive standard in Australian domestic legislation (such as section 87 of the FMA, section 245C of the Migration Act and section 457 of the Environment Protection and Biodiversity Conservation Act) other than the Customs Act. Article 4 of the treaty permits a party to continue a hot pursuit, closing off an avenue for the pursued vessel to break the continuity of the hot pursuit and preventing the legitimate apprehension by the pursuing party. If the target vessel stopped, then the ADF could not continue the pursuit and it would be a matter for the French authorities to take any further enforcement action.

HISTORICAL EXAMPLE - THE SOUTH TOMI

Some interesting questions as to multinational hot pursuit arose out of the pursuit (see figure 8-1 below) of the SOUTH TOMI (see figure 8-2 below) in April 2001. The Australian Fisheries Management Agency vessel SOUTHERN SUPPORTER detected the Togolese registered SOUTH TOMI fishing illegally in the Australian Fishing Zone around the Heard and Macdonald Islands. It ordered the master of the SOUTH TOMI to take his boat to Fremantle.

After initially complying and before leaving the exclusive economic zone (EEZ), the SOUTH TOMI then altered course and made for Africa, skirting the French EEZ around Kerguelen Island. The SOUTHERN SUPPORTER pursued the SOUTH TOMI to waters south of Cape Town, South Africa.
HISTORICAL EXAMPLE (CONT) - THE SOUTH TOMI

Two South African warships intercepted the vessel, while the SOUTHERN SUPPORTER called upon it to stop. An Australian Defence Force boarding party in a South African rigid hull inflatable boat then left from a South African warship and took control of SOUTH TOMI.

In terms of the Fisheries Management Agency this presented no difficulty, as described above, as the handover took place between two officers. As a matter of international law, the 1982 United Nation Convention on the Law of the Sea is silent on such co-operation, only requiring that the intercepting vessels be clearly marked as being on Government service. It is an open question then as to how an international tribunal would treat multinational hot pursuit.

Figure 8–1: The pursuit of SOUTH TOMI
Aircraft

8.24 There is no equivalent express right recognised to pursue aircraft. Apart from piracy and by agreement between sovereign States, there appear to be no provisions that would allow for exercise of enforcement jurisdiction over aircraft in international airspace. Conceivably there could also only be two ways of ending a pursuit of an aircraft without using force against it. The fleeing aircraft would either run out of fuel or find sanctuary in the national airspace of a foreign country.

FIRING AT OR INTO A VESSEL

8.25 A general guideline as to the extent of force to be used in maritime law enforcement against foreign vessels is:
8.26 Whilst the language in Article 225 is prohibitive it infers measures including force by expressly limiting such potentially damaging powers of enforcement. The UNCLOS is silent on the question of firing at or into a vessel though, which is in the realm of customary international law. There are two significant cases referred to most by writers in this field, the I'M ALONE case and the RED CRUSADER case.

8.27 There are other cases worth noting but it is these two that the International Tribunal on the Law of the Sea (ITLOS) considered in the SAIGA case, the most recent and authoritative consideration of the question. Currently, international law is unclear on the question of the level of force that may be used if a merchant vessel does not co-operate with a warship’s exercise of the right of visit and search on the high seas.

8.28 The I'M ALONE case involved the pursuit of a British registered schooner from Canada by two United States (US) Coastguard vessels in 1929. After a long chase the US ships fired into I'M ALONE and sank her with loss of life. The case raised a number of questions, including the right of hot pursuit. On the use of force however, a Joint British and American Commission found that the use of force had been excessive. It was acceptable to fire into a vessel to compel it to stop. If it sank as an incidental result then this was also acceptable. It was not acceptable though to fire into the vessel for the purpose of sinking it.

…the intentional sinking of the vessel… could not be justified by any principle of international law.

Claim of the British Ship “I’m Alone” v United States Joint Interim and Final Reports of the Commissioners, 1933 and 1935 29 American Journal of International Law 326 (1935), page 330

8.29 The RED CRUSADER case involved the pursuit of a British trawler by a Danish fisheries vessel, the NEILS EBBESEN, in 1961. The RED
CRUSADER had two members of the Danish vessel’s crew onboard when she fled. The Danish vessel directed machine gun and 40 millimetre calibre gun fire into the mast, radar scanner and lights, then the stern, of the RED CRUSADER, after the initial use of warning shots from the ship’s 127 millimetre calibre gun. An Anglo-Danish Commission of Enquiry found that the Danish vessel exceeded legitimate use of armed force on two counts:

a. firing without warning of solid [as opposed to explosive] gunshot; and

b. creating danger to human life on board the Red Crusader without proved necessity, by the effective firing at the Red Crusader.

The Commission is of the opinion that other means should have been attempted, which if duly persisted in, might have finally persuaded Skipper Wood to stop and revert to the normal procedure.

35 International Law Reports 485 (1962), pages 497-499

8.30 ITLOS came to consider these matters in the case of the SAIGA. In that case, the Guinean patrol boat opened fire on the St Vincent and the Grenadines registered tanker upon suspicion that it was bunkering fishing vessels contrary to Guinean customs law. The court found that the Guinean patrol boat fired without warning. The court considered a number of questions but particularly considered the use of force to apprehend vessels at sea. It considered the I'M ALONE and RED CRUSADER cases as well as the standard established in the United Nations Fish Stocks Agreement (FSA). The essence of the court’s decision on this point is that:

It is only after appropriate actions fail that the pursuing vessel may, as a last resort, use force. Even then, the appropriate warning must be issued to the ship and all efforts should be made to ensure that life is not endangered.

SAIGA, paragraph 156

8.31 Article 73(3) of the UNCLOS also specifies that States shall not impose custodial penalties for fishing offences so it is unlikely that use of potentially lethal force, in order to merely stop a vessel to board it, would be consistent with international law.
8.32 The requirements for firing at or into vessels may be considered to be as follows:

   a. The action must be a last resort. It must be absolutely necessary evidenced by patiently exhausting all less forceful means available, including warning shots, unless an urgent threat to life demands otherwise.

   b. The action must follow an explicit warning that shots are to be fired into the vessel.

   c. That all efforts are made to ensure that life is not endangered. Any appreciable risk to life would render the use of direct fire unlawful. A death would not necessarily render the action unlawful in itself provided that the risk of death from direct fire was extremely unlikely and mitigated against.

8.33 Ensuring that life is not endangered however could allow for the use of potentially lethal force where there was a concomitant risk to life. If there was a reasonable belief that failing to stop a vessel could in itself lead to endangering life, then it would appear permissible to increase the risk of death from direct fire sufficient to reduce the danger to life. The requirement for necessity would have to be satisfied. This would more obviously apply in the case of self defence (SD) and the defence of others. It may also apply in the course of enforcing the law where the threat to life may not be as immediate as in the case of SD, but is nonetheless highly likely. This might be the case in apprehending suspects that have already taken life in fleeing, where they are sufficiently well armed to resist a boarding party and if not apprehended could be reasonably expected to take further life. This might be a case of sudden and extraordinary emergency in domestic law.

**Fisheries Management Act**

8.34 The FMA permits an officer to fire at or into a boat to stop it in order to board it as follows:
(1) An officer may:

(aa) for the purposes of boarding a boat that is at a place where the officer may board it under paragraph (a) or (b):

(i) require the master to stop the boat at such a place to allow the officer to board it; and

(ii) if the master does not stop the boat as required and the boat is not an Australian-flagged boat, use any reasonable means consistent with international law to stop the boat (including firing at or into the boat after firing a warning shot, and using a device to prevent or impede use of the system for propelling the boat);

Section 84(1)(aa), FMA

8.35 The TSFA section 42(1)(hb) has a similar provision which permits use of 'any reasonable means consistent with international law to stop the boat' as long as the boat is not Australian. It stops short of mentioning firing at or into so, when compared to the legislation discussed here, presumably does not authorise firing at or into. The authority to fire at or into a boat authorises the use of lower levels of force as well as using alternative means such as propeller entrapment devices. This power does not extend to Australian flagged boats or to boats without nationality on the high seas.

Border protection

8.36 Under section 245C of the Migration Act and section 184B(6) of the Customs Act a Commonwealth commander may chase a foreign ship, other than a ship without nationality, which does not comply with a request to board. The commander may:
... use any reasonable means consistent with international law to enable boarding of the chased ship, including:

(a) using reasonable and necessary force;

(b) where necessary and after firing a gun as a signal, firing at or into the chased ship to disable it or compel it to be brought to for boarding; and

(c) where necessary, using a device designed to stop or impede a ship.

Section 245C Migration Act and section 184B(6), Customs Act

8.37 Notably this power also applies to Australian ships, in contrast to the FMA. A commander may only exercise this power outside foreign territorial seas. The use of force, and the use of direct gunfire in particular, must be consistent with international law. There are no constraints in the UNCLOS, as in the law regarding fisheries, on the penalty for breaches of coastal State law regarding migration, customs and quarantine. Section 184B(6)(c) of the Customs Act also allows for the use of a device to stop or impede a ship. Authority for the use of alternative means or lower levels of force can only be implicit in the Migration Act.

Common aspects of the Fisheries Management Act and border protection provisions

8.38 A notable aspect of the provisions of both the FMA and the border protection provisions for firing at or into vessels to stop them for boarding is that the power is only for the purpose of stopping the vessel. It does not authorise any level of harm to a person. The phrase found in the relevant section, ‘any reasonable means consistent with international law’, imports all of the international law issues discussed above.

Legislation that does not authorise firing at or into vessels

8.39 There is no specific authorisation for the ADF to fire at or into vessels in the TSFA, the Offshore Petroleum and Greenhouse Gas Storage Act, the Environment Protection and Biodiversity Conservation Act or in the Crimes Act for piracy. Without an explicit authorisation there is no power to fire at or into a vessel to compel it to stop (except possibly with respect to piracy given its status as a crime of universal jurisdiction in which case the executive
power may extend to authorise such action). Ordinary criminal law standards would apply. This would mean that any force likely to cause death could only be that necessary and reasonable for SD or the defence of others where life is threatened.

Aircraft

8.40 Article 2 of the UNCLOS makes clear that airspace over the territorial sea is part of the coastal State’s sovereignty and therefore is national, rather than international, airspace. Unlike ships, aircraft have no right of innocent passage in another State’s airspace over territorial seas. A plain reading of Article 17 shows that the UNCLOS is silent on whether aircraft have a right of innocent passage, from which it can be inferred not to exist. Article 19 states that launching, landing or taking aboard any aircraft is not innocent passage (but does not expressly prohibit overflight).

8.41 Australia, as the coastal State, is therefore not fettered by the UNCLOS as to how it regulates overflight of the territorial sea in the same way as it is for vessels transiting it. The Convention on International Civil Aviation (Chicago Convention) however regulates overflight by civilian aircraft, and the 1984 Protocol relating to an Amendment to the Convention on International Civil Aviation sets requirements for intercepts in Article 3bis (a) as follows:

...every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of the aircraft must not be endangered. This provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations.

Article 3bis Convention on International Civil Aviation

8.42 The International Civil Aviation Organisation’s ‘Rules of the Air’ set out detailed rules for the conduct of intercepts.4 There is no current Australian domestic legislation other than the Defence Act 1903 (Part IIIAAA) that authorises firing at or into aircraft.

4 Annex 2 to the Chicago Convention, see specifically chapters 5, 6, 8 and 9.
CHAPTER 9

OFFSHORE CALL OUT AND MARITIME TERRORISM

Executive summary

- The Commonwealth Government and its agencies are responsible for the operational response to maritime terrorism offshore, seaward of the territorial sea base line, including responsibility for oil and gas facilities and installations, areas and facilities of national security significance, and the interdiction of ships and aircraft.

- Border Protection Command (BPC) is the lead agency in responding to terrorist incidents offshore in Australia’s maritime zones and adjacent areas.

- The principal reference guides for terrorism related incidents are the National Counter Terrorism Handbook (NCTH) and the National Counter Terrorism Plan (NCTP) which provide the procedural basis for responding to acts of terrorism within Australia.

INTRODUCTION

9.1 Former Prime Minister John Howard announced in December 2004 that the Commonwealth was taking responsibility for counterterrorism (CT) response offshore from the states, and that consequently the Australian Defence Force (ADF) would have primary responsibility for this task. This is now reflected in the NCTH and NCTP.

9.2 The same announcement created BPC, then Joint Offshore Protection Command, as the lead agency for offshore CT. Effectively, BPC has taken over the role state and territory police formerly had in offshore CT. BPC also has responsibility for civil surveillance and law enforcement. This means that the one command has responsibility for the spectrum of offshore protection operations from a benign investigative fisheries boarding to possible high level action to destroy terrorist vessels or aircraft. Whilst the ADF can be involved in any type of operation along this spectrum, the ADF may be ‘called out’ when distinctly military levels of capability are required to respond to actual or potential violence.

9.3 Legal authority for counterterrorism offshore. There are two main sources of authority for offshore CT for the ADF, Part IIIAAA of the Defence
Act 1903 and the Executive Power under the Constitution. Part IIIAAA is a fairly comprehensive set of powers and procedures for call out both offshore and onshore, most recently amended in 2006. Section 51Y of this legislation though appears to preserve any authority to utilise the ADF that exists separately to the legislation. The Government has previously relied on the Executive Power as a source of authority for ADF CT operations, most recently in 2003. There has been no instance of any actual use of force in such an operation.

9.4 The Proliferation Security Initiative (PSI) relies on existing sources of legal authority. Australia is also likely to implement offshore enforcement powers in legislation for the 2005 Protocols to the Convention for Suppression of Unlawful Acts Against Navigation of 1988 (2005 SUA Protocols), which would provide another source of authority for this particular aspect of offshore CT. Call out under Part IIIAAA of the Defence Act, the Executive Power, the PSI and the 2005 SUA Protocols are discussed below.

PART IIIAAA OF THE DEFENCE ACT

Threshold of application

9.5 Under section 51A(1) of the Defence Act, the threshold for a call out in the offshore is relatively broadly defined, and is more permissive than that for a call out ashore. To paraphrase section 51AA(1), the Authorising Ministers must be satisfied that there is a threat in the Australian offshore to Commonwealth interests, whether those interests are in the offshore or not.

Those Ministers must also be satisfied that:

the Defence Force should be called out and the Chief of the Defence Force should be directed to utilise the Defence Force in the Australian offshore area to protect the Commonwealth interests against the threat.

Section 51AA(1), Defence Act

9.6 This second element states the requirement for military levels of capability to be necessary to counter the threat. The act does not define ‘Commonwealth interests’, nor the word ‘threat’. 
General requirements

9.7 Where the ADF is called out, an overall requirement under section 51 of the Defence Act is that the Chief of the Defence Force (CDF) utilise the ADF in such a manner as is reasonable and necessary, subject to the Minister for Defence (MINDEF) directions. At no stage may the CDF transfer command of the ADF, to any extent, to a state or territory or its police.

Geographical area of application of offshore provisions

9.8 Section 51(1) defines the ‘Australian offshore area’ to include Australian waters, the exclusive economic zone (EEZ) and the continental shelf, including for the external territories, as well as any other area prescribed by the regulations. The definition includes the airspace above these waters.

9.9 There are no areas prescribed by regulations at the time of writing. The EEZ and the continental shelf have the same definition as in the Seas and Submerged Lands Act 1973.

9.10 Section 51(1) also defines ‘Australian waters’ to mean the territorial sea and internal waters, except waters within the limits of the states and self-governing territories (the Northern Territory, the Australian Capital Territory and Norfolk Island). The waters of the Jervis Bay Territory would therefore be ‘Australian waters’. The limits of the states are the low water line and waters infra fauces terrae (‘within the neck of the land’), as well as the South Australian Gulfs. Section 14 of the Seas and Submerged Lands Act defines waters within the limits of states as any ‘bay, gulf, estuary, river, creek, inlet, port or harbour’ of a state. The territorial sea baseline is not therefore the outer limit of state jurisdiction for the purposes of any call out pursuant to Part IIIAAA.¹

9.11 Notably with regard to the South Australian Gulfs, the closing line is drawn across Cape Spencer so that the waters southward to Kangaroo Island, that is Investigator Strait and Backstairs Passage, are not within the limits of South Australia. The Commonwealth legislation pursuant to the Coastal Waters (State Powers) Act 1980 and the Coastal Waters (State Title) Act 1980, giving the states jurisdiction to ‘coastal waters’ seaward to three nautical miles, does not change the constitutional limits of the states.

¹ However this does not affect the formal agreed division of responsibility between state/territories and the Commonwealth for counterterrorism prevention and response – as found for instance in the national counterterrorism plan.
Requirement to have regard to Australia’s international obligations

9.12 There are specific requirements under Part IIIAAA for Authorising Ministers to have regard to Australia’s international obligations. Section 51SC imposes the requirement in relation to making a declaration or authorisation under Division 3A, which deals with ‘Powers in the Australian offshore area, etc’. Section 51ST(8) imposes the requirement in relation to authorisations under Division 3B, which deals with powers relating to aircraft in specified circumstances.

9.13 It is important to note that the requirement is only for MINDEF to have regard to Australia’s international obligations. It is does not state that MINDEF is strictly bound by such obligations. This provision may be particularly helpful where international obligations are uncertain or even conflicting. As long as MINDEF has had regard to those obligations, he or she will have acted lawfully for the purposes of Australian domestic law. The Act does not state that any member of the ADF particularly has to have regard to Australia’s international obligations. It should be assumed that MINDEF will receive advice on Australia’s international obligations and that the rules of engagement will also take them into account. This requirement does not apply to Division 2A relating to critical infrastructure, or Divisions 2 and 3 relating to call out ashore.

Call out procedure

9.14 Division 1 of Part IIIAAA sets out four main grounds for which a call out may occur as follows:

   a. for violence occurring within a state or territory that is beyond the capacity of the state or territory Government to deal with, where the Commonwealth initiates the call out to protect Commonwealth interests (section 51A);

   b. for violence occurring within a state or territory that is beyond the capacity of the state or territory Government to deal with, where the state or territory requests the call out to protect itself (sections 51B & 51 C);

   c. where there is a threat offshore to Commonwealth interests (section 51AA), in relation to which there may also be a direction with regard to state or territory internal waters; and

   d. that if specified circumstances were to arise domestic violence would occur in Australia that would affect Commonwealth interests, or, if they were to arise in the Australian offshore
area, there would be a threat to Commonwealth interests (section 51AB). ‘Specified circumstances’ are not defined other than that if they arose, it would be impractical for reasons of urgency for the Governor-General to make an order for the protection of Commonwealth interests under section 51A or section 51AA (as noted above). The most likely occasion would be an air threat to a particular place, object or event.

9.15 Governor-General’s order – Australian offshore area. Under section 57AB, for a call out in relation to the Australian offshore area, the three Authorising Ministers, the Prime Minister, MINDEF and the Attorney-General, must be satisfied that:

a. there is a threat in the Australian offshore area to Commonwealth interests, whether in the offshore or not;

b. the Defence Force should be utilised to protect against the threat; and

c. Division 2A, powers relating to critical infrastructure, or Division 3A, powers relating to the Australian offshore area, or both, should apply, together with Division 4 relating to the use of force and other procedural requirements.

9.16 If the Authorising Ministers are satisfied with the above, then the Governor-General may make a written order calling out the ADF and directing the CDF to utilise it to protect the Commonwealth interests from the threat (section 51AA(2)). Section 51AA(8) requires that the order must state the following:

a. the section it is made under;

b. the threat to which it relates, the Commonwealth interests threatened and the state or territory to which any internal waters direction applies (sections 51AA(4) and (5) - see below);

c. that Divisions 2A or 3A, or both, and Division 4 (which must always be ordered to apply), apply in relation to the order; and

d. that the order comes into force when it is made and that it ceases to be in force after a specified period (which cannot be more than 20 days, although this does not prevent a further order being made).
9.17 If the Authorising Ministers cease to be satisfied that all the requirements for a call out are met then the Governor-General must revoke the order (section 51AA(10)). CDF must also then cease utilising the ADF as required by the order (section 51AA(12)).

9.18 **Internal waters.** In relation to an offshore call out, the Authorising Ministers may additionally be satisfied that violence will occur in the internal waters of a state or territory, and the relevant Government will not be able protect Commonwealth interests from the violence, and the Defence Force should be utilised to protect those interests. If this is the case, then the Governor-General may include in the order a direction to CDF to utilise the ADF in the internal waters of the state or territory to protect the Commonwealth interests (sections 51AA(4) and (5)). There is no requirement for the state or territory to consent to the call out in its internal waters, although there is a requirement for an Authorising Minister to consult with the Government of the state or territory. Even then, the requirement to consult is not applicable if the Authorising Ministers are satisfied that urgency makes it impracticable to comply with it (sections 51AA(6) and (7)).

9.19 Notably, powers are available in internal waters when there is a call out ashore under sections 51A, 51B or 51C. These powers are not as great as those under an offshore call out though. Consequently, the NCTH states that, even when there is a call out ashore, a call out for the offshore should include an internal waters direction. This does not apply if the internal waters are not internal waters within the state or territory.

9.20 **Governor-General’s order – specified circumstances.** For a call out in relation to specified circumstances, the three Authorising Ministers, the Prime Minister, MINDEF and the Attorney-General, must be satisfied that:

a. if specified circumstances were to arise domestic violence would occur in Australia that would affect Commonwealth interests, or, if they were to arise in the Australian offshore area, there would be a threat to Commonwealth interests;

b. if specified circumstances arose, it would be impractical for reasons of urgency for the Governor-General to make an order for the protection of Commonwealth interests under section 51A (Commonwealth initiated call out in a state or territory) or section 51AA (the Australian offshore area);

c. if the specified circumstances arose in a state or territory, the state or territory Government could not protect the Commonwealth interests;
d. the CDF should be directed to utilise the ADF to protect the Commonwealth interests, and

e. Division 3B, powers in specified circumstances, should apply, together with Division 4, relating to the use of force and other procedural requirements.

9.21 If the Authorising Ministers are satisfied of the above, then the Governor-General may make a written order calling out the ADF and directing the CDF to utilise it to protect the Commonwealth interests from the threat if the specified circumstances arise (section 51AB(2)). Where the specified circumstances arise in a state or territory, there is no requirement for its Government to request a call out, although there is a requirement for an Authorising Minister to consult with the Government of the state or territory. (section 51AB(3)). Section 51AB(4) requires that the order must state the following:

a. that it is made under section 51AB;

b. the specified circumstances, any state or territory in which the violence may occur, the Commonwealth interests concerned, the violence concerned or the threat in the offshore area;

c. that Division 3B and Division 4 apply in relation to the order, and

d. that the order comes into force when it is made and that it ceases to be in force at the end of the period specified (although this does not prevent a further order being made).

9.22 If the Authorising Ministers cease to be satisfied that all the requirements for a call out are met then the Governor-General must revoke the order (section 51AB(6). CDF must also then cease utilising the ADF as required by the order (section 51AB(8)).

**Expedited call out**

9.23 Section 51CA states that the Prime Minister may make a call out order which the Governor-General could make if he or she is satisfied that, because a sudden and extraordinary emergency exists, it is not practicable for an order to be made by the Governor-General. The circumstances that would satisfy the requirements for a call out under the relevant section must exist. If the Prime Minister is unable to be contacted to make such an order, the other two Authorising Ministers, MINDEF and Attorney-General, may jointly make the order. If one of these ministers is unable to be contacted,
and the Prime Minister is also unable to be contacted, then the remaining minister may make the order together with the Deputy Prime Minister, the Minister for Foreign Affairs and Trade or the Treasurer. The Prime Minister, or the two Authorising Ministers if that is the case, may also include a direction with respect to state or territory internal waters in an expedited call out order provided that the circumstances exist that would satisfy the requirements for an internal waters direction under section 51AA(4).

9.24 Order need not be in writing. If the order is not in writing, the Prime Minister, or the other two Authorising Ministers as the case requires, and the CDF must each make a signed and witnessed written record of the order. As soon as practicable, the Prime Minister, or the two Authorising Ministers, must give that record to CDF, and CDF must give his or her record to the Prime Minister, or the two Authorising Ministers. A copy of each written record must also be given to the Governor-General as soon as practicable. Failure to give the records over as required does not invalidate the order, but the written records must be made and should be given over.

9.25 The same requirements apply to any authorisation or declaration (such as declaring an Offshore General Security Area (GSA) or authorising destruction of a vessel) made by a Minister, except that a copy of such a record need not be given to the Governor-General. In accordance with section 51CA(9), (10) and (11) of the Defence Act, the authorisation or declaration takes effect after the written record is signed and witnessed.

9.26 Effect of an expedited call out order. An expedited call out order must state that it is made under section 51CA but has the same effect as an ordinary call out order, and is revoked in the same way and for the same reasons, except that it can only be in force for five days.

Industrial disputes

9.27 For call out in relation to the Australian offshore area, there is a prohibition on calling out the Reserve Force in connection with an industrial dispute (section 51AA(3)).

Offshore general security areas

9.28 Under section 51SF, the Authorising Ministers may declare an Offshore GSA. It may be declared around a moving ship or aircraft or a class

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2 Offshore General Security Areas and Offshore Designated Areas need to be declared by Ministers – therefore the Prime Minister alone could not declare these.
of ships or aircraft (for example, cruise liners) and travel with the vessel or aircraft, or class of them, as their location changes. An Offshore GSA may be declared in state or territory internal waters if there is an internal waters direction in force (as discussed above). Offshore GSA can only apply over water, not land. The declaration must summarise the call out order under section 51AA and describe the Offshore GSA and its boundaries. The declaration must be:

a. notified to anyone in the Offshore GSA, to the extent that this is practicable;

b. published in the Commonwealth Government Gazette; and

c. forwarded within 24 hours to the presiding officer of each House of Parliament for tabling in that House, unless to do so would prejudice the exercise of special powers by the ADF (described below). ³ (Each House of Parliament must sit within six days of receiving the declaration.)

9.29 Searches of premises in an offshore general security area. Under section 51SG, the CDF, or an officer (or class of officers) authorised to do so by CDF, may give an offshore search authorisation for a search in an Offshore GSA. He or she must believe that there is a dangerous thing on a facility in the Offshore GSA and that it is necessary as a matter of urgency to make the dangerous thing safe or prevent it from being used, or, that there is another thing related to the threat concerned and it is necessary as a matter of urgency to seize that thing. The offshore search authorisation must:

a. authorise entry and search of the facility;

b. describe the facility;

c. state the name, rank and service number of the ADF ‘offshore member in charge’;

d. authorise the member in charge to carry out the search, as well as those assisting the member in charge (the ‘offshore search members’);

³ The Authorising Ministers must declare this in writing.
e. authorise seizure of anything found on the facility reasonably believed to be a dangerous thing, or thing related to the threat concerned;

f. authorise search of any person in or near the facility upon reasonable belief that the person has a dangerous thing in their possession, or a thing related to the threat concerned, and to seize those things. Such a search should ordinarily only extend to removing outer garments and frisking the person; and

g. state the time the authorisation is in force, which cannot be more than 24 hours, although further authorisations can be issued for the same facility.

9.30 Under section 51SH, the member in charge must identify themselves, and give a copy of the search authorisation, to the occupier of the facility or their apparent representative if they are present when the search takes place. Where there is to be a search of a person, the member in charge must also first show a copy of the offshore search authorisation to the person being searched. Under section 51SI, the occupier or their apparent representative, if present, is entitled to observe the search, unless they impede it, although more than one area of the premises can still be searched at the same time.

9.31 Searches of vessels and aircraft in an offshore general security area. Under section 51SJ, an ADF member may, upon reasonably believing that there is a dangerous thing, or a thing related to the threat, in or on a vessel or aircraft in an Offshore GSA, do the following:

a. erect barriers for the purpose of stopping the vessel or aircraft;

b. stop and detain the vessel or aircraft;

c. search the vessel or aircraft and anything found in or on it; and

d. seize any dangerous thing, or thing related to the threat concerned, the member finds in the search.

9.32 Searches of persons in an offshore general security area. Under section 51SK, an ADF member may search a person in an Offshore GSA upon reasonably believing that the person has a dangerous thing in their possession, or a thing related to the threat concerned, and seize any such thing found in the search. Such a search should ordinarily only extend to removing outer garments and frisking the person.
Offshore designated areas

9.33 Under section 51SL, the Authorising Ministers may in writing declare an Offshore Designated Area (DA) in the whole or part of an Offshore GSA. An Offshore DA may surround a vessel or aircraft, or a class of vessels or aircraft (for example, cruise liners), and travel with the vessel or aircraft, or class of them, as their location changes. An Offshore DA may include areas of state or territory internal waters if there is an internal waters direction in force (as discussed above).

9.34 As soon as an area ceases to be an Offshore GSA, it also ceases to be an Offshore DA. The Authorising Ministers must arrange for the declaration of the Offshore DA and its boundaries to be notified to persons in the Offshore DA to the extent that this is practicable, unless they believe it would prejudice the exercise of special powers under section 51SP (discussed below).

Other powers

9.35 Questioning. Under section 51SO, an ADF member may require a person to answer a question put by the member or produce a particular document to the member if the member believes on reasonable grounds that it is necessary for the purpose of preserving the life or safety of others or to protect Commonwealth interests against the threat concerned. A person is not excused from answering a question or producing a document on the ground that the answer to the question or production of the document may incriminate the person. In the normal course of events, the above power should not be used as this would prevent information obtained being used in evidence.

9.36 Operating facilities, vessels, machinery and other things. Under section 51SP, an ADF member may require a person to operate a facility, vessel, aircraft or machinery or equipment on a facility, vessel or aircraft, in connection with the exercise of any power under Division 3A. However this may only be done if the member believes on reasonable grounds that it is necessary for the purpose of preserving life or safety of other persons or in the protection of Commonwealth interests against the threat concerned. It would be an offence if the person fails to comply with the requirement.

Special powers relating to vessels and aircraft

9.37 There are special powers for an ADF member, under the command of CDF, to take measures against an aircraft (for a Division 3B specific circumstances (air threat) call out) under section 51ST, or a vessel or aircraft (for a Division 3A offshore callout) under section 51SE, up to and including
destroying the vessel or aircraft or giving an order relating to the taking of such measures. This action may be undertaken whether or not an aircraft is airborne or vessel is at sea, so long as the member is being utilised in accordance with section 51D, by CDF under a call out.

9.38 Taking measures against a vessel or aircraft, such as destroying it, cannot take place unless:

a. the ADF member takes measures under the authority of a superior,

b. is under a legal obligation to obey the order,

c. the order is not manifestly unlawful,

d. the ADF member has no reason to believe that circumstances have changed in a material way since the order was given,

e. that the order is not based on a mistake as to a material fact, and

f. the measures are reasonable and necessary to give effect to the order.

9.39 In addition, an ADF member must not take measures against a vessel or aircraft or give an order as to the taking of such measures unless an Authorising Minister has in writing authorised the taking of measures against the vessel or aircraft. A member does not have to obtain ministerial authorisation if a sudden and extraordinary emergency exists, or if the Authorising Minister has already issued an authorisation that takes effect when specific circumstances exist in relation to aircraft.

9.40 As the Authorising Minister must have regard to Australia’s international obligations, in giving an authorisation to take measures against an aircraft it should be noted that the Convention on International Civil Aviation (Chicago Convention) regulates overflight by civilian aircraft, and its 1984 Protocol relating to an Amendment to the Convention on International Civil Aviation sets requirements for intercepts in Article 3 bis (a) as follows:
every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of the aircraft must not be endangered. This provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations. [This includes the right to act in national self defence.]

Article 3bis Convention on International Civil Aviation

Designated critical infrastructure

9.41 Under section 51CB, the Authorising Ministers may declare that particular infrastructure, or a part of it, in the Australian offshore area is ‘Designated Critical Infrastructure’ (DCI). (This is not to be confused with ‘mission essential property’, or ‘critical infrastructure’ that has not been so designated.) Examples might include part of the energy supply grid or offshore installations. The Authorising Ministers must believe on reasonable grounds that:

a. there is a threat of damage or disruption to the operation of the infrastructure; and

b. the damage or disruption would directly or indirectly endanger the life of, or cause serious injury to, other persons.

9.42 The Authorising Ministers must revoke the declaration if they no longer believe that this is the case. There does not have to be a call out in force to make a declaration of DCI although a call out is required for the ADF to have powers to protect the DCI. Where DCI is within a state or territory, there is no requirement to have that state or territory request a declaration. An Authorising Minister must still consult with the relevant state or territory Government about making the declaration unless urgency makes it impracticable to do so.

9.43 Expedited call out limitations. The Prime Minister may not make a declaration of DCI under an expedited call out order. This may only occur where there are two Authorising Ministers for an expedited call out.

9.44 Designated critical infrastructure powers. To protect DCI, under section 51IB an ADF member may, under the command of CDF, prevent or put an end to damage or disruption to the operation of the DCI or prevent or put an end to acts of violence. ADF members may:
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a. detain persons, whom they believe on reasonable grounds to have committed an offence against the law of the Commonwealth, a state or territory, for the purpose of placing the person in the custody of a member of a police force at the earliest practicable time;

b. protect persons from acts of violence;

c. control the movement of persons or means of transport;

d. evacuate persons to a place of safety;

e. search persons or things or dangerous things or other things related to the threat concerned;

f. seize any dangerous thing or other things related to the threat concerned found in such a search; or

g. do anything incidental to the above actions.

Use of force generally

9.45 Under section 51T, an ADF member may use such force against persons and things as is reasonable and necessary in the circumstances except to compel answers to questions or to require the operation of machinery or equipment, etc. as discussed above. In using force, an ADF member must not though do anything that is likely to cause death or grievous bodily harm to a person unless:

a. the member believes on reasonable grounds that such action is necessary to protect life or prevent serious injury to another person or themselves,

b. to protect DCI against a threat of damage or disruption to its operation,

c. it is necessary and reasonable to carry out an order to take measures against a vessel or aircraft under the section 51SE or section 51ST special powers, or

d. a person is attempting to escape being detained by fleeing and the person has already been called upon to surrender if practicable and the member believes on reasonable grounds that the person cannot be apprehended in any other manner.
A member should also not subject a person to greater indignity than is reasonable and necessary in the circumstances.

Seizure requirements

9.46 Under section 51V, if an ADF member seizes a thing, they may take such action as is reasonable and necessary to make the thing safe or prevent it being used and if practicable, give the person a receipt for the thing seized. If the ADF member believes on reasonable grounds that the thing has been used or otherwise involved in the commission of an offence against the law of the Commonwealth, a state or territory, the ADF member must give the thing to a member of the police at the earliest practicable time. If the thing that was seized from a person was not involved in the commission of an offence then the member must return the thing to the person as soon as it is practicable to do so.

9.47 If an ADF member seizes a thing from a person and believes on reasonable grounds that the person used the thing in the commission of an offence, then the ADF member must detain the person for the purpose of placing him or her in the custody of a member of the police at the earliest practicable time.

Powers reliant on obligations of individual members

9.48 Under section 51W, if an ADF member fails to comply with any obligation that relates to the exercise of the powers, the ADF member is not entitled to exercise that power. This includes the power to protect DCI (Division 2A), powers in the Australian offshore area (Division 3A) or powers relating to aircraft (Division 3B).

Applicable criminal law

9.49 Under section 51WA, the applicable criminal law in relation to any criminal act of an ADF member acting under Part IIIAAA is the substantive criminal law of the Jervis Bay Territory. As a consequence, the substantive criminal law of the states and the other territories does not apply in relation to a criminal act of an ADF member. Further, only the Commonwealth Director of Public Prosecutions (DPP) can prosecute a member of the ADF for any alleged offences whilst called out under Part IIIAAA. This excludes any role for state/territory DPP to prosecute, although it does not limit the power of state or territory police to investigate any criminal acts done by ADF members operating under Part IIIAAA.
THE EXECUTIVE POWER

9.50 The last section of Part IIIAAA regarding call out states:

This Part does not affect any utilisation of the Defence Force that would be permitted or required, or any powers that the Defence Force would have, if this Part were disregarded.

Section 51Y Defence Act

This section is presumed to preserve the authority to utilise the ADF for CT pursuant to the Executive Power.

9.51 State requests for protection. Section 119 of the Australian Constitution provides for a state to request the Commonwealth to protect it against domestic violence, which means an internal security disturbance. Whilst a number of requests were made in the early decades of Federation, the Commonwealth did not accede to any of them, and there have been none since.

Counterterrorism operations pursuant to the Executive Power

9.52 The Commonwealth Government has utilised the ADF at its own initiative on a few occasions for CT purposes pursuant to the Executive Power. These operations are distinct from using the ADF in industrial disputes, such as in the 1989 national pilots’ strike or the 1949 New South Wales coal miners’ strike, which might better be categorised as Defence Aid to the Civil Community.


In both of these operations, Royal Australian Air Force fighter aircraft provided combat air patrols over Coolum, Queensland, and Canberra, Australian Capital Territory, respectively. The purpose of the patrols was to protect the visiting dignitaries from attack from the air.

There was no call out for these operations as such, nor was there a legislative basis for them. They both relied on the Executive Power.

9.53 Concerns/risks versus advantages. Despite support for the constitutionality of this use of the Executive Power, there has been
considerable concern about the lack of clarity as to the force ADF members may use in domestic CT operations under the Executive Power. Members of the ADF themselves enjoy no special powers outside of legislation and are subject to the same laws as ordinary citizens. This has been the constitutional position since the *Bill of Rights 1688* (Imp.), which followed the English Civil War. Nonetheless, members of the ADF are obliged to follow orders which are not manifestly unlawful and the direction of the civilian Government of the day.

9.54 The advantage of call out under the Part IIIAAA legislation is that it clarifies to a great degree the use of force and exercise of other powers by the ADF. The advantage of still retaining scope for the use of the Executive Power on the other hand is that it provides flexibility for unexpected situations. By way of example, the first Part IIIAAA amendments in 2000 did not anticipate attack from the air or offshore threats. In 2001, the use of civilian aircraft to attack buildings in New York and Washington changed the perception of the threat of terrorist attack from the air. Within three years of the 2000 legislative amendments, the Commonwealth had relied twice upon the Executive Power to counter air threats as discussed above. This situation led in part to amendments to Part IIIAAA in 2006 to deal with threats from the air and in the offshore.

**State/territory co-ordination and involvement**

9.55 Where an incident originates offshore, the intention is to resolve the incident offshore. However, there is always the possibility that a vessel could enter the internal waters of a state/territory prior to the incident being resolved (this would be more likely if the incident originates in the vicinity of state/territory internal waters). Where a response involves ADF call out offshore (pursuant to section 51AA of Part IIIAAA of the *Defence Act 1903*), the call out should in the ordinary course include adjacent internal waters, where beyond the capability of relevant jurisdictions (for instance as provided for in section 51AA(5)). This will assist a smooth transition from the offshore to the internal waters during any resolution of an incident.

9.56 Significant operational difficulties would arise if a vessel does cross into state/territory internal waters and there were no Part IIIAAA powers applying in those internal waters. Consultations with relevant jurisdictions must occur, unless for reasons of urgency it is impracticable.

9.57 If the state/territory was responding to an incident within its internal waters, BPC would maintain a close ‘watching brief’ on the incident, noting that it might cross into the offshore at short notice prior to the incident being resolved. During this period, BPC might pre-position assets offshore and take measures to facilitate call out to ensure that BPC is in the best possible
position to resolve the incident should it move offshore. If the state/territory requested ADF assistance whilst the incident was still within internal waters, the ADF would need to ensure that appropriate powers were available should the vessel leave internal waters and proceed offshore (for instance as provided for in section 51AA). Once an incident moves into the offshore area, that is seaward of the territorial sea baseline and outside of a designated port area, responsibility for that incident will transfer to the BPC in accordance with the NCTP.

9.58 Close consultation will be necessary between the Commonwealth Government and the relevant state/territory. A formal transfer of responsibility may be required (based on the handover form in the National Counterterrorism Handbook) for the resolution of the incident, from the state/territory to the Commonwealth Government (or vice-versa). Where responsibility for an incident is transferred, it may be transferred back to the initiating jurisdiction, another jurisdiction or retained by the Commonwealth Government, depending on the circumstances.

Criminal investigation and evidential requirements

9.59 The responsibility for criminal investigation offshore is the responsibility of the relevant police service, including the Australian Federal Police (AFP). However, criminal investigations relevant to a terrorist incident offshore should be undertaken cooperatively, including through joint task forces where appropriate. Police commissioners, including the AFP Commissioner, will determine the investigative arrangements, and consult with BPC. In most instances, joint CT teams will be utilised to provide a flexible and adaptive investigative resource in response to a terrorist incident. Any arrangements will consider the contributions from other Commonwealth Government and state/territory law enforcement bodies. BPC will ensure that the integrity of the crime scene is preserved as operational circumstances permit.

9.60 Where offences may have been committed on foreign-flagged vessels, the relevant flag State may be involved in the criminal investigation. In these circumstances, there will have to be close cooperation between flag State law enforcement agencies and Australian law enforcement agencies. Where an incident is ongoing, priority will be given to its resolution. However, BPC will work closely with the investigators to ensure that the investigative requirements are identified early and met as far as operational circumstances permit.
Police

9.61 A terrorist incident will create one or more crime scenes from the time it commences. Whilst for offshore terrorist incidents BPC will retain control, the responsibilities of police in relation to the crimes scenes may include:

a. detaining suspects,

b. preserving the crime scene,

c. locating and isolating witnesses, and

d. locating and securing evidence.

9.62 The investigation will extend beyond the immediate resolution of the particular incident to service fully any criminal prosecution, coronial inquest or commission of inquiry. During the investigative process, investigators will need to investigate matters such as:

a. that the scene has been preserved and if not how it has been altered and by whom (including removal of any equipment on the authority of relevant ADF commander or other appropriate person for the purpose of safeguarding national security);

b. the position of ADF personnel, offenders/suspects and hostages at moments of engagement, the circumstances of the engagement and its results;

c. identities of ADF personnel involved and roles played;

d. the total number of persons involved;

e. details of all ADF and offender/suspect weapons, who carried them and whether weapons were discharged and by whom;

f. identities/descriptions of any persons removed from the scene, their roles and positions at the time of engagement; and

g. that ADF weapons and devices found at the scene have not been interfered with in any way since the assault – neither proved (cleared), cleaned nor further discharged (note, however, that safety considerations dictate that explosive/booby-trap devices found at the scene be disarmed/rendered safe to gain safe access to the site).
Coronial investigation and inquests

9.63 State/territory coroners have jurisdiction to investigate deaths, and in some cases the causes of fires and explosions. Foreign coroners may have jurisdiction to investigate deaths on board their flag vessels. Access would be negotiated through diplomatic channels.

Foreign interests

9.64 Foreign interests involved in an offshore incident will need to be handled sensitively, noting in particular that foreign Governments may wish to investigate offences that have occurred on their flag vessels. The Department of Foreign Affairs and Trade is responsible for foreign relations and must be advised immediately in the event of an incident involving foreign nationals or a foreign-flagged vessel and trans-border issues.

Use of state assets by the Commonwealth

9.65 In managing offshore terrorist incidents, the Commonwealth Government may seek appropriate assistance from states/territories when its own resources are inadequate or cannot be mobilised within required time frames. It is important to note that Part IIIAAA powers are not available to police or any agency other than the ADF.

INTERNATIONAL INITIATIVES IN RELATION TO OFFSHORE COUNTERTERRORISM

9.66 There are two main international initiatives which relate to offshore CT in which Australia is involved. These are the Proliferation Security Initiative (PSI)/Non-Proliferation and the Suppression of Unlawful Acts against Navigation.

The Proliferation Security Initiative

9.67 The PSI is one of a number of measures taken by the international community in response to the heightened concern over terrorism since the attacks on the United States of America on 11 September, 2001. Australia is part of this initiative, which is a practical and informal arrangement among countries to cooperate with each other, as necessary, by intercepting and disrupting illicit Weapons of Mass Destruction (WMD) trade, their delivery systems and related materials.

9.68 It must be noted that the PSI is not a convention or new international law, rather it is an activity and a process. It can be seen as a practical tool of
international counter-proliferation cooperation where the degree of participation is entirely voluntary.

9.69 The PSI seeks to involve all States that have a stake in non-proliferation, in some capacity, as well as the ability and willingness to take steps to stop the flow of such items at sea, in the air, or on land. It also seeks cooperation from any State whose ships, flags, ports, territorial waters, airspace, or land might be used for proliferation purposes by States and non-State actors of proliferation concern.

9.70 Australia has hosted two PSI meetings and led the successful interdiction exercise in October 2003 known as ‘Operation Pacific Protector’ and is planning to host another meeting and exercise in late 2010. The participation in such exercises enables countries to develop and standardise their capabilities to respond effectively to the proliferation of WMD.

9.71 Participants of PSI are committed to a set of ‘Interdiction Principles’ that were created to establish a more coordinated and effective basis through which to impede and stop shipments of WMD, delivery systems and related materials flowing to and from States and non-State actors of proliferation concern, consistent with legal authorities and relevant international law and frameworks, including the United Nations Security Council. These Interdiction Principles include:

a. undertake effective measures, either alone or in concert with other States, for interdicting the transfer or transport of WMD, their delivery systems and related materials to and from States and non-State actors of proliferation concern;

b. adopt streamlined procedures for rapid exchange of relevant information concerning suspected proliferation activity;

c. review and work to strengthen their relevant national authorities where necessary to accomplish these objectives; and

d. take specific actions in support of interdiction efforts regarding cargoes of WMD.

The convention for the suppression of unlawful acts against the safety of maritime navigation

9.72 The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA) and its Protocol on Fixed Platforms came into force on 1 March 1992. Australia is a party to this Convention and
implemented provisions under the *Crimes (Ships and Fixed Platforms) Act* 1992. It covers the hijacking of civilian ships, attacks against the person on board a ship or the ship itself in a manner likely to endanger the safe navigation of that ship, or deliberately endangering shipping generally through sabotage or misinformation. There are currently no enforcement powers under this Act which the ADF, or any other agency, can exercise at sea. The main purpose of the Act is to permit prosecution of alleged offenders already within Australia’s jurisdiction.
CHAPTER 10
SECURITY OF OFFSHORE FACILITIES

Executive Summary

• The bulk of Australia’s domestically produced oil and gas is derived from offshore petroleum reserves, principally in Bass Strait, the northwest shelf of Western Australia and in the Timor Sea.

• The protection of offshore oil and gas platforms is of vital strategic and economic importance.

• International law places limitations on the area around an oil or gas platform to a safety zone of 500 metres. The Offshore Petroleum and Greenhouse Gas Storage Act 2006 provides, with the Customs Act 1901, a regime for the arrest of vessels that infringe a 500 metre safety zone.

• Australia has moved to implement the 2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, with a view to strengthening its legal protection for offshore oil and gas platforms.

INTRODUCTION

10.1 Most of Australia’s domestically produced oil and gas is derived from offshore petroleum reserves, in Bass Strait, the northwest shelf of Western Australia and in the Timor Sea. The strategic importance of these reserves cannot be overstated, and it has long been recognised that the Royal Australian Navy has a key role in the protection of the vital oil and gas platforms that exploit these reserves. Although none of these facilities in Australia has ever been the subject of a terrorist attack, the level of threat to them is perceived to have grown since the attacks against the United States of America on 11 September 2001.

10.2 Reflecting this rising threat, Australia moved to overhaul its offshore petroleum legislation, passing the Offshore Petroleum and Greenhouse Gas Storage Act 2006 and the Maritime Transport and Offshore Facilities Security Act 2003 (MTOFSA). The former Act replaces the Petroleum (Submerged Lands) Act 1967. In addition, there are powers under the Customs Act 1901 and the Sea Installations Act 1987 which are relevant to the protection of
offshore facilities. Additionally, there exist powers through the operation of the *Crimes at Sea Act 2000* with respect to offshore facilities, including offshore oil and gas platforms in the Joint Petroleum Development Area (JPDA) in the Timor Sea.

**PROTECTION OF OFFSHORE FACILITIES**

**International law**

**10.3** Before considering the two principal pieces of legislation dealing with the protection of offshore oil and gas installations, it is appropriate to consider the relevant international law dealing with such facilities. The 1982 *United Nations Convention on the Law of the Sea* (UNCLOS) provides that a coastal State has jurisdiction over exploration and exploitation of its seabed resources within its exclusive economic zone (EEZ) to a distance of up to 200 nautical miles (nm) and on its continental shelf, which in certain circumstances can extend as much as 350 nm from the territorial sea baselines of the coastal State. To ensure absolute clarity, the UNCLOS also provides the coastal State has sole jurisdiction over installations and artificial islands constructed on the seabed in these areas. This includes any oil or gas platforms and any other similar structures, such as research facilities, fish aggregation devices and navigational aids.

**10.4** The UNCLOS recognises that oil and gas platforms are vulnerable so there are some measures devoted to their protection. However, at the time the UNCLOS was concluded in 1982, the perceived threat to these facilities was from poor navigation and the risk of collision rather than from terrorist attack. As such, the measures required by Article 60(4) of the UNCLOS include an obligation on a coastal State to advise the International Maritime Organisation of the location of all oil and gas platforms, and a coastal State may establish a ‘reasonable safety zone’ around such facilities. The UNCLOS indicates that in the absence of agreement to the contrary, the limit of such a safety zone is 500 metres around the facility. Shipping is not permitted to enter a safety zone without permission. Safety zones cannot be used to hamper navigation unnecessarily.

**10.5** The use of a 500 metre wide safety zone might be effective in dealing with collision at sea, but it has some limitations in being used to combat threat of attack. The amount of time to traverse 500 metres by various means is indicated in table 10-1.
### Table 10–1: Time to traverse 500 metres by various means

<table>
<thead>
<tr>
<th>Mode</th>
<th>Time to cover 500 metres</th>
</tr>
</thead>
<tbody>
<tr>
<td>Container vessel or oil tanker (at 15 knots)</td>
<td>65 seconds</td>
</tr>
<tr>
<td>Speed boat (at 40 knots)</td>
<td>24 seconds</td>
</tr>
<tr>
<td>Commercial jet aircraft</td>
<td>2-3 seconds</td>
</tr>
<tr>
<td>Missile</td>
<td>1-2 seconds</td>
</tr>
</tbody>
</table>

10.6 Concern over the risk to offshore oil and gas platforms rose after the hijack of the Italian cruise ship ACHILLE LAURO in 1985. After this incident, States negotiated the *Convention for the Suppression of Unlawful Acts against the Safety of Marine Navigation* (SUA Convention) in 1988. The *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf* (SUA Protocol) was negotiated to be applicable to ‘fixed platforms on the continental shelf’.

10.7 This SUA Protocol provides, under Article 2, for a range of offences including seizing a platform by force, threat or intimidation, acts of violence against persons aboard a platform, destruction or damage threatening the safety of a platform, or the placing of a device designed to damage or destroy or endanger safety on a platform. The offences include attempting, abetting and threatening to commit an offence. The jurisdictional reach of States under Article 3 of the SUA Protocol is over offences that take place on fixed platforms located on its continental shelf, and also over offences committed by their nationals, or against their nationals, or to coerce the State concerned, or by Stateless individuals. The SUA Protocol has been adopted by 145 States, representing 89.56 percent of international shipping tonnage.

10.8 The SUA Protocol does not deal with the issue of boarding the fixed platforms of other States, and the preamble reiterates ‘that matters not regulated by this Protocol continue to be governed by the rules and principles of general international law’, limiting apparently direct unilateral intervention against acts against platforms to the coastal State. As such, foreign forces could not take action in response to terrorist acts against an oil or gas platform on the Australian continental shelf, unless explicitly authorised by the Australian Government.

10.9 In 2005, a perception of an increasing threat against navigation and platforms led to the conclusion of further protocols to deal with maritime terrorism. The changes in the 2005 SUA Protocol amendments create new offences where an individual causes explosive or radioactive material or a chemical, biological or nuclear weapon to cause death, serious injury or
damage to an installation, or releases oil or gas from an installation in a manner calculated to cause death, serious injury or damage. Article 3bis and 3ter make it clear that the threat to undertake such an offence is also an offence, as is participation in the preparation and organisation of such offences. State parties must assert their jurisdiction in respect of these offences over their own nationals and fixed platforms on their own continental shelf. At the time of writing, the 2005 amendments were yet to enter into force.

Offshore Petroleum and Greenhouse Gas Storage Act

10.10 The Offshore Petroleum and Greenhouse Gas Storage Act was passed with the intention of replacing the Petroleum (Submerged Lands) Act. The enforcement provisions of the Offshore Petroleum and Greenhouse Gas Storage Act are for the most part still the same as those under the Petroleum (Submerged Lands) Act. Much of the Offshore Protection and Greenhouse Gas Storage Act is directed towards regulatory functions, exercised by inspectors, to ensure the safe and effective operation of offshore oil and gas production. Consideration of the Act in this chapter will be restricted to those provisions dealing with external threats to oil and gas platforms that could conceivably be relevant to Australian Defence Force (ADF) personnel.

10.11 The Offshore Petroleum and Greenhouse Gas Storage Act makes use of the safety zone regime under the UNCLOS discussed above. Sections 616 and 617 of the Act provide that unless authorised, a vessel may not enter or remain inside a 500 metre petroleum or greenhouse gas safety zone established around a well, structure or equipment. Both the owner and master of the offending vessel are deemed to have committed an offence when a vessel breaches this provision. The offence may be regarded as serious as the maximum penalty is 15 years imprisonment.

10.12 ADF members have powers under section 615 of the Offshore Petroleum and Greenhouse Gas Storage Act to deal with such breaches of the Act as ‘authorised persons’. Under section 620 of the Act, authorised persons have the power to direct vessels to leave a safety zone, or to tow a vessel from a safety zone. In addition under section 621, they may require a master to answer questions, detain the vessel, take its measurements, require a document be produced, search the vessel and to board a vessel in a safety zone. There are restrictions on the circumstances in which these powers are available, but it is clear that they could be utilised without warrant in the event of an emergency.
10.13 In addition to the safety zone provision, there is also a similar provision applicable to the ‘Area to be Avoided’ under Schedule 2 of the Act. The ‘Area to be Avoided’ is a large area of sea located around the Bass Strait oilfields off the coast of Gippsland in eastern Victoria. The zone extends from the territorial sea well out into the EEZ. Ordinarily, the proclamation of such a zone would be contrary to international law, as it would impede the freedom of navigation in the EEZ, and the right of innocent passage in the territorial sea. However, Australia negotiated a traffic separation scheme around the area with the International Maritime Organisation (IMO), with a view to ensuring navigational safety for the numerous oil platforms inside the area. As such, vessels flying flags of IMO-participating States are obliged to comply with the traffic separation scheme, and keep out of the area to be avoided. As this includes in excess of 95 percent of the world’s shipping tonnage, the ‘Area to be Avoided’ provisions are applicable to most shipping traffic, although the Offshore Petroleum and Greenhouse Gas Storage Act limits the application of domestic legislation to Australian registered vessels. The provisions of the Act applicable to relevant Australian vessels are essentially the same as for vessels in a safety zone. The ‘Area to be Avoided’ is shown in figure 10-1.
Section 619 of the Offshore Petroleum and Greenhouse Gas Storage Act makes it an offence for a ‘relevant vessel’ to enter or remain in the ‘Area to be Avoided’ without permission. As noted above, a ‘relevant vessel’ is defined in section 614 as a vessel registered in Australia, or a vessel capable of registration in Australia not being a foreign flagged vessel. ADF members are designated ‘authorised persons’, and hold similar powers for dealing with relevant vessels in the area to be avoided as for safety zones.

Figure 10–1: Bass Strait – area to be avoided

10.14 Section 619 of the Offshore Petroleum and Greenhouse Gas Storage Act makes it an offence for a ‘relevant vessel’ to enter or remain in the ‘Area to be Avoided’ without permission. As noted above, a ‘relevant vessel’ is defined in section 614 as a vessel registered in Australia, or a vessel capable of registration in Australia not being a foreign flagged vessel. ADF members are designated ‘authorised persons’, and hold similar powers for dealing with relevant vessels in the area to be avoided as for safety zones.
10.15 The Customs Act also contains provision for boarding vessels within the safety zone of an offshore installation and can be used in conjunction with the Offshore Petroleum and Greenhouse Gas Storage Act. Section 184A of the Customs Act permits the commander of an ADF vessel to board a vessel which has entered a 500 metre safety zone to establish its identity or upon reasonable suspicion it is involved in an offence within the zone. With this power to board comes a power to ask questions, search the vessel and to secure goods under section 185 of the Customs Act.

Maritime Transport and Offshore Facilities Security Act

10.16 The MTOFSA was implemented in order to give effect to Australia’s obligations under the International Shipping and Port Security Code (ISPS Code) of the IMO. The ISPS Code provides for a regime of graduated security plans for ships, ports and offshore platforms. The implementation of the ISPS provisions in MTOFSA is undertaken by the Office of Transport Security, and the ADF is not specifically empowered to take on this task.

10.17 Under section 147 of the MTOFSA, the Secretary of the Department Of Infrastructure, Transport, Regional Development and Local Government may appoint ADF members to be a ‘duly authorised officer’ only for the purpose of inspecting the operational areas of a security regulated ship or security regulated offshore facility.

10.18 Section 113 of MTOFSA permits the creation of an offshore security zone, to protect offshore facilities from unlawful interference. Such zones may be directed at a number of purposes, including restricting the movement of ships in the zone. While not explicitly limited to 500 metres around offshore platforms, offshore security zones must be consistent with Australia’s obligations under international law.

*Types of offshore security zones*

1. The regulations may prescribe different types of offshore security zones.

2. The purposes for which different types of offshore security zones may be prescribed include, but are not limited to, the following:

   (a) limiting contact with security regulated offshore facilities;
(b) controlling the movement of people within a security regulated offshore facility;

(c) controlling the movement of ships and other things within and around a security regulated offshore facility;

(d) providing cleared areas within and around security regulated offshore facilities;

(e) preventing interference with security regulated offshore facilities;

(f) preventing interference with people or goods (including petroleum) that have been, or are to be, transported to or from security regulated offshore facilities.

Section 113B, MTOFSA

10.19 Enforcement under the MTOFSA is vested in ‘law enforcement officers’. These are defined in section 151 of the Act as being Federal, state or territory police, or Australian Customs and Border Protection Service officers prescribed by the regulations. ADF personnel are not empowered to enforce provisions in respect of offshore security zones.

Other provisions

10.20 There are other provisions which operate to deal with criminal offences on board offshore facilities. The Sea Installations Act provides for a basic regulatory regime for the establishment, licensing and removal of offshore oil and gas platforms on the Australian continental shelf. This Act does not provide for a wide range of criminal offences, but does duplicate the offence of entering a 500 metre safety zone in section 57. In this case the penalty is presently a maximum penalty of $100,000 or ten years imprisonment or both for an individual and $500,000 for a body corporate.

10.21 The Sea Installations Act also provides for the operation of civil law aboard offshore facilities. Criminal jurisdiction however is explicitly noted as falling under the Crimes at Sea Act. The Crimes at Sea Act establishes the basic regime for the criminal law, evidence and procedure for Australian ships and offshore facilities. While jurisdiction in respect of Australian and flag State vessels was discussed in chapter three, it is relevant to consider
briefly the application of the *Crimes at Sea Act* to offshore oil and gas facilities.

10.22 Schedule 1, clause 2 of the *Crimes at Sea Act* takes the basic approach of applying Australia’s criminal law based on proximity to a state (as in a state of Australia), and using the criminal law of that state. For the purposes of this identification, the offshore areas around Australia have been divided into ‘adjacent areas’, where criminal jurisdiction will be tied to the law of the adjacent state, albeit beyond 12 nm by force of Commonwealth law. The adjacent areas are vast, and are illustrated in figure 10-2 below.

![Figure 10–2: Areas of offshore criminal jurisdiction](image)

10.23 The practical effect of the legislation is to apply the criminal law of the adjacent state to activities aboard an offshore facility. For example, the oil platforms in Bass Strait would have the criminal law of Victoria applicable to
them. Similarly, the gas platforms of the North-West Shelf would use the criminal law of Western Australia.

10.24 In addition, there are special rules for the continental shelf in the JPDA, which is jointly administered by Australia and East Timor. The JPDA is subject to the laws of both Australia and East Timor, so the *Crimes at Sea Act* indicates the scope of that joint application. The Act provides that the substantive criminal law of the Northern Territory applies to acts done in the JPDA that are connected with petroleum exploration or exploitation. Under section 6A of the *Crimes at Sea Act*, application of Northern Territory law will not include East Timorese nationals, East Timorese permanent residents who are not Australian nationals or activities taking place aboard ships or aircraft operating in the JPDA. A person may not be prosecuted if he has been dealt with by East Timorese law. The JPDA is shown in figure 10-3.
Figure 10–3: Timor Sea joint petroleum development area
CHAPTER 11
SECURITY OF PORTS, SHIPPING AND WATERS

Executive summary

- The International Ship and Port Facility Security Code (ISPS Code) which was implemented as Chapter XI-2 of the International Convention for the Safety of Life at Sea 1974 (SOLAS) and entered into force in July 2004.

- Contracting Governments must implement legislation and create administrative agencies to manage the provisions of the ISPS Code.

- The Maritime Transport and Offshore Facilities Security Act 2003 (MTOFSA) provides a legislative basis for meeting Australia’s international obligations and establishes a scheme to safeguard against unlawful interference with maritime transport or offshore facilities.

THE INTERNATIONAL SHIP AND PORT FACILITY SECURITY CODE

11.1 Following the events of 11 September 2001 in the United States of America, there was a general increase in interest in security in the international community. This focus was manifest in many different areas, one of which concerned maritime trade. One result was that the International Maritime Organisation (IMO) undertook the development of new measures relating to the security of ships and of port facilities. This undertaking led to the development of the ISPS Code which was implemented as Chapter XI-2 of the SOLAS. The Code came into force in July 2004. These provisions are restricted to the ship/port interface for port facilities but still represent a significant change in the approach of the international maritime industries to the issue of security in the maritime transport sector.

11.2 Although the provisions of the ISPS Code do not apply to warships, naval auxiliaries or other ships owned or operated by a contracting State and used only on Government, non-commercial service, these ships do regularly interact with commercial ports, so a degree of co-operation is required.

11.3 As a party to SOLAS, the Australian Government was obliged to implement the provisions of the ISPS Code into legislation. This was done mostly in the implementation of the MTOFSA. This Act, together with a range
of existing legislation, provides a set of regulations for maintaining the Security of Ports, Shipping and Other Land-based Facilities.

11.4 The ISPS Code comprises two parts. Part A covers mandatory requirements to achieve the objectives of the Code and so provide a minimum level of security for ships and ports. The measures provided are designed to enhance maritime security by defining processes and administrative procedures through which ships and port facilities can co-operate to detect and deter acts which threaten security in the maritime transport sector. The provisions assign responsibilities to the Contracting Governments for measures such as the appointment of security officers for shipping companies, ships and port facilities, the development of security assessments and plans, implementing training schemes and verification/certification for ships. Part B gives guidance on the minimum processes which could be used to establish and implement the measures.

11.5 The ISPS Code objectives are to:

a. establish an international framework involving co-operation between contracting Governments, Government agencies, local administrations and the shipping and port industries to detect security threats and take preventive measures against security incidents affecting ships or port facilities used in international trade;

b. establish the respective roles and responsibilities of the contracting Governments, Government agencies, local administrations and the shipping and port industries, at the national and international level, for ensuring maritime security;

c. ensure the early and efficient collation and exchange of security-related information;

d. provide a method for security assessments so as to have in place plans and procedures to react to changing security levels; and

e. ensure confidence that adequate and proportionate maritime security measures are in place.

11.6 The ISPS code applies to ships engaged on international voyages and to the port facilities serving such ships engaged on international voyages. The types of ships covered include:

a. passenger ships, including high-speed passenger craft;
b. cargo ships, including high-speed craft, of 500 gross tonnage and upwards; and

c. mobile offshore drilling units.

11.7 The ISPS code does not apply to:

a. warships;

b. naval auxiliaries;

c. fishing vessels;

d. ships under 500 tonnes;

e. non-SOLAS vessels (including vessels flagged in North Korea, Nauru, Kiribati, Federated States of Micronesia (FSM), Palau and Somalia); or

f. contracting Government ships used on non-commercial service.

11.8 As noted above, however, warships and naval vessels do make use of port facilities and it is evident that, despite their exemption from the Code, close co-operation with the port's authorities concerning security requirements for both visiting ships and Australian Defence Force (ADF) bases and installations will need to be undertaken. This co-operation will involve easing any concerns about the ADF security arrangements in ports and taking account of any additional potential threat due to the presence of an ADF facility or vessel. ADF members should be aware that their interactions with ISPS vessels may lead to a change to their security status. Additionally, the question of declaring control of naval waters may cause concerns. These issues are discussed later in this chapter.

Summary of part A

11.9 Responsibilities of contracting Governments. Contracting Governments must implement legislation and create administrative agencies to manage the provisions of the Code. They shall set security levels and provide guidance for protection from security incidents. Higher security levels indicate greater likelihood of occurrence of a security incident.
There are three security levels for international use. These are:

a. security level 1, normal; the level at which ships and port facilities normally operate;

b. security level 2, heightened; the level applying for as long as there is a heightened risk of a security incident; and

c. security level 3, exceptional; the level applying for the period of time when there is the probable or imminent risk of a security incident.

Contracting Governments shall determine when a declaration of security is required by assessing the risk the ship/port interface or ship to ship activity poses to persons, property or the environment.

Obligations of a company. The company must appoint a company security officer and for each ship, a ship security officer subordinate to the master. The company must ensure that:

a. each ship undertakes a ship security assessment and develops an approved security plan,

b. each security plan responds to the security levels set by the Governments,

c. each security plan shall include provisions for recording all security related incidents onboard, and

d. each security plan contains a clear statement emphasising the master’s authority.

Port facility security. A port facility is required to act upon the security levels set by the Government. Security measures and procedures shall be applied at the port facility in such a manner as to cause a minimum of interference with, or delay to, passengers, ship, ship’s personnel and visitors, goods and services. Each facility shall:

a. undertake a security assessment and develop a port facility security plan. (The plan shall make provisions for the three security levels, as defined in this Part of the Code); and
b. appoint a designated security officer (although a person may be designated as the port facility security officer for one or more port facilities).

**11.14 Verification and certification for ships.** Each ship shall be subject to verification that it satisfies the requirements of the Code. After verification, an International Ship Security Certificate with a duration not exceeding five years shall be issued. Provisions for the issue of short term and/or interim certificates are also available.

**Summary of part B**

**11.15** Part B provides guidance on the processes envisaged in establishing and implementing the measures and arrangements needed to achieve and maintain compliance with the provisions of Part A of the Code. Compliance with Part B is not mandatory, however, when considering the appropriate security measures to respond to any security threats, the essential considerations listed in this Part provide a starting point for adapting requirements to local conditions.

**The Maritime Transport and Offshore Facilities Security Act**

**11.16** The MTOFSA provides a legislative basis for meeting Australia’s international obligations and establishes a scheme to safeguard against unlawful interference with maritime transport or offshore facilities. The regime now regulates the security arrangements of 470 maritime industry participants, including 70 ports, 184 port facilities, 98 port service providers, 60 Australian flagged ships and 58 offshore oil and gas facilities. The MTOFSA allows Australia to deny port access to any ships identified as a risk, although the MTOFSA does not directly empower the ADF. Only those parts which relate to ports and shipping are discussed in this chapter.

**11.17** Part 2 of the Act defines the requirements for maritime security levels and security directions. Maritime security level 1 is in force for each security regulated port, each maritime industry participant, each regulated Australian ship and each security regulated offshore facility unless the Secretary of the Department of Transport declares that maritime security level 2 or 3 is in force for the port, participant, ship or facility. If maritime security level 2 or 3 is in force for a port, that maritime security level is in force for every maritime industry participant, security regulated ship, ship regulated as an offshore facility and security regulated offshore facility within the port.

**11.18** Part 3 defines maritime security plans which identify security measures to be implemented when different maritime security levels are in force. Various maritime industry participants and some other persons are
required to have and comply with, maritime security plans. The part defines the content and form of maritime security plans and the approval process.

11.19 Part 6 defines maritime security zones. These are used to subject areas within ports, on and around ships, and on and around offshore facilities to additional security requirements.

11.20 Part 7 covers other security measures such as:

a. clearance to enter certain areas;

b. use of certain vehicles;

c. approval to board certain vessels;

d. screening of vehicles, goods and vessels;

e. clearing of vehicles, goods and vessels; and

f. requirements in relation to the carriage and possession of weapons and prohibited items in maritime security zones, on board regulated Australian ships and on board ships regulated as offshore facilities. There are also prohibitions on carrying weapons and prohibited items through screening points.

The relevance of the Maritime Transport and Offshore Facilities Security Act to the Australian Defence Force

11.21 The MTOFSA will have an impact on the ADF even though all warships are exempt from its provisions and are therefore not required to submit security plans consistent with the ISPS Code when entering an Australian security-regulated port. However, through consultation with the Association of Australian Port and Marine Authorities, liaison procedures have been developed to ensure that when Royal Australian Navy (RAN) ships visit Australian ports, the self-protection measures they implement are consistent with, and avoid compromising, the port security plans in force. This also extends to ADF member's exemptions from carrying Maritime Security Identification Cards (MSIC) when going about their legitimate business in an Australian port. These measures avoid unduly hampering ADF operational activities. However, in a heightened security environment, the ADF cannot utilise the MTOFSA to create security zones around its warships in security-regulated ports.
11.22 Under section 147 of MTOFSA, members of the ADF may be appointed as duly authorised officers, along with Australian Customs and Border Protection Service officers, immigration officers, Australian Maritime Safety Authority surveyors and quarantine officers. The powers of duly authorised officers extend only to inspecting the operational areas of a security regulated ship or security regulated offshore facility. A duly authorised officer may do one or more of the following:

a. board a security regulated ship and inspect its operational areas (including any restricted access area in the operational area of the ship);

b. observe and record operating procedures for the ship (whether carried out by the crew or some other person); and

c. inspect, photograph or copy one or more of the following:

   (1) the ship’s International Ship Security Certificate (ISSC);

   (2) a ship security record for the ship; or

   (3) operate equipment in the operational area of a security regulated ship for the purposes of gaining access to a document or record relating to the ship.

Security of naval establishments

11.23 The security of naval establishments is covered under the Naval Defence Act 1910 or more specifically, Naval Establishment Regulation 101. This empowers Naval Police Coxswains in the vicinity of naval establishments. A ‘naval establishment’ includes any naval college, naval instructional establishment, ship, vessel or boat used for services auxiliary to naval defence and any dock, shipyard, foundry, machine shop, work, office or establishment, used in connection with naval defence. This regulation provides:
For the purpose of ascertaining whether an offence is being or has been committed or attempted at any naval establishment, a member of the Naval Police may, without warrant, detain and search any person who is in a naval establishment, or any bag, parcel, vehicle, or other receptacle which is in, or is being conveyed into, or out of, a naval establishment, or any ship, boat or aircraft in or alongside or in the vicinity of a naval establishment.

Regulation 101(1), Naval Establishment Regulations

11.24 If a member of the Naval Police has reasonable grounds to believe:

a. that any person has committed, or attempted to commit, any offence in a naval establishment; and

b. that proceedings against the person by summons would not be effective;

c. he/she may, without warrant, apprehend the person and deliver him/her into the custody of the civil authorities to be dealt with according to law.

11.25 For the purposes of this regulation, offence means an offence against the common law, the Naval Defence Act, the Control of Naval Waters Act 1918 (CNWA), the Crimes Act 1914 or any other act relating to naval establishments or Government property generally. In harbours where naval waters have been declared, the Control of Naval Waters Act and its regulations empower the RAN to protect these waters when necessary in times of threat.

Australian Defence Force control of shipping

11.26 The Naval Defence Act includes the power to make regulations to control shipping in time of war or for the purposes of any naval operation or practice. This power is generally not exercised in peacetime. The Defence Act 1903 includes a power to make regulations that could, by virtue of section 63, extend to control shipping and associated civilian infrastructure in extreme circumstances. This power is generally not exercised in peacetime.
Control of naval waters

11.27 The purpose of the CNWA is to provide for the protection of Defence land and/or installations used/owned by the Commonwealth, thereby assisting in the security of Defence assets as required by force protection measures and heightened threat levels. The CNWA Regulations do not apply to restrict naval ships or any vessel belonging to, or being used by the Commonwealth. In accordance with the CNWA, and the proclamation made under it, each state has areas of declared naval waters.

11.28 The CNWA provides that Naval Waters can only be declared when waters are within a distance of five nautical miles (nm) from an installation or two nm from the limits of defence land on which there is no installation. Installation means:

a. a naval establishment, dock, dockyard, slipway, victualling yard, arsenal, wharf or mooring owned or used by the Commonwealth; or

b. any fixed structure, apparatus or equipment used by the Commonwealth for the purposes related to the naval defence of the Commonwealth.

11.29 ‘Naval waters’ are those waters defined as such by proclamation but usually would include any port, harbour, haven, roadstead, sound, channel, creek, bay or navigable river of Australia up to and including the high-water mark.

11.30 Under the CNWA, the Governor-General may declare specified waters as being naval waters and may make Regulations. These regulations may include:

a. regulating the mooring or anchoring of vessels within, or so as not to obstruct navigation into, in or out of, naval waters;

b. appropriating any space in naval waters as a mooring place or anchoring ground for the exclusive use of exempt vessels;

c. prohibiting or restricting the entry into any specified part of any naval waters, of any vessel having explosives, ammunition, tar, oil, or other combustible substance on board, and for regulating the loading and unloading of explosives and ammunition in naval waters;
d. prohibiting or restricting the discharging of explosives and ammunition in any naval waters or part thereof;

e. restricting the use of fire and light on board any vessel in any specified part of any naval waters;

f. regulating the speed at which vessels may be navigated in any specified part of any naval waters;

g. requiring the presence of at least one person at all hours of the day and night on board every vessel above a specified size moored anchored or placed in any specified part of any naval waters;

h. prohibiting or regulating the breaming or careening and cleaning of vessels in any specified part of naval waters or on the foreshore of any specified part of any naval waters;

i. prescribing the lights or signals to be carried or used, and the steps for avoiding collision to be taken, by exempt vessels and other vessels navigating naval waters;

j. conferring upon prescribed persons powers of search and inspection for the purposes of control of the waters;

k. conferring upon prescribed persons power to remove from, or from the foreshore of, any naval waters;

l. generally for making provision for the proper protection of installations in, or on the foreshore of, any naval waters; or

m. for prescribing penalties, not exceeding $1,000 or imprisonment for 6 months, for any contravention of, or failure to comply with, the regulations.

11.31 The Minister for Defence (MINDEF) may prohibit the construction:

a. of any jetty, wharf, building or structure in or on the foreshore of any naval waters; and

b. of any factory or store for explosives, oil or other inflammable material within five nm of the limits of a dockyard or within two nm of the limits of any naval waters.
11.32 A Superintendent is appointed to give directions concerning the specified naval waters under the CNWA and its regulations. Generally, the Superintendent is the Commanding Officer of the nearest naval establishment and has the power to:

a. give directions concerning vessels within naval waters;

b. give directions concerning aircraft, vehicles or vessels on the foreshore of naval waters;

c. remove vessels/wrecks that obstruct naval waters (or the approaches to naval waters); that impede the navigation of those naval waters; or that are found within or on the foreshore of naval waters.

11.33 The impact of naval waters being declared around the facility means that the local communities, the port authority and/or the local council cannot construct or move or tamper with anything that exists within the naval water boundaries, unless prior approval is sought from the Superintendent.

**Defence practice areas**

11.34 MINDEF may declare areas for Defence operations or practice, under Regulation 49 of the *Defence Force Regulations 1952*, for each of the three Services. The details are published in the *Australian Government Gazette* and the *Designated Airspace Handbook*. Delegates of the Chief of the Defence Force, the Secretary of the Department of Defence or the Service Chiefs may authorise carrying out a Defence operation or practice in a Defence Practice Area (DPA) provided that the authorisation is in writing and states when the operation or practice is to occur. There must be notice to potentially affected members of the public of the time and place of the practice, any equipment or ammunition to be used and the likely affect of that equipment or ammunition, as well as how the notice is being communicated to the public. This does not affect the conduct of any other Defence practices or operations but simply allows the operation of powers to exclude others from the DPA.

11.35 There are a number of offences for being in a DPA during a notified operation or practice or interfering with the Defence operation or practice. There is also a special compensation scheme for those affected by the declaration or use of DPA which limits the time in which they may make a claim in writing to the Secretary of the Department of Defence to sixty days.

11.36 **Powers of members of the Australian Defence Force.** ADF members, as well as police officers, may remove or direct any person,
vehicle, vessel or aircraft out of a DPA which is there without permission
during a notified Defence operation or practice. In order to exercise this
power a member, if asked by a person who is to be removed, must produce
evidence that he or she is a member of the ADF.

11.37 It should be noted that the Australian jurisdiction to exclude persons
or vessels from DPA extends only to the edge of the territorial sea. Outside
the territorial sea, only Australians and Australian vessels or aircraft are
subject to this jurisdiction. Vessels or aircraft from other States are not
subject to this jurisdiction. However, in the case of commercial craft,
adherence to the warning for DPA would be strongly advised by the craft’s
insurer.

11.38 Declared DPA may be either:

a. **Restricted area (R-)**. An area of defined dimensions within
which certain restrictions are applied to aircraft operations.

b. **Prohibited area (P-)**. An area of defined dimensions within
which ships are not permitted at any time under any
circumstances.

c. **Surface restricted area (SR-)**. A surface area of defined
dimensions within which activities dangerous to maritime traffic
may exist at specified times. The restriction is applicable to
maritime traffic only.

11.39 When an operation or practice is planned, warnings are promulgated
as Notice to Mariners and Notices to Airmen, originated by the RAN and
Royal Australian Air Force, and depending on the area concerned, visual
warnings may be displayed.
GLOSSARY


Note: The ADG is updated periodically and should be consulted to review any recent changes that may have changed the data in this glossary.

TERMS AND DEFINITIONS

archipelagic waters
Those waters enclosed by archipelagic baselines drawn in accordance with article 47 of the United Nations Convention on the Law of the Sea. Note: The sovereignty of an archipelagic State extends to the waters enclosed by the baselines, regardless of their depth or distance from the coast, as well as the associated seabed, subsoil and airspace.

Australian Customs and Border Protection Service
Previously the Australian Customs Service, the Australian Customs and Border Protection Service is an agency created by the Customs Administration Act 1995 which works closely with other government and international agencies to manage the security and integrity of Australia's borders.

coastal state

coastal waters
Under Australian law, those waters adjacent to a state or territory within three nautical miles of Australia’s territorial sea. Note: This includes waters on the landward side of the territorial sea baselines.

contiguous zone (CZ)
A zone contiguous to its territorial sea in which in which a coastal State may exercise the control necessary to: a. prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territorial sea; and b. punish infringement of the above laws and regulations committed within its territory or territorial sea. Note: The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.
continental shelf
An area of the sea bed and the subsoil adjacent to the coast but beyond the territorial sea in which the coastal State has sovereign rights for the purpose of exploration, control and exploitation of the living and natural resources. Note: The extent of the area can be defined by formulae developed by the United Nations Convention on the Law of the Sea.

customary international law
Those laws that represent the long-standing and consistent practice among most States with respect to a particular subject and which are accompanied by the belief of such States that the practice is obligatory. Notes: 1. A long-continued practice acquiesced by other states may create customary international law irrespective of the intent of those states. 2. A State, as a member of the community of nations, may therefore be said to have tacitly consented to it. 3. Customary international law is one of the principal sources of international law.

Defence civilian
For the purposes of the Defence Force Discipline Act, a person with the authority of an authorised officer who accompanies a part of the Australian Defence Force (ADF) that is outside Australia, or on operations against the enemy, and has consented in writing to be subjected to Defence Force discipline while so accompanying that part of the ADF.

exclusive economic zone (EEZ)
An area beyond and adjacent to the territorial sea, subject to the specific legal regime established in part V of the United Nations Convention on the Law of the Sea, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions. Note: It shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

freedom of navigation operation
An operation of naval diplomacy designed to challenge an attempt to restrict free use of the seas by the passage of combat forces. Note: It may be symbolic or coercive.

high seas
All parts of the sea which are not included in the territorial seas or internal waters of States. Notes: 1. All States have the freedom to navigate or conduct other activities, subject to certain restrictions, on
the high seas. 2. Where States have declared other zones beyond the territorial sea (contiguous zone, exclusive economic zone, continental shelf), the traditional high seas freedoms are affected by the rights that coastal States can exercise in such zones.

hot pursuit
The pursuit by a government ship or aircraft of a foreign vessel from a coastal State’s internal waters, territorial seas, contiguous zone or exclusive economic zone or the continental shelf on to the high seas, for the sole purpose of effecting its arrest for a violation of the laws and regulations of the coastal State. Notes: 1. Pursuit must be commenced contemporaneously with the offence committed; it must be pressed with all possible dispatch (it must be ‘hot’) and it must be continuous, although one pursuer may be relieved by another. 2. The right of hot pursuit ceases if it is interrupted or when the pursued enters the territorial seas of its own or a third State.

human rights law
That body of domestic and international law which protects individuals and groups against actions that interfere with their human rights.

innocent passage
Continuous and expeditious navigation through the territorial sea of a State for the purpose of either traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters, or of proceeding to or from internal waters or a call at such roadstead or port facility, and which is not prejudicial to the peace, good order, or security of a coastal State. Note: Vessels have the right to exercise innocent passage through territorial seas without interference by the coastal States concerned.

internal waters
All waters within the territory of a State such as harbours, rivers and lakes; together with all other waters to landward of the baseline from which the State’s territorial sea is measured. Note: They are an integral part of the territory of the State over which the State.

international law
The set of rules considered binding between States.

international strait
A strait which is used for international navigation between one part of the high seas or an exclusive economic zone (EEZ) and another part of the high seas or EEZ. Note: In these straits all ships and aircraft enjoy the right of transit passage, which shall not be impeded; except
that, if the strait is formed by an island of a State bordering the strait and its mainland, transit passage shall not apply if a route exists seaward of the island through the high seas or through an EEZ of similar convenience.

**law of armed conflict (LOAC)**
The international law regulating the conduct of states and combatants engaged in armed hostilities.

**lowest astronomical tide (LAT)**
The lowest tide level which can be predicted to occur under average meteorological conditions under any combination of astronomical conditions.

**maritime exclusion zone**
Declaration by a State of sea areas, including parts of the high seas, in which a State purports to impose conditions on the passage of ships and aircraft.

**merchant ship (MERSHIP)**
A vessel engaged in mercantile trade except river craft, estuarial craft or craft which operate solely within harbour limits.

**national airspace and waters**
All airspace above all those waters landwards of the outer limit of a nation's territorial sea, including internal waters, territorial sea and archipelagic waters and territory is national airspace and subject to the territorial sovereignty of individual nations.

**normal baseline**
The low-water line along the coast as marked on large-scale charts officially recognised by the coastal State used for measuring the breadth of the territorial sea. Note: Australia uses the lowest astronomical tide to measure its normal baselines.

**piracy**
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) on the high seas, against another ship or aircraft or against persons or property on board another ship or aircraft; or (b) in a place beyond the jurisdiction of any country against a ship, aircraft, persons or property.
roadstead
Waters normally used for the loading, unloading and anchoring of ships, and which would otherwise be situated wholly or partly outside the outer limit of the territorial sea, but included in the territorial sea. Note: A roadstead is clearly marked on charts by the coastal or island nation.

self-defence (SD)
Force permitted to be used to defend oneself or another person, to defend against unlawful imprisonment, to protect property, and against criminal trespass on land. Notes: 1. Australian criminal law limits the amount of force that a person may use in self-defence. 2. It does not apply if a person is responding to lawful conduct of another person and the accused person knew that conduct to be lawful.

state aircraft
Any aircraft used by a nation's military, police or customs services, and includes any aircraft under the control of the national government and used for public service. Note: The latter category may include national Very Important Person transports and aircraft on special missions.

territorial sea
An area of waters adjacent to a State over which it exercises sovereignty, subject to the right of innocent passage. Notes: 1. Every state has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from the baselines. 2. Section 2 of Part II of the United Nations Convention on the Law of the Sea addresses the limits of the territorial sea in greater detail.

territorial sea baseline (TSB)
The line from which the territorial sea is measured. Notes: 1. The normal baseline is the low-water line along the coast as marked on large scale charts officially recognised by the coastal State. 2. Part II of the United Nations Convention on the Law of the Sea provides for exceptions to this rule.

transit passage
All vessels and aircraft have the right to unimpeded transit passage through and over straits used for international navigation. Notes: 1. Transit passage must be continuous and expeditious and vessels and aircraft must not threaten or use force against nations bordering the strait. 2. Transit passage is in the normal mode and includes activities
such as fuel replenishment, submerged transit for submarines, organic flying operations and tactical manoeuvring.

The international agreement that resulted from the third United Nations Conference on the Law of the Sea. It lays down a comprehensive regime of law and order on the world’s oceans and seas, establishing rules governing all uses of the oceans and their resources. Note: Much of what is now internationally accepted as the law of the sea is contained in the Official Text of this agreement (with annexes and index) and the Final Act of the Third United Nations Conference on the Law of the Sea.

**water column**
A vertical continuum of water from sea surface to, but not including, the sea bed.
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