The Implementation of the Law of the Sea Convention in Australian Law

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The purpose of this paper is to outline some of the issues underlying the ratification of the Law of the Sea Convention, 1982 (hereafter referred to as the Convention or LOSC). The paper is in the nature of a "work in progress" report on the study I am currently undertaking for the Department of Foreign Affairs. The views expressed must therefore be regarded as tentative and incomplete. A full coverage of the Convention has not been undertaken here: some parts are not directly relevant to Australia (such as Part X Right of Access of Land-locked States to and from the Sea and Freedom of Transit) and are for that reason not considered. Likewise, Part IV, which deals with Archipelagic States, is also not considered (though its navigation provisions along with other parts of the Convention concerning navigation constitute an important factor in determining whether overall the Convention provides a regime favourable to Australia). Part XI, which concerns the deep seabed regime, is not considered, though it is still an area of uncertainty, and is the subject of further negotiations at Prepcom. Attention is drawn to a paper, written by G. Quinlan, of the Maritime Resources Section, Department of Foreign Affairs, which deals with Part XI and Prepcom, and covers the kinds of issues that will affect a decision by Australia whether or not to ratify LOSC so far as Part XI is concerned. Part XII, the Protection and Preservation of the Marine Environment, is only partially covered in this paper. It is arguably the most complex part of the Convention, and, although extensively considered in the Table referred to below, it is only briefly touched upon here Part XVII, dealing with Final Clauses, is also not considered here, except in particular instances. Some aspects of this part are fundamental to the new treaty regime, such as the supersession of the 1958 Geneva Conventions by the 1982 Convention, (Art. 311(1)), the acceptance of the Convention without reservations (Art. 309) etc. Others, such as the Article allowing the making of declarations and statements (Art. 310) are discussed below, but the precise content of any declaration or statement Australia might choose to make is not considered here.

Is a study necessary?

There is an important threshold question: is it necessary to undertake a study of the Convention prior to ratification? It is apparent that many States are not bothering to undertake such a study prior to (or even after) ratification. Indeed, it might even be argued that Art. 310 LOSC hints that domestic legislation does not have to comply with the Convention so long as the State's practices are in accordance with the obligations incurred.

The wording of Art. 310 is as follows:

> Art. 309 does not preclude a State, when signing, ratifying or acceding to this Convention, from making declarations or statements, however phrased or named, with a view, inter alia, to the harmonization of its laws and regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of this Convention in their application to that State.

The object of Art. 310 is apparently to allow those States with laws manifestly inconsistent with LOSC to keep those laws, provided that their application is compatible with the Convention. For example, there are those Latin American States which have extended territorial sea claims which would be politically difficult to repeal; or there are some States which enacted the early EEZ's or fishing zones which by their terms do not precisely accord with the Convention. Such States could make statements "with a view, inter alia, to their harmonisation etc "

These statements would be binding on the State in their own right in international law, and it would be possible for a State which proposed not to ratify the Convention to make a similar type of statement indicating that it would nonetheless honour the Convention in practice. This could be relevant where the State in question was unable to ratify or accede for domestic political reasons, but nonetheless might wish to commit itself to LOSC on the international level A more problematic question

is whether a State could, following this approach, "pick and choose" which parts of LOSC it might observe by this method. On one line of reasoning, the presence of Art. 309 ("No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention") would limit the flexibility of a State here.

Where a State did utilise Art. 310 as a ratifying or acceding State, it would not be able to avoid or diminish its international legal responsibilities under LOSC, a point made clear by the proviso to Art. 310 itself. This proviso also reflects part of a much more basic rule of general international law, namely that a State cannot invoke the provisions of its internal law as a reason for non-compliance with a treaty obligation (Vienna Convention on the Law of Treaties, Art. 29, though note also Art. 46).

Ultimately, therefore, the question becomes, for a ratifying or acceding State, one of compliance in practice with the Convention, should it wish to avoid the risk of international legal responsibility.

Although it may not be strictly necessary to change domestic laws before or as a result of ratification, it is nonetheless desirable that a State should survey its laws and practices to ensure that they are, as far as practicable, consonant with the Convention. Several reasons can be advanced: first, if domestic laws are harmonised with the Convention it will significantly reduce the risk of international responsibility resulting from the strict application of contrary domestic law by the local courts in cases involving foreigners or foreign interests, as well as increasing the likelihood that executive discretions, whether under statutory powers or otherwise, will be exercised in accordance with the Convention. It should be noted here that much of the Convention is subject to compulsory dispute settlement under Part XV, or in some instances to compulsory conciliation

Secondly, for many countries it is a well established practice that ratification or accession occurs only when the necessary legislative and administrative measures have been established. For a federal nation such as Australia, this practice is deeply entrenched, even though not strictly necessary, because in many instances it is thought desirable that the legislative implementation of a treaty should involve the legislatures of the six States and the Northern Territory, as well as the Commonwealth. A further reason, which goes well beyond the narrow question of domestic implementation is that for many countries, including Australia, the LOSC is arguably the most important treaty to be entered into after the UN Charter itself. Given its importance, it is surely worthwhile ensuring that its implications, both domestic and international, are understood prior to ratification.

One final general comment may be made here: it is not always easy to determine whether the use of "shall" in the Convention connotes a strict legal obligation or whether, in some circumstances, it connotes little more than a "best endeavours" clause.

One Article which illustrates this difficulty well is Art. 207. This Article states:

> 1. States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from land-based sources, including rivers, estuaries, pipelines and outfall structures, taking into account internationally agreed rules, standards and recommended practices and procedures.
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> 2. States shall take other measures as may be necessary to prevent, reduce and control such pollution.
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> 3. States shall endeavour to harmonize their policies in this connection at the appropriate regional level
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> 4. States, acting especially through competent international organizations or diplomatic conference, shall endeavour to establish global and regional rules, standards and recommended practices and procedures to prevent, reduce and control pollution of the marine environment from land-based sources, taking into account characteristic regional features, the economic capacity of developing States and

their need for economic development. Such rules, standards and recommended practices and procedures shall be re-examined from time to time as necessary.

5 Laws, regulations, measures, rules, standards and recommended practices and procedures referred to in paragraphs 1, 2 and 4 shall include those designed to minimize, to the fullest extent possible, the release of toxic, harmful or noxious substances, especially those which are persistent, into the marine environment.

To a lawyer uninfluenced by any possible compromises intended by the negotiators at UNCLOS III, paras (1) and (2) would seem to impose a fairly clear obligation on the coastal State to adopt laws and take other measures, especially when read against the background of the general provisions (Arts 192-196) Paragraphs (3) and (4) on the other hand use "shall endeavour" which is clearly an obligation of a lesser kind, and a genuine "best endeavours" clause. However, several people directly involved in the negotiations of UNCLOS III are of the view that the entire Article is in effect a "best endeavours" clause It might, in any event, be argued that para. (1) does not involve an obligation as such until there are in existence internationally agreed rules, etc to be taken into account, though against the background of the general provisions (Arts 192-196) that interpretation is unconvincing. It may well be that Art. 207 is, in the words of one commentator "largely hortatory" (A.E. Boyle, Marine Pollution Under the Law of the Sea Convention (1985) 79 AJIL 347 at p.354); that it will depend on the good will of States; and that para. (5) recognises that there may be economic limitations on the coastal State's capacity to deal with the matter. This interpretation of Art. 207 is given support by the dispute settlement provisions in Art. 297(1)(c) which would only permit compulsory dispute settlement under sect. 3 of Part XV where there has been a breach of "specified international rules and standards" etc. A very literal interpretation of Art. 297(1) might be possible - it refers to the coastal State exercise of sovereign rights, whereas Art. 207 imposes obligations generally on States (in contrast, for example, with Art 208), which deals with coastal States) It is unlikely, however, that such a result was intended

The point of this minor excursus, however, is to establish whether or not there is in Art. 207(1) and (2) a minimum obligation which the State incurs irrespective of the question of justiciability under Part XV. From the language employed in those paragraphs that would seem to be so, all the more so when it was apparently the intention of the drafting committee at UNCLOS III to use "shall" throughout the Convention with that result in mind. Of course, it is always possible that certain obligations can be regarded as more fundamental to the Convention: for example, many States and commentators at present (though possibly not in the future) would regard the obligation to respect innocent passage in the territorial sea as more important than the obligation to control landbased pollution, for example. However, it must always be remembered here that what is fundamental to a lawyer trained in the West European tradition might be abhorrent to a lawyer with the perspective of a developing nation. The navigation provisions of LOSC might well be seen by the former as fundamental, in large part because they can be traced back to notions of high seas freedoms, whereas to a lawyer from a developing country, it was the "abuse" of those freedoms that in large measure inspired G77 nations to seek a revision of the Law of the Sea.

For federal States, such as Australia, the existence of an Article such as Art. 207 is potentially significant as the existence of that Article would most probably support legislation by the Commonwealth Parliament which might previously have been regarded as coming within the States' legislative authority

Approaches to ratification or implementation in other countries

I have started to compile information on how other countries are going about giving effect to the new regime of the oceans - which may or may not include ratification of or accession to LOSC This information is not readily obtainable and what follows is necessarily incomplete and tentative at this stage

First, there are those countries which have decided not to sign the Convention at all, such as U.K., U.S. and West Germany For these countries, the objection to the Convention is almost entirely focussed on Part XI, concerning the deep seabed regime. These countries accept much that remains in the Convention and are, in varying degrees, honouring the non-seabed parts as customary international law, or through participation in conventions that elaborate on or have mirror provisions in LOSC, as for example in the marine environment part. In the United States, it is understood that when an EEZ was proclaimed, the domestic legislation implications were examined. It is also understood that a Defence Department study of the entire Convention is being undertaken, though the precise purpose of the study is not known.

In the United Kingdom, no doubt in large part because of its decision not to sign, no overall study has been made of the new regime of the oceans. However, consideration is being given to different aspects of the Convention on a sectoral basis and it has recently announced that it will increase its territorial sea to 12 miles.

In another category would be States such as Australia, Canada, Denmark and New Zealand. These States actively supported the Convention, all have signed it, and each is considering its position in relation to ratification.

In Denmark, prompted in part by the need to translate the Convention into Danish, an analysis of the Convention is underway to ascertain its implications for Denmark, including domestic legal implications. Likewise, Denmark has had discussions with the Nordic Cooperation Group on the kind of legislation required to give effect to certain aspects of the Convention, including marine scientific research, and preservation of the marine environment I have no details on the outcome of the study at this stage

For New Zealand, the question of ratification is likely to hinge as much as anything on the costs of participating in the institutions associated with Part XI (the Seabed Area)

In Canada, no decision has been taken on whether or not to ratify, though individual departments are undertaking in an ad hoc and sectoral way an examination of some parts of the Convention. Canada's attitude is complicated by the involvement of certain Canadian nationals in deep seabed mining consortia, and by a division of opinion whether ratification of the Convention is necessary. On one view, the Convention has done its work and most of the Convention, except for Part XI, is now customary international law. Another view emphasises Canada's role at UNCLOS III, and its greater interest in securing agreement for an overall regime for the oceans that LOSC is capable of achieving. Such a division of opinion is also likely to exist in those countries which were initially supporters of the Convention but now find it difficult to ratify because of regional complications in doing so, or because of genuine dissatisfaction with Part XI. Italy is one such country for both of these reasons.

Finally, there are many countries, principally developing, which are currently considering ratification. I have been able to ascertain the approaches of several, and I shall give the contrasting concerns of two adjacent States, neither of which would necessarily wish to be precisely identified. Both have 200 mile zone fisheries laws in place. One has every intention of ratifying, is not concerned about the financial costs to it of Part XI, and is not worried about making legislative changes to ensure that the Convention will be fully effective in domestic law. The ratification question is seen more as an exercise of good faith to support the results of a decade of negotiations and to demonstrate loyalty to G.77 ideals. Its neighbour is not concerned with ratification as such, has undertaken no study of the implications of ratification, and is more concerned to develop relations with its neighbours in the maritime sector. It is particularly anxious to join an important regional economic

organisation and would ratify LOSC if it would assist that objective.

The attitudes adopted by these two countries probably represent, in a very general way, the attitudes of many other countries towards ratification. In other words, political factors such as the so-called "North-South" debate, loyalty to the non-aligned movement, real and imagined regional or security loyalties, rather than a cautious assessment of the benefits and obligations of the Convention, will play an important role in determining whether, when, and to what extent, the Convention will come into force.

The Australian study.

The study that I have been asked to undertake for the Department of Foreign Affairs on the implications of ratifying the Convention for Australia is required to involve the following aspects: 1. a brief summary of each Article or paragraph; 2. an indication whether there is a right, an obligation, and a brief indication of its character; 3. a functional categorisation of each Article or paragraph; 4. an indication whether the Article or paragraph is operative, operative in part, or not operative; and 5. some comments.

At the time of writing this paper all Articles have been considered, except for those in Part X (Right of Access of Landlocked States to and From the Sea and Freedom of Transit) and Part XI (The Area).

I propose now to indicate how different parts of the table are compiled.

1. A brief summary. Although it was originally the intention to summarise the Articles, this has proved to be difficult to do with consistency To begin with, the Article headings used in the final text are sometimes misleading as to the significance of the contents The basic problem is more that some Articles

are now well known (e.g. the Articles on coastal delimitation, innocent passage, EEZ sovereign rights) and lend themselves to abbreviation while others (especially those concerning the Protection of the Marine Environment and Marine Scientific Research) are complex and lengthy and often do not lend themselves to being briefly summarised.

2. The right/obligation characterisation. Each Article, or paragraph where appropriate, has then been classified as involving a Right or an Obligation, and then sub-classified into Legal, Non-Legal, Contingent, Definitional and Financial. Many Articles, and paragraphs, involve both a right and an obligation, while the sub-classifications inevitably overlap, for example, Legal/Financial. Obviously, however, the presence of a financial obligation, even if also a legal one, merits a separate reference given the importance of financial aspects to the final ratification decision.

A non-legal obligation covers mainly the "should not" clauses in the Convention, (such as Art. 28), or "best endeavours" (such as Art. 266(4)).

3 Functional categorisation. Under the column headed functional categorisation there is, so far, little more than an attempt to identify what each Article or paragraph concerns. It quickly became apparent that a much more elaborate list of terms will be needed than has been used so far. The purpose of the functional categorisation is to enable a computer search to be undertaken of both the Convention and the table with a view to identifying those clauses concerning, e.g., dispute settlement, navigation issues, etc. This part of the table will be elaborated upon in the future.

4 State of implementation. The column, state of implementation, has three categories: Operative, Operative in Part, Not Operative This refers to the extent to which, if at all, the Article, or paragraph in question is operative in Australian law Where a provision has been given effect to by

legislation (the common example in most countries being the fisheries or EEZ Articles), it is characterised as operative or possibly, depending on the scope of the legislation, operative in part. Likewise, where no legislation is necessary, whether because there already exists a statutory discretion or other administrative power that is capable of giving effect to the Convention, or because the obligation arises at the international level only without any need for domestic implementation, it would be characterised as operative.

"Operative in part" is used where there exist laws which give partial or imperfect effect to certain parts of the Convention. An excellent example of this is apt to be found in the laws not only of Australia but other coastal States in respect of marine scientific research. Australia has provisions that would authorise research concerning fisheries, sedentary species and offshore minerals including petroleum. There is, however, no general, or complete, power to authorise marine scientific research with respect to matters falling outside those categories. In other words, "pure oceanographic research" might be difficult to approve in strict terms under existing domestic law. The view might be taken that research matters falling outside the specific categories referred to would, in the absence of specific legislative prohibition, constitute an exercise of a high seas freedom, and such activity would be lawful so far as the coastal States' laws are concerned. In such a situation, the characterisation adopted is "operative in part" because the coastal State has not yet fully availed itself of the benefits of the Convention, and it follows from that characterisation that a new legislative or administrative scheme would probably be required.

"Not operative" is used to indicate that a Convention right or obligation is not capable of being implemented in domestic law at the present time without legislation At this stage, the judgment on whether legislation is required is based on legislation of the Commonwealth Parliament only State legislation operating in the territorial sea is currently being

examined, as well as certain other State laws operating beyond that sea, in order to ascertain whether or not these laws either hinder or provide the mechanism for implementing certain aspects of the Convention.

An important question that needs to be resolved not only in the Australian context, but for other States as well, is whether it is appropriate to adopt completely new legislation or to graft onto existing laws provisions that fill in the gaps This question arises, we have seen, with respect to marine scientific research in Australia, and it appears, in Canada, where several different Acts permit authorisation of research relevant to the subject matter of the Act. Although a final judgment on whether completely new legislation is an appropriate solution will turn on the quality of the existing legislation, existing administrative arrangements, and the importance of the activity in question to the State concerned, the basic approach adopted in the study is that it is better to start with the assumption that new legislation giving effect to the Convention is desirable, given the widespread impacts of the Convention on so many aspects of domestic law. If the opposite approach is adopted, it is virtually certain that important parts of the Convention will languish in a legislative limbo so far as domestic law is concerned.

5 Comments. A final column is devoted to comments, which can range from points of interpretation, ambiguities, linking parts of the Convention to others, indicating existing treaties that concern particular Articles or paragraphs, existing legislation or administrative practice that gives effect or partial effect to particular Articles, recommendations for new legislation, etc.

I propose now to consider particular parts of the Law of the Sea Convention focussing in particular on the domestic law implications (I shall hereafter refer to the 1958 Geneva Conventions as: TSC (Convention on the Territorial Sea and the Contiguous Zone); HSC (Convention on the High Seas) CSC

(Convention on the Continental Shelf); HSFC (Convention on Fishing and Conservation of the Living Resources of the High Seas))

It must be re-emphasised that what follows is not a comprehensive consideration of all the issues that need to be considered in the domestic implementation of a Part of the Treaty. In most instances, a more detailed discussion of each Article has been undertaken in the table referred to.

The Width of the Territorial Sea, its Delimitation, and the Regime of Innocent Passage.

Much of Part II of LOSC is an evolution from the 1958 TSC, hence the ratification of LOSC will not raise many novel issues so far as compliance with the Convention in domestic law is concerned

The primary question raised here is whether Australia should extend its territorial sea to twelve miles, the maximum limit permitted under the Convention (Art. 3). In the light of the permissive language of Art. 3, the coastal State is clearly not under an obligation to do so. Likewise, given that Australia currently claims a territorial sea of three miles, there is no need to consider whether a coastal State can do away with a territorial sea altogether.

The extension of the territorial sea to 12 miles around the Australian coast would have the following consequences:

(a) it would, it has been suggested, bring Bass Strait potentially within the straits regime of Part III of LOSC, as well as other, navigationally less important, areas around the Australian coast;

(b) it could bring parts of the Torres Strait within the straits regime (for the solution adopted between Australia and Papua New Guinea, see Art. 7 Torres Strait Treaty),

(c) any increase in the territorial sea beyond 3 miles may well result in pressure from the States to have the extra area accrue to them, even though the Coastal Waters (State Powers) Acts 1980 rule out that consequence under the offshore constitutional settlement. (Section 4(2)).

There is an argument, though a weak one, that the Seas and Submerged Lands Act, 1973 might prevent the Commonwealth from giving full effect to a twelve mile territorial sea as a matter of domestic law. The argument arises from the wording of Section 7 which allows the Governor General to proclaim the limits of the territorial sea "not inconsistently with Section II of Part I" of the 1958 TSC. That Convention did not stipulate the maximum width of the territorial sea, as no agreement could be reached, though two articles (7 and 24) anticipated agreement on a 12 mile territorial sea. Possibly a 12 mile territorial sea is "not inconsistent" with Section II of Part I, indeed the silence of the 1958 Convention on this may well require that the limit of the territorial sea is to be determined by customary international law, which may in 1958 have tolerated such claims, and certainly came to do so in subsequent years.

The 1982 Convention has adopted substantially the same baseline provisions to be found in Section II of Part I of the 1958 TSC, though there are some minor changes concerning islands having fringing reefs (Art. 6), deltas, and other highly unstable coastlines (Art. 7(2)), and the use of low tide elevations as baseline points where that use has received general international recognition (Art. 7(4)). Further, there are some textual changes and additions consequent upon the addition of novel regimes to LOSC (compare, for example, Art. 9 TSC with Art. 11 LOSC)

It seems necessary to amend the Seas and Submerged Lands Act in order to require consistency with the 1982 Convention instead of the 1958 Convention. This would not only remove the small doubt raised concerning the breadth of the territorial sea, but it would also ensure that the territorial sea baselines

already proclaimed in 1983 would be judged for their consistency with the slightly more generous provisions of LOSC (note in particular, Art. 14 LOSC). (The reliance in the Seas and Submerged Lands Act, Sect. 12, on the CSC definition should also be replaced with the 1982 LOSC definition.) It may even be unnecessary to mention specifically the Convention, a reference to baselines drawn in accordance with international law being thought to be sufficient. For an example of this, see the Fisheries Act, Sect. 4 (C'th).

Given that, to date, the territorial sea baselines proclaimed by Australia have not been contested by other nations, the most likely context in which these baselines will be disputed is where an individual sought to have a domestic judicial determination set aside on the basis that the locus of the activity in question was subject to another legal regime because a particular baseline did not conform to the 1982 Convention, or at present, the 1958 TSC. Thus, any amendment of the Seas and Submerged Land Act will be primarily for domestic law purposes only.

Ratification of the 1982 Convention would not affect the delimitation of the territorial sea at the only point of overlap of that sea with a foreign nation, namely in the Torres Strait The provisions of the 1958 TSC and the 1982 LOSC are identical on this point (see Art. 12 TSC, Art. 15 LOSC), and the agreement contemplated in them is dealt with in the Torres Strait Treaty between Australia and Papua New Guinea.

The 1982 Convention has not radically altered the regime of innocent passage when compared with the 1958 TSC, however, some provisions elaborate on the definition while others are novel, with the overall result that coastal state control over vessels passing through its territorial sea is increased.

In the 1982 Convention, there are several points of uncertainty some of which can be briefly adverted to here

First, the scope of innocent passage is now narrower under LOSC compared with TSC. Art. 19, which defines innocent passage, includes as part of the definition of non-innocence a catch-all paragraph "any other activity not having a direct bearing on passage" through that State's territorial sea.

Secondly, LOSC leaves unanswered, as did the TSC, the vexed question whether warships need to notify the coastal State or obtain its authorisation before exercising a right of innocent passage.

These, and others, are more important to Australia in relation to the practice of, in particular, our neighbours, should unacceptable restrictions be imposed by them on the passage of vessels navigating to or from Australia through their territorial seas, international straits or archipelagos.

When Australia ratified the 1958 TSC, no general Act was passed to incorporate the innocent passage provisions of that Convention into Australian law, possibly on the assumption that those provisions reflected customary international law, and therefore, it was also assumed, did not need to be implemented by legislation. There are several Articles in that Convention, which are also found in LOSC, which may not be adequately covered in Australian law. See, for example, Art. 25 LOSC, which in paragraph (1) authorises steps to be taken to prevent non-innocent passage, or para (3) which authorises temporary suspension of innocent passage. It is uncertain whether there exists sufficient power in domestic law to enforce judicially such measures, should Australia choose to exercise them. However, as similar provisions can be found in the 1958 TSC (Art. 16), the absence of specific provisions in Australian law has not to date, it appears, caused practical problems.

In most instances non interference can be achieved through administrative restraint. The Crimes at Sea Act 1979, for example, does not refer to innocent passage, nor to the freedom of navigation beyond the territorial sea, though it does require

the assent of the Commonwealth Attorney General before certain prosecutions can be initiated (Sect. 7 (4-7)). The Coastal Waters (State Powers) Act makes the following reference to innocent passage:

> Nothing in this Act affects the status of the territorial sea of Australia under international law or the rights and duties of the Commonwealth in relation to ensuring the observance of international law, including the provisions of international agreements binding on the Commonwealth and, in particular, the provisions of the Convention on the Territorial Sea and the Contiguous Zone relating to the right of innocent passage of ships. (Sect. 6)

Another example of how Australian law sits uncomfortably with the innocent passage provisions of both the 1958 TSC and now the 1982 LOSC was identified in a recent Australian Law Reform Commission study, where it drew attention to a power in the Navigation Act which when read with the Acts Interpretation Act Sect 15B gave significantly greater power to local courts than is contemplated by Art. 20 TSC (or Art. 28 LOSC). (Civil Admiralty Jurisdiction in Australia ALRC 33, paras 113-115)

Although the absence of a coherent regime in Australian law for regulating passage of foreign ships through Australia's territorial sea has not, it appears, given rise so far to practical difficulties, it is recommended that the opportunity is taken to review existing Australian legislation, both State and Commonwealth, that is capable of operating in the territorial sea, as well as attempting to clarify some basic issues still unresolved in Australian law. For example, it is not clear whether the territorial sea over which the States have been given legislative jurisdiction and title is within or beyond State limits for all purposes. This doubt exists because the Coastal Waters (State Title) Acts did not actually alter state limits (possibly because of complications to be found in Sect. 123, Constitution), rather, they gave the states an extra-territorial belt If, as the Seas and Submerged Lands Case (1975) 8 ALR 1 held, the limits of the states did not extend beyond the low water mark, it could mean that for the purpose of judicial jurisdiction, and in the absence of any contrary legislative

mandate, the territorial sea is extra-territorial to the States, which could affect the outcome of a decision where the exercise of judicial jurisdiction required that the relevant events occurred within the territory. This is not the place to explore this potentially complex question - it merely underlines the plea for a thorough review of these and other issues concerning the territorial sea. Ratification of the Convention could provide the opportunity to do this.

Finally although not strictly a consequence of ratification of LOSC, the right of innocent passage as a matter of international law has applied in certain Australian internal waters since 1983, when our new territorial sea baselines were proclaimed. (See Art. 5(2) TSC and 8(2) LOSC) This will exist whenever the baselines drawn in 1983 have "the effect of enclosing as internal waters areas which had not previously been considered as such". (For further discussion of these baselines, see J.R.V. Prescott, Australia's Maritime Boundaries (Canberra Studies in World Affairs No.16, 1985), I. Shearer, Australia and the International Law of the Sea [1986] Archiv des Volkerrechts, p.22, esp. pp.28-34, M. Landale and H. Burmester, Australia and the Law of the Sea - Offshore Jurisdiction in International Law in Australia, 2nd ed. p.390, esp. p.394.)

Straits used for International Navigation

The provisions on straits (set out in Part III of LOSC), along with the right of transit across archipelagic waters (set out in Part IV), are vital to Australia's acceptance of the Convention, not so much because of their impact on Australian waters, but because they provide the most satisfactory basis for ensuring navigation rights for our vessels through the archipelagic waters and straits to our north and in the Pacific It is recommended that a close scrutiny is made of such claims, and the laws enacted and enforced in them

In the application of this Part to the Australian coastline, the two key areas are. the Torres Strait and Bass Strait. The

Torres Strait is covered by the Treaty between Australia and Papua New Guinea, which sought to apply the provisions of the earlier draft of the Convention (see Art. 7). Presumably the Torres Strait Treaty would be covered by Art. 311(2) LOSC, and would be compatible with it on the matter of navigation through the area covered by the Treaty.

In the Bass Strait, the need to consider the straits regime will arise only if Australia proclaimed a 12 mile territorial sea, and if particular islands are employed as base points for measuring the territorial sea. It would be possible to proclaim a territorial sea of a lesser distance in the Bass Strait, or to proclaim a territorial sea of 12 miles only from certain of the islands, thus leaving a strip of EEZ or high seas through which ships could continue to pass without coming under the straits or territorial sea regime. (see Art. 36)

The right of transit passage is defined in Art. 38, while the duties of ships in transit passage are set out in Art. 39 The difference between transit passage and innocent passage depends on the careful wording of Art. 18, and Art. 38. While both emphasise the requirement that the passage be continuous and expeditious, innocent passage includes stopping and anchoring to the extent that it is incidental to navigation. This is not specifically referred to in either the definition (Art. 38) or the duties (Art. 39), though the latter refers to refraining from "any activities other than those incident to their normal modes of continuous and expeditious transit". This ambiguous phrase is intended to deal with the passage of submarines while submerged, though it might also cover forward sweeps by helicopters from an aircraft carrier for protective purposes related to the transit of the carrier.

In both innocent and transit passage an exception is made for force majeure and distress (though worded slightly differently) Two other important differences need to be mentioned: there may be a temporary suspension of innocent passage in the territorial sea, but no suspension of transit

passage in straits used for international navigation, nor of innocent passage through straits not covered by the transit passage regime. Secondly, transit passage includes overflight which is not a right in the territorial sea. In the event that Australia did enclose the Bass Strait, that right would have to be allowed for. Curiously, although the coastal states may designate sealanes and traffic separation schemes for ships in straits (Art. 41), no reference is made to aircraft; however, in Art. 53, which deals with archipelagic sealanes passage, particular reference is made to the designation of air routes

The coastal State is given (Art. 42) a number of powers in the Strait, which include safety of navigation, control over vessel-sourced pollution, control over fishing vessels, or the loading or unloading of any commodity, currency or person in contravention of the customs, fiscal, immigration or sanitary laws. However, some important duties are also imposed: its laws are not to discriminate in form or in fact among foreign ships, or have the practical effect of denying, hampering or impairing transit passage; it shall give "due publicity" to its laws. There is a more general obligation not to hamper transit passage and to give "appropriate" publicity to any danger to navigation or overflight of which it has knowledge. The general obligation not to hamper transit passage will be more important in the context of drafting instructions given to RAN officers, and other maritime enforcement officials, should Australia create a straits regime by extending its territorial sea

The Torres Strait Treaty in Art. 7 covers navigation, both transit and innocent passage, in particular waters of the Torres Strait. Art. 7(7) adds:

> The rights of navigation and overflight provided for in this Article are in addition to, and not in derogation of, rights of navigation and overflight in the area concerned under other treaties or general principles of international law

The application of the straits regime in the Torres Strait to third parties is reaffirmed by this paragraph; moreover, the parties are not able to extend their territorial sea (or archipelagic waters) in certain areas. In the area south of the Protected Zone, Australia could increase its territorial sea, thereby creating some international straits. However, there already exists some straight baselines enclosing internal waters off Cape York, and in all probability a right of innocent passage will apply in them (Art. 5 TSC, Art. 8 LOSC).

In respect of other localities, an increase in the territorial sea will result in certain straits coming within the straits regime of Part III. In many localities, however, these will be removed from important shipping lanes, and there may be no need to consider the application of the coastal State laws referred to in Art. 42. Further, in many localities that would become straits, there may well exist seaward of the island "a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics" (Art. 38(1), and note also Art 36)

The creation of straits subject to the regime of Part III will raise the question of whether State laws should apply in such waters. As the area has the juridical character of the territorial sea, though with a special navigation regime added, State laws would continue to apply in the first three miles under the Coastal Waters (State Powers) Acts. In those waters, the Commonwealth's obligations with respect to innocent passage are preserved Thus, the Acts would need amendment to protect Australia's obligations also with respect to transit passage, and more generally, to refer to LOSC instead of the TSC.

The Contiguous Zone

So far, under the TSC, Australia has exercised legislative jurisdiction only with respect to customs (See Customs Act, sects 59, 184, 185) With ratification, although the heads of power

remain the same ("customs, fiscal, immigration, and sanitary" as in TSC, the 1982 Convention gives the coastal state authority to exercise contiguous zone jurisdiction out to 24 miles, compared with 12 miles under Art. 24 TSC, even, it might be added if the territorial sea is not extended up to the 12 miles permitted by the 1982 Convention. In other words, while retaining the present 3 mile territorial sea, Australia could extend its contiguous zone type jurisdiction up to 24 miles

One matter left unresolved by the LOSC, is the choice between the broader interpretation favouring wider enforcement powers for the coastal State which allows it to create offences in the zone or the narrower more literal interpretation pushed so strongly at the 1958 conference by certain States which only allows the coastal State to take certain preventive measures Some State practice favours the wider view, though the matter remains controversial in academic writings. Australian practice, as revealed in Section 59 of the Customs Act, supports the wider view, but Section 59(6) would have the effect of "reading down" that section, were it to be clear that the narrow view was the correct view for the purposes of international law.

Finally, whereas Art. 24 TSC applied a median line as between opposite or adjacent States for the maximum width of the contiguous zone, this provision has been dropped from LOSC (see Art. 33). Presumably, this reflects the limited nature of contiguous zone jurisdiction, rendering unnecessary any formal boundary line.

The EEZ

The EEZ regime is undoubtedly one of the most important developments at UNCLOS III and is also, in terms of state practice, the most accepted Part of LOSC so far. Indeed, in several important respects, the EEZ regime was arguably already part of customary international law before the 1982 Convention was opened for signature, irrespective of ratification The EEZ is generally assumed to be a concessive regime in contrast

to the continental shelf, the principal basis for this view being the absence for the EEZ of an equivalent provision to Art. 77(3) (see also Art. 2(3) CSC) which acknowledges that the rights of the coastal State over the shelf "do not depend on occupation, effective or notional, or on any express proclamation". It would also permit the coastal State to move in stages towards the full exercise of its sovereign rights and this could occur independently of ratification and entry into force of the Convention. However, in the absence of ratification and entry into force, there could be uncertainty over the nature and extent of coastal State sovereign rights or jurisdiction with respect to certain matters. Would, for example, the details of the marine scientific research regime operate as customary law?

Although concessive, it is possible that certain duties attach to the coastal State in its "EEZ" automatically. For example, the conservation obligation in Art. 61, especially the obligation to ensure that the living resources are not endangered by over-exploitation, or certain basic obligations regarding marine pollution (see for example Arts 192, 207) might apply to the coastal State irrespective of an actual claim to an EEZ, or to certain selected EEZ rights.

In addition, the duties with respect to freedom of navigation in the EEZ would clearly apply. It might even be arguable that where a State has only partially exercised its sovereign rights in the waters within 200 miles of its coast, it is not so much a matter of a "duty" under Art. 56, but rather the retention of a high seas freedom of navigation. This view depends on regarding the EEZ regime as one which displaces high seas freedoms only to the extent that particular sovereign rights and jurisdictions are exercised by the coastal State (and then only to the extent that is permitted having regard to Art. 58). This view is not one that would necessarily find favour with those States who strove for a more "territorialist" approach. For Australia, the approach favoured in domestic legislation, though hardly explicitly, is that in the absence of a domestic law qualifying the exercise of a high seas freedom, the seas

remain free as a matter of Australian law. It would be reasonable to expect that that approach will underly any proclamation or legislation Australia might make for an EEZ, whether or not it is made in the context of ratification of LOSC by Australia.

From Australia's point of view, the proclamation of an EEZ, whether or not it is linked to ratification of LOSC, need not be a high priority. We already exercise sovereign rights over the continental shelf to the extent that it admits of exploitation relying on the 1958 CSC formula (Art. 1). Proclamation of an EEZ by Australia might merely encourage arguments that in delimitation matters, the EEZ concept prevails over the continental shelf though to the extent that such arguments have any merit the same would apply in respect of ratification. Of course, in those parts beyond the continental shelf but within 200 miles of the coast, any sovereign rights asserted or exercised by Australia over the non-living seabed resources would have to depend on the EEZ regime, whether treaty or customary law in origin.

In addition to the continental shelf regime claimed by Australia, we have, since 1978, exercised control over fisheries within the 200 miles Australian Fishing Zone, which in effect relies on the fisheries regime that emerged during UNCLOS III and since 1980, we have also exercised control over marine mammals. In Australian law (and international law), activities not covered by our continental shelf or fisheries regime would be subject to the high seas regime. What, then, are we missing out on by not claiming an EEZ? In addition to non-living resources beyond the limit of the continental shelf but within 200 miles, we would gain control over sedentary species in that same area; we would also gain control over such marine living resources as are not covered by our current definitions of fisheries or marine mammals. Mermaids beware! Also, we would gain sovereign rights with regard to "other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water currents and winds"

The Convention (Art. 60) also authorises coastal state jurisdiction over artificial islands and structures within an EEZ To the extent that these relate to exploration and exploitation activities on our continental shelf, these are covered by existing legislation (see, in particular, the Minerals (Submerged Lands) Act, and Petroleum (Submerged Lands) Act, though these laws do not seek to cover comprehensively the new artificial islands regime.)

The Sea Installations Bill, 1987 covers installations within either the outer limits of the continental shelf, or the Australian fishing zone, thus, in part, it relies on the EEZ regime. The Bill defines a sea installation in clause 3 as:

(a) any man-made structure that, when in, or brought into physical contact with the seabed or when floating, can be used for an environment related activity;

(b) any partly constructed structure that, when completed, is intended to be, or could be, a structure referred to in paragraph (a); or

(c) the remains of a structure that has been a structure referred to in paragraph (a) or (b);

but does not include:

(d) an off-shore industry fixed structure;

(e) an off-shore industry mobile unit;

(f) a structure belonging to an arm of the Defence Force or to the naval, military or air forces of a foreign country; or

(g) a prescribed structure or a structure in a class of prescribed structures;

Environment related activity is defined (also in clause 3) to mean:

any activity relating to:

(a) tourism or recreation;

(b) the carrying on of a business;

(c) exploring, exploiting, or using the living resources of the sea, of the seabed or of the subsoil of the seabed, whether by way of fishing, pearling, oyster farming, fish farming or otherwise;

(d) marine archaeology; or

(e) a prescribed purpose;

The proclamation of a full EEZ would enable us to move towards exercising greater control over marine scientific research in the 200 mile zone. At present, the only legislative controls concerning research are in the context of continental shelf exploration and exploitation, sedentary species, fishing, whaling and more recently, sea installations. Even within these rubrics, the legislation is not comprehensive. For research falling outside these categories, the high seas freedoms would operate. The coastal state would acquire under the Convention the right to control the undertaking of the research, to participate in it, or to be provided with the information obtained. It also gains the right to refuse consent to research in certain circumstances. The coastal State also gains certain powers in respect of marine pollution in the EEZ, an important addition, though qualified by the requirement that coastal state laws and regulations in the EEZ must have, at least, the same effect as generally accepted international rules and standards.

There is a final catch all phrase - "other rights and duties provided for in this Convention". (Art. 56(1)(c)) Amongst the "other" rights (too numerous and too uncertain to catalogue here) would be the right to seek or in some circumstances to refuse compulsory settlement of a dispute. It is the "duties" which have caused most concern, for many states have chosen merely to assert their rights in the EEZ, with an only occasional reference in the legislation to their duties. Australia in its Fisheries Act, is one of the few countries to acknowledge explicitly some of its duties regarding fisheries (see Sect 5B, Fisheries Act where the objective of avoiding over exploitation is referred to as well as that of achieving optimum utilisation of the living resources of the AFZ).

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These duties are to be found in several parts of the Convention in addition to the Part V itself. In particular, the High Seas provisions would apply via Art. 58(2), as would certain of the general provisions concerning protection and preservation of the marine environment, the provisions concerning marine scientific research, and settlement of disputes. As well, Part XVI (General Provisions) contains some clauses that might also relate to the duties, though arguably in any event as customary international law in respect of any maritime zone over which the coastal state exercises control. Art. 301 (peaceful uses of the Seas) reiterates "the principles of international law embodied in the" UN Charter, while Art. 300 incorporates the "good faith" and "abuse of rights" concepts into the Convention, which presumably are part of customary international law

The duties regarding fisheries would include the duty to avoid over exploitation (Art. 61(2)); the duty to promote the objective of optimum utilisation, including granting access to other States to any declared surplus (Arts 62(1) & (2)). Most articles concerning the obligation to "cooperate", "seek to agree", etc (Arts 61, 63, 64, 65, 66, 67, 69 & 70) impose weak obligations; Art. 73 (non-imprisonment and release on bond in respect of foreign fishing vessels, notification of flag state of arrest) would also come under the duties contemplated by Art 56

Other "duties" found within Part V would include: the duty to attempt to enter into provisional arrangements pending the final delimitation of the EEZ; the outer limits of the EEZ and lines of delimitation to be shown on charts of a scale or scales adequate for ascertaining their position; the duty to deposit charts or lists of geographical coordinates with the UN Secretary General

Given the widespread acceptance of the EEZ regime in State practice and some supporting judicial dicta from the International Court of Justice in its recent decisions concerning

sea boundary delimitation, it may be that the rights and duties are there for Australia to take without having to rely on ratification. This is not the place to join the extensive debate on when a treaty provision (even of a treaty not yet in force) can become part of customary international law. It can be said, however, that many of the specific provisions of LOSC concerning the EEZ (including here not just Part V, but the provisions on marine scientific research, marine pollution, and dispute settlement) may not translate easily into customary international law, first, because of a lack of detailed practice on some important aspects, secondly because many of the provisions are not of a norm creating character, depending more on future negotiations, agreement, or simply future cooperation. To take the fisheries provisions on which at least there is a substantial body of practice, while the obligation to ensure that the living resources of the EEZ are not endangered by over exploitation, and the obligation to promote the objective of optimum utilisation, including granting access to a declared surplus, are probably part of customary international law, the provisions regarding shared and straddling stocks (Art. 63) or anadromous stocks and catadromous species (Arts 66, 67), have very little State practice to confirm their existence as customary international law, and in any event, depend heavily on agreements between the relevant States.

What changes need to be made to domestic legislation? Whether or not Australia wishes to go to a full EEZ upon ratification, or sometime there after, it will at least be necessary to amend the legislation concerning the continental shelf, and in particular, the Seas and Submerged Lands Act, Sect. 12 to incorporate the 1982 definition of the continental shelf, and desirable to give full effect to the artificial islands regime of Art. 60 to the extent that it is not covered by the offshore petroleum and minerals legislation, and the sea installations legislation. Other piecemeal changes could be made It is suggested, however, that instead of grafting onto old Acts or simply copying old models it may be better to look anew at what the Convention offers for the EEZ, and draft new

legislation in the light of it. This is not necessarily to suggest that an all embracing EEZ Act should be drafted, as has been done in some countries. On the other hand, a series of Acts dealing with the particular sovereign rights and jurisdictions in the EEZ, but drafted from the perspective of the Convention would assist in ensuring that Australia gains the maximum benefits from the Convention, more effectively than the piecemeal improvement of older Acts designed to deal with topics founded in past perceptions that have been overtaken by the new regime for the oceans.

The provisions on marine scientific research, especially in the EEZ, are novel and merit a fundamental re-appraisal. The present Australian legal regime is outlined later in more detail (under Marine Scientific Research) but there is no comprehensive regime covering marine scientific research. The view might well be taken, in the absence of a specific legislative or other lawful prohibition, that certain types of marine scientific research, to the extent that they fell outside the specific existing categories of national laws, constituted an exercise of a high seas freedom and were lawful so far as Australian law was concerned.

The Fisheries Act, along with the Continental Shelf (Living Natural Resources Act) is one Act which needs a substantial overhaul It was initially drafted to deal with fisheries problems in the early fifties, when the prime objective was to exclude foreign fishermen, amended in 1967 to incorporate a 12 mile exclusive fishing zone and since then in 1978 to incorporate the 200 mile EEZ so far as it concerned fisheries, and where much greater emphasis needed to be placed on the management responsibilities of the coastal State, including the access of foreign fishing vessels to a declared surplus. Quite apart from the important changes referred to, there have been many small amendments.

Although the present laws on offshore mineral and petroleum legislation and the sea installations Bill currently before

Parliament are probably adequate to cover existing offshore structures on the continental shelf, and installations within the 200 mile Australian Fishing Zone, it is recommended that the new regime in Art. 60 is examined in the light of present laws to ascertain whether the more comprehensive regime warrants further incorporation into Australian law.

Another part of the EEZ provisions that requires a totally new approach is in the area of enforcement. Art. 73 lays down certain limitations in respect of fisheries offences, (no imprisonment without flag state agreement, release of vessel on payment of bond or other security, while the artificial islands regime and the continental shelf regime (including sedentary species) it seems, are not subject to similar constraints. A more complex issue is the extent to which vessels purporting to exercise a "high seas" freedom of navigation through the EEZ can be controlled in their passage, in particular but not exclusively where the vessel has the capacity to engage in fishing or in marine scientific research. Does such a capacity of itself authorise coastal state regulation of its passage eg by requiring a fishing vessel to navigate away from fishing grounds, etc, or by imposing reporting requirements on such vessels?

The problem here is that, prima facie, such vessels are merely exercising a high seas freedom of navigation, yet, particularly in the case of fishing vessels, the unrestricted exercise of that freedom is apt to render coastal state enforcement measures ineffective. Several States now accept that some control over such vessels is both appropriate and necessary, for example regulating stowage of fishing gear, imposition of certain position reporting requirements while the vessel is transiting the zone, or, more controversial, the restriction on its navigation through the zone. (See, for an example, Sect. 13AB Fisheries Act.) The legal problems are more intractable with marine scientific research Does the mere existence of that capacity in a vessel enable the coastal State to exercise control? What if the foreign vessel concerned claims

that it is merely undertaking research with a view to laying submarine cables either on the continental shelf (See Art. 79), or beyond, but still within the EEZ? This point is considered further when the continental shelf regime and the marine scientific research regime are discussed.

The purpose of this diversion is to illustrate that there are many new questions in the enforcement area that require, almost certainly, new approaches, and on which the Convention provides no explicit answer. It is in these areas in particular, that completely new legislation is recommended which reflects new thinking, rather than relying on old Acts which may not necessarily enable the full benefits to be obtained.

It will be apparent already that the EEZ regime is much more complex than Part V itself suggests, and that it involves other parts of the Convention in order for it to be fully comprehended. It is also apparent already that State practice is not providing a clear answer on many of the uncertainties identified. Yet for the purpose of implementation in Australian law many of these uncertainties can be avoided if the view is taken that where there is a potential conflict between freedom of navigation and the exercise of coastal State control, preference is given to the freedom of navigation except in particular situations, principally fisheries matters, where coastal State enforcement measures can in consequence be easily evaded This would be consistent with Australia's stance throughout UNCLOS III of opposing a "territorialist" view of the EEZ and supporting proposals which attempted to give effective protection to the freedom of navigation.

The Continental Shelf

Australia was a strong supporter of the continental margin being included in the definition of the shelf, and was largely successful in achieving its objectives at UNCLOS III in this regard However, at the present, domestic legislation concerning the continental shelf is based on the 1958 CSC definition which

permits the exercise of sovereign rights for the purpose of exploration and exploitation beyond a depth of 200 metres "to where the depth of the superjacent waters admits of the exploitation of the natural resources".

The Seas and Submerged Lands Act, 1973, Sect. 12, does give Australia some latitude in regard to the extent of the continental shelf, for it states:

> The Governor-General may, from time to time by Proclamation, declare, not inconsistently with the Convention on the Continental Shelf or any relevant international agreement to which Australia is a party, the limit of the whole or any part of the continental shelf of Australia.

Any "relevant international agreement" would presumably embrace the Torres Strait Treaty, our agreements with France and Indonesia, any agreement which might result from the negotiations with Indonesia concerning the Timor Sea, and presumably also the delimitation provisions of LOSC.

Nonetheless, it will be necessary to change at least the references to the 1958 CSC in the Seas and Submerged Lands Act, 1973, the Continental Shelf (Living Natural Resources) Act, the Historic Shipwrecks Act, and the offshore petroleum and minerals legislation.

For Australia, the ratification of the Convention will be important not so much for accepting a new, more complex definition of the continental shelf (see Art. 76), as for the acceptance of two particular constraints on the exercise of sovereign rights with respect to the shelf where it extends beyond 200 miles. These are: (a) the obligation to make certain payments or contributions in kind in respect of the exploitation of the margin beyond 200 miles (Art. 82); (b) the obligation to determine the outer limits of the margin "on the basis of" the recommendations of the Commission on the Outer Limits of the Continental Shelf. (Art. 76(8) and Annex II)

The payments or contributions required are indicated in Art 82(2), which states:

> The payments and contributions shall be made annually with respect to all production at a site after the first five years of production at that site. For the sixth year, the rate of payment or contribution shall be 1 per cent of the value or volume of production at the site. The rate shall increase by 1 per cent for each subsequent year until the twelfth year and shall remain at 7 per cent thereafter Production does not include resources used in connection with exploitation.

Australia was unenthusiastic about this provision throughout the time it was negotiated at LOSC, and its acceptance, both by Australia and other broad margin states, in the final text must be seen as founded on the need for a comprehensive regime for the oceans, including the continental margin, rather than willing acceptance of the principle underlying the Article. Quite apart from the question whether it would succeed in generating benefits for developing states, particularly least developed and landlocked (Art. 82(4)), the Article is hardly drafted with clarity. Paragraph 2 refers to the "first five years of production at" a site, but it would be odd if that included production that had taken place prior to signature, or only slightly less bizarre, on ratification or entry into force for that would give the paragraph a retrospective operation. Likewise, it is not clear whether the 1% of the value or volume of production refers to gross or net, though perhaps the last line suggests it is net. The paragraph needs to be carefully assessed for its cost to Australia before its implications for ratification can be fully appreciated.

The delineation of the outer limits of the continental shelf is also a matter of some concern in that the coastal State is required to submit information on its shelf limits to the Commission on the Limits of the Continental Shelf. The Commission makes recommendations to the coastal State on matters related to the establishment of the outer limits However, the limits established by the coastal State "on the basis of these recommendations shall be final and binding" Annex II requires

the coastal State to submit particulars "as soon as possible but in any case within 10 years of the entry into force of this Convention for that State" (Art. 4). Where there is disagreement by the coastal State with the recommendations made, it "shall, within a reasonable time, make a revised or new submission to the Commission" (Art. 8).

That the Commission's recommendations are intended to be quasi-mandatory is revealed not only by the requirement that the coastal state limits are to be "on the basis of" the Commission's findings (Art. 76(8)) but also in Annex II Art 7, which states:

> Coastal States shall establish the outer limits of the continental shelf in conformity with the provisions of Article 76 paragraph 8, and in conformity with the appropriate national procedures.

By having a continental shelf extending beyond 200 miles in certain locations, Australia has a particular interest in these provisions, and in their application. Under Art. 2 of Annex 3, this Commission is defined as consisting of "21 members who shall be experts in the field of geology, geophysics, or hydrography", elected by States Parties to this Convention from among their nationals having due regard to the need to ensure equitable geographical representation, who shall serve in their personal capacities". The qualifications for membership should not make it difficult for broad margin States to obtain an effective representation on the Commission, though the non participation of certain of those States in the Convention will not assist.

One other consequence of ratification is that, under Art 246(6), the coastal state's control beyond 200 miles over marine scientific research is limited to those specific areas of the shelf which the coastal state has publicly designated as exploitation or exploration areas Assuming that our reliance on the 1958 CSC definition of the continental shelf does enable Australia to exercise control over the margin beyond 200 miles, the Minerals (Submerged Lands) Act, 1981, Sect 74 authorises

the joint Authority to approve mineral exploration operations in the course of a scientific investigation in part of an adjacent area, though Sect. 75 prohibits interference to a greater extent than is necessary with navigation, fishing, conservation of sea and seabed resources, or other lawful operations. (See also Sects 123, 124 of the Petroleum (Submerged Lands) Act, 1967, to similar effect.) The Sea Installations Bill 1977 would also apply to the continental margin as it will extend inter alia to the outer limits of the continental shelf, as defined in the Petroleum (Submerged Lands) Act, 1967.

Apart from some presently irrelevant exceptions, Australian law does not at present extend to matters outside the scope of these sections (i.e. activities other than in connection with minerals or petroleum or sea installations). As it is a matter of increasing only by a small degree, our rights, this particular aspect of the margin beyond 200 miles need not affect our decision to ratify, while any legislative changes could be implemented after ratification, if necessary. The revenue sharing obligation under Art. 82 raises more acutely the "pick and disregard" problem for non-ratifying states. If Australia chose not to ratify, it could argue that, under the CSC, it was already exercising sovereign rights over the margin beyond 200 miles by virtue of the exploitability criterion, and the obligation to make payments could only arise upon ratification of LOSC and its entry into force. It could also point to sustained disagreement with the revenue sharing clause throughout the negotiations. It might also be argued that Art. 82 lacks the qualities required to generate customary international law, an argument which would gain strength from the lack of support for the Convention by certain important nations, including other broad margin states.

The arguments in favour of an obligation to participate in revenue sharing would probably be based on an argument along the lines that the Area, as defined in part XI, is the dominant concept outside the EEZ, both as a matter of treaty interpretation, and customary international law. So far as the

treaty is concerned, Art. 134 provides some literal support for this view, for paragraph 3 states: "Nothing in this article affects the establishment of the outer limits of the continental shelf in accordance with Part VI", while Art. 134(1) states that "This Part (i.e. Part XI) applies to the Area". The absence here of a reference to the obligation to participate in revenue sharing, where there is a specific reference to the outer limits not being affected, could support the view that the latter prevails over the Area, while the former does not. If the Area prevails as between the two, it could then be argued that the treaty could generate customary international law, if not precisely in accordance with Art. 82, then at least sufficient to support an obligation to make some reasonable contribution to the Authority, or perhaps even to hold it on trust, along the lines of certain national seabed mining laws. No doubt lawyers reared on Grotian concepts of freedom of the seas will regard this line of reasoning with distaste. It is worth recalling that Ambassador Koh in his "A Constitution for the Oceans" specifically referred to the continental margin beyond 200 miles as dependent on acceptance of the overall treaty regime. After discussing whether the Convention, except for Part XI, codified customary international law, and pointing out that transit passage through straits, and archipelagic sealanes passage are among two new concepts found in the Convention, he said:

> Even in the case of article 76 on the continental shelf, the article contains new law in that it has expanded the concept of the continental shelf to include the continental slope and the continental rise. This concession to the broad margin States was in return for their agreement for revenue-sharing on the continental shelf beyond 200 miles It is therefore my view that a State which is not a party to this Convention cannot invoke the benefits of article 76.

Presumably, if it did, it would give rise to some obligation regarding revenue sharing.

In the event of non ratification by Australia, however, it is likely that, Art 82 will raise the debate whether and

to what extent LOSC can generate customary international law with more immediate consequences for Australia than for example the status of seabed mining beyond national jurisdiction.

The continental shelf provisions also raise some other, but less important, issues concerning ratification. There is no reference in Part VI to historic shipwrecks, though Art. 303 allows a coastal state to presume that the removal of an archaeological or historical object from the seabed in the contiguous zone without coastal state approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in Art. 33. The Historic Shipwrecks Act, 1976 (see in particular, the preamble, and Sects 3 and 5) gives Australia the power to protect historic shipwrecks situated on Australia's continental shelf. (The Sea Installations Bill also covers the use of sea installations for an "environment related activity" which is defined to include "marine archaeology": clause 3.) As both the CSC and Parts V and VI of LOSC give the coastal state sovereign rights with respect to exploration, etc, of the natural resources, which would not include shipwrecks, the Australian legislation would need to be justified on the basis of an emerging new rule of customary international law. The closest LOSC comes to recognising this possibility is in Art. 303(4) which states: "This article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historic nature"

Art. 79 LOSC gives all States the right to lay submarine cables and pipelines in accordance with the Article; paragraph 2 requires the coastal state not to "impede the laying or maintenance of" cables and pipelines. Paragraph 3 states that the delineation of the course for laying pipelines on the continental shelf is subject to the consent of the coastal state

The Petroleum (Submerged Lands) Act regulates pipelines on the continental shelf which convey petroleum (including gas),

(and note also the Pipelines Authority Act, 1973, which applies also to petroleum pipelines) but there is no general power outside those Acts to regulate the laying of pipelines. Although hardly a matter to affect ratification, it would seem wise to examine afresh our legislation in this general area with a view to securing by legislation our full rights regarding submarine cables and pipelines on the continental shelf which would include in particular the adoption of measures to prevent, reduce and control pollution from such pipelines.

There are some small points concerning sedentary species that might usefully conclude this discussion of the continental shelf. First, sedentary species are subject to coastal state sovereign rights both within 200 miles, and beyond, on the continental margin, though they are not subject to revenue sharing under Art. 82.

Secondly because Part V (the EEZ) does not apply to sedentary species, as defined in Art. 77(4), the obligation to promote optimum utilization in respect of them is inapplicable Arguably, therefore, the reference to "the provisions of this Convention with regard to fisheries" (Art. 297(3)) would not apply to sedentary species, in which event they would not be subject to compulsory conciliation as provided for in that Article.

Thirdly, the coastal state may impose imprisonment in respect of offences concerning sedentary species, (see the Continental Shelf (Living Natural Resources) Act, Sect.18), but may not do so in respect of fisheries within 200 miles: see Arts 68 and 73. However, unlike Part V, in particular Art 73, Part VI contains no statement of the enforcement powers of the coastal state. Presumably, and obviously, the enforcement powers with respect to continental shelf activities including control of sedentary species, exist by virtue of the sovereign rights which the coastal state has They are not subject to the restrictions found in, for example Art 73 or Art. 235

Finally, we do not at present control sedentary species beyond the continental shelf but within 200 miles of the Australian coast, as the Continental Shelf (Living Natural Resources) Act, 1968, only extends to the continental shelf, as defined in the 1958 CSC. It is unlikely that we would gain control over significant extra resources by adopting the EEZ formula instead.

The High Seas

The provisions of Part VII on the High Seas are, for the most part, either a restatement of the 1958 HSC or, in some instances, an elaboration of that Convention. However, it can be expected that some uncertainty has been introduced into this area

First the seabed beneath the high seas becomes subject to the new regime of Part XI, (and may already have acquired a new status under customary international law), and the interaction of high seas freedoms with the activities in the Area is unclear (See Art. 87(2)). Secondly Art. 88 boldly states that "The high seas shall be reserved for peaceful purposes", a clause which was absent from the 1958 Convention, and which lends itself to more than one interpretation!

The main uncertainty, at least in the short-term, is likely to centre on how some of the high seas provisions of Part VII mesh with the EEZ provisions of Part V through Art. 58, especially paras (1) and (2). This has been discussed under the EEZ, above. It is likely that a similar degree of uncertainty will be reflected in customary international law.

In addition to the impact of the new seabed regime on the freedom of the high seas, the area in which these freedoms can be exercised unrestrained by EEZ's has contracted sharply; further, the wording of Art 87(1), which sets out the classical high seas freedoms, differs from Art 2, HSC, in that certain of the freedoms are now "subject to" other parts of the

Convention. The freedoms to lay submarine cables and pipelines, are subject to Part VI on the continental shelf, which would result in fetters being placed on the exercise of those freedoms on the continental margin beyond 200 miles which did not operate under the old regime. The freedom of scientific research would be subject to certain restraints in respect of the continental margin beyond 200 miles (see Art. 246(6)) and other restrictions in the Area (see Arts 143 and 256). The freedom of fishing is now subject to section 2 of Part VII (Conservation and Management of the Living Resources of the High Seas), Art. 116 of which in turn makes high seas fishing subject to "the rights and duties as well as the interests of coastal States provided for, inter alia, in article 63(2) and articles 64 to 67". The articles referred to concern shared and straddling stocks, highly migratory species, marine mammals, anadromous stocks and catadromous species, in which there are important coastal states rights, which in certain circumstances, now take priority over high seas fishing under the Convention. This latter extension of coastal state interest was anticipated in the area beyond the territorial sea in Arts 1 and 6 of the unsuccessful Convention on Fishing and Conservation of the Living Resources of the High Seas, 1958.

Inevitably, there will arise the vexatious issue whether a treaty provision such as Art. 116, constituting as it does, a significant departure from pre-existing customary international law, is itself part of customary international law today by virtue of its being regarded as inextricably linked to the customary international law regime of fisheries that has evolved in respect of 200 mile zones. The same might be asked of the other intrusions upon high seas freedoms outside the Convention regime.

The provisions of LOSC concerning registration and flag state controls over vessels differ in some respects from the 1958 HSC regime In particular, Art. 5 of HSC laid down not only the "genuine link" requirement for nationality, but also the requirement that the flag state "must" effectively exercise

jurisdiction and control in administrative, technical and social matters These are separate in LOSC, Art. 91 containing the genuine link requirement, Art. 94 containing the effective jurisdiction requirement ("shall"), though considerably elaborated upon, and containing certain obligations not in the HSC It is arguable that the separation of the two elements of Art 5 HSC further weakens the genuine link requirement, though the elaboration in Art. 94, together with the obligation to investigate reports by other states that proper jurisdiction and control is not being exercised (paragraphs 6 and 7) strengthens the flag state obligations to exercise greater control over its flag vessels.

The responsibilities Australia has in this area are largely covered by the Shipping Registration Act, 1981, and the Navigation Act, 1912. Although the latter Act provides a basis for giving domestic effect to most of the Convention obligations, and in some instances, goes further, it would seem advisable to review these Acts in the light of the latest provisions. Certainly many of the provisions can be given effect to by virtue of discretions already existing in the legislation, or in instructions to national enforcement authorities, in particular the RAN. In some instances, the legislation is cast in wider terms: for example sects. 379, 380, 383 of the Navigation Act allow for a wider jurisdiction than Art. 97 (penal jurisdiction in the event of a collision) anticipates, and compliance with the Convention would depend very much on the exercise of a discretion whether or not to prosecute, or, perhaps, by the exercise of a judicial discretion.

Other Articles concerning prohibition on the transport of slaves, suppression of high seas piracy, the right of visit, and hot pursuit could be achieved principally through instructions to RAN officers, and other officials engaged in enforcement activity. The suppression of illicit traffic in narcotic drugs, and of unauthorised broadcasting are additions to the Convention, having no counterpart in HSC, nor do they appear to have achieved customary international law status

(except possibly by virtue of LOSC generating the evolution) Especially in the case of unauthorised broadcasting, legislation may be necessary to cover all the jurisdictional bases recognised in Art. 109(3).

One unresolved issue that underlies the enforcement of high seas rights is the extent to which legislative backing is necessary. Leaving aside action taken by RAN vessels against Australian ships, it would seem that the RAN would be able to exercise in respect of foreign ships a right of visit under Art 110 or to exercise the right of hot pursuit under Art. 111, (or its predecessors in the HSC, Arts 22 and 23) without specific legislative authority, the prerogative providing sufficient authority. In the event that the action of an officer of the RAN was questioned in an Australian court, the court might feel bound to decide that the matter was non-justiciable, because the actions, coming within the prerogative to conduct foreign affairs, raised "Act of State" considerations and had not occurred within the territory, however defined. This is, however, a murky area of law which still awaits a thorough analysis. For the most part, however, it has been assumed that enforcement action on the high seas does not depend on specific legislation for its lawfulness, but rather that the prerogative is capable of providing the necessary basis for the actions of naval enforcement officers against foreigners and foreign vessels on the high seas. (A related issue is discussed later under marine scientific research.)

The right of hot pursuit in LOSC Art. 111 is similar to its predecessor in Art. 23 HSC, the principal difference being that pursuit is now possible from archipelagic waters, the EEZ, and in respect of the continental shelf and safety zones. It is arguable that hot pursuit is a right available under customary international law in relation to the various maritime zones over which the coastal state has jurisdiction provided of course that the pursuit is in respect of a matter within the competence of the coastal State in the zone from which the pursued vessel flees Certainly, many States have authorised in their 200 mile

fisheries or EEZ legislation the hot pursuit of offending foreign vessels On the other hand, Spain has argued, in the context of a fisheries dispute with Canada, that until the Convention enters into force, pursuit is possible only from a territorial sea or a contiguous zone.

Arts 113 to 115 require all States to adopt certain laws in respect of damage to cables and pipelines. These Articles, with minor changes only, repeat Arts 27 to 29 HSC. The latter articles were incorporated into Australian law by the Submarine Cables and Pipelines Act, 1963, which related to the high seas, as defined in the 1958 HSC. It would be advisable to amend this Act to apply in the EEZ as well as the high seas, even though the definition of high seas in the 1958 HSC, which the 1963 Act adopts, merely states that the high seas means all parts of the sea that are not included in the territorial sea or the internal waters of a State. The 1982 Convention does not define high seas directly, but Art. 86 describes the areas where Part VII (the high seas) does not apply, and this includes the EEZ. The application of these Articles to the EEZ depends on Art. 58(2) insofar as they are not incompatible with the EEZ provisions Thus, although a strict literal interpretation of the 1963 Act might produce the desired result under LOSC, it would seem preferable to put the matter beyond doubt by amending the 1963 Act to apply in the EEZ as well.

Protection and Preservation of the Marine Environment

The provisions of Part XII concerning the protection and preservation of the marine environment were the subject of very careful negotiation at UNCLOS III, and they reflect a balance between the desire of coastal States to control pollution in their adjacent waters, (which underlay clauses increasing coastal State control) and a desire to ensure that the exercise of that control did not bring about a de facto interference with the freedom of navigation by permitting each coastal State to impose its own set of standards for marine pollution (which inspired

clauses which require in many instances, conformity with generally accepted international standards).

For the most part, Part XII provides additional opportunities for (carefully worded) extensions of coastal State jurisdiction, though aside from duties imposed regarding the manner in which such extensions of jurisdiction are exercised, some general duties are imposed by the Convention. (See Sect. 1 of Part XII) These general duties are difficult to quantify Art 192 imposes the obligation "to protect and preserve the marine environment". From one viewpoint, this is an important statement which puts into a global treaty for the first time the general obligation recognised in the Stockholm Declarations, and as such it has a key role in the overall thrust of the treaty in its endeavour to create a new regime of the oceans. From another point of view, Art. 192, even though located in an important global treaty, is little more than an exhortation that depends on further and future detailed practical measures for it to have effect. In fact, Art. 197, which urges states to cooperate on a global basis, and as appropriate, on a regional basis, directly or through competent international organisations, in formulating and elaborating international rules, and Art 235(3), which requires States to cooperate in the further development of international law relating to responsibility and liability, clearly underscore Art. 192 as a commitment as much to the future as to the present. Most of the Articles in Section 1 are very general in character and are backed up by more detailed Articles in Sect. 2 (Global and Regional Cooperation), Sect. 3 (Technical Assistance), Sect. 4 (Monitoring and Environmental Assessment) while Sect. 5 provides the detailed Articles concerning international rules and national legislation It is this latter part, which in particular endeavours to harmonise national measures with international standards.

Because Part XII has more the character of a framework or a code for future measures, as well as embracing important marine pollution treaties already negotiated, it would be a major task in itself to cover all aspects of Part XII so far as

implementation in domestic law is concerned. (For further discussion, see Australia and the Law of the Sea - The Protection and Preservation of the Marine Environment, by H. Burmester, International Law in Australia, 2nd ed. p.439.)

In the table referred to, the various laws of the Commonwealth that give effect to IMO Conventions (which in many instances are embraced by LOSC) concerning marine pollution have been identified. I am currently compiling State laws that either give effect to certain of these Conventions, in particular where the relevant Commonwealth Act has a "roll back" clause (e.g. Sect 9 Environment Protection (Sea Dumpting) Act, 1981) permitting State laws to operate which give effect to the relevant Convention, or more generally, where State laws have an operation beyond the land in respect of land based pollution Special attention is also paid to Australian laws concerning dumping, intervention, pollution from vessels, and offshore mining operations. As well, the elusive question of responsibility and liability, and some of the novel enforcement provisions are being addressed.

Underlying the operation of State laws in the territorial sea is the offshore constitutional settlement. The role of the States in implementing certain of the provisions of the Convention, especially those concerning marine pollution, will be an important issue for determination.

Overall, Part XII of LOSC is likely to suit Australia's interests, though perhaps more so than virtually any other part of the Convention apart from Part XI (The Seabed Area), it not only provides for existing rules, but, more importantly, provides the framework for significant and extensive international cooperation both at the global level (principally through the International Maritime Organisation) and at the regional level

Marine Scientific Research

Marine Scientific research was not listed as a high seas freedom in the 1958 HSC, though it was assumed at the 1958 Conference that it was, (see, for example, CSC Art. 5(1)) Art 87(1)(f) LOSC now puts the matter beyond doubt by listing it as a freedom, though subject to Part VI (Continental Shelf) and Part XIII (Marine Scientific Research). The new treaty regime is comprehensive, especially in its provisions concerning the EEZ and the continental shelf. Although there is not the same quantity of state practice as with fisheries, many States which have enacted general EEZ laws have covered marine scientific research, and as these laws were enacted in the context of the regime evolving at UNCLOS III, it could reasonably be assumed, unless there was a clear contrary provision, that these laws were intended to give effect to that regime.

Although the inference that the marine scientific research regime of LOSC for the EEZ is now part of customary international law is not as strong as in the case of the fisheries regime, it is arguable that the main features of the new regime have passed into customary international law. This is of itself a fascinating question which cannot be pursued here. Likewise, it is possible only to raise the equally interesting problem of at what point does data collection in the exercise of freedom of navigation across an EEZ become subject to the new regime, and in particular, the consent requirement. Also, does surveying the continental shelf with a view to laying a submarine cable amount to marine scientific research?

These problems of classification will take some years to be resolved. Although it should not affect a decision on whether or not to ratify the Convention, it does underline the need to use the occasion of ratification, and in particular the necessary review of existing laws and policies, to determine the appropriate balance between coastal state control over marine scientific research and the sorts of data collection that can be properly regarded as normal incidents of navigation, and other

activities which although involving scientific research nonetheless are to remain outside the control of the coastal State under the Convention.

In the territorial sea, the 1958 TSC made no specific reference to scientific research in the context of innocent passage through that sea, and it remains unclear whether under that Convention such research rendered passage of a foreign vessel non-innocent. The point is now put beyond doubt by Art 19(2)(j) of LOSC which includes "research and survey activities" as a non-innocent activity. (See also for transit passage through straits, and archipelagic sea lanes passage, Arts 40 and 54). So far as there are state laws that impinge on scientific research in the territorial sea of Australia, it would become critical to the validity of such laws to determine whether such research was innocent or not in accordance with the 1958 Convention, for the Coastal Waters (State Powers) Act (s 6) requires that nothing in the Act is to affect Commonwealth responsibilities in particular under the 1958 Convention relating to the right of innocent passage of ships. A fortiori, with any Commonwealth laws that operate in the territorial sea that might impinge upon marine scientific research activities, though there is no general law of the Commonwealth applying in the territorial sea. (The diplomatic note of 21 October, 1983 which is discussed further below, does require approval for marine scientific research in Australia's territorial sea.)

The 1982 Convention not only answers conclusively the question of marine scientific research and non-innocence of passage: Art. 245 of LOSC gives to coastal States the "exclusive right to regulate, authorise and conduct marine scientific research in their territorial sea" and stipulates that the "express consent" of the coastal State is required ("prior authorisation" is required in the case of research and survey activities during transit passage and archipelagic sealanes passage, Arts 40 and 54). If it were appropriate to do so under the offshore constitutional settlement, the Commonwealth and the States might explore possibilities for developing a regime

to control marine scientific research activities in the territorial sea. A side issue to be considered here is that if the coastal State wished to reduce the opportunity for marine scientific research in its adjacent waters, the extension of the territorial sea to 12 miles would be an effective way of achieving this. It is unlikely that Australia would wish to pursue such an objective.

In the area beyond the territorial sea, marine scientific research would have been subject to the high seas regime, and therefore one of its freedoms, but for the right to control scientific research on the continental shelf, and more recently the right to control fishing activities beyond the territorial sea. The new regime, in Art. 246, gives the coastal State the power to regulate marine scientific research in the EEZ and on the continental shelf, though in "normal circumstances" it should grant its consent to states and competent international organisations. It can withhold its consent where the research is of direct significance to the exploration or exploitation of the natural resources, involves drilling or the use of explosives, or construction of artificial islands, though this discretion does not exist in relation to the continental margin beyond 200 miles, (except in specifically designated exploitation areas). The new regime also makes provision elsewhere in Part XIII for a number of other aspects, including marine scientific research by competent international organisations, suspension and cessation of research, the development of scientific research, the development of scientific research installations in the marine environment, and responsibility and liability

This new treaty regime is touched upon in part by several Australian laws concerning offshore petroleum or minerals exploitation, sea installations, fisheries, sedentary species, and whaling, though each Act is limited to its particular subject matter. The Fishing Legislation Amendment Act, 1984, s 9 for example, allows a permit to be granted to a boat "for scientific purposes in such activities by way of fishing" The Mineral (Submerged Lands) Act, 1981, s 74, allows authorisation of

"mineral exploration operations in the course of a scientific investigation". Those Acts, and the same applies to others operating in the offshore area, would not authorise pure oceanographic research, except to the extent that it came within the scope of a particular Act. Furthermore, although the Fisheries laws apply to a 200 mile zone, Acts such as the Minerals or Petroleum Submerged Lands Acts, or the Continental Shelf (Living Natural Resources) Act, apply only to the continental shelf as defined in the 1958 CSC. While that might cover the margin beyond 200 miles, it would not extend to the waters or seabed beyond the continental shelf but within 200 miles The Sea Installations Bill avoids this by applying to both the continental shelf and in the 200 mile Australian Fishing Zone.

In addition to the scattered legislative regimes referred to, the Australian Government has issued (21 October 1983) a note to all Diplomatic Missions in Australia, and non-resident Diplomatic Missions accredited to Australia, which also concerns marine scientific research. This note covers approvals for visits by research vessels to Australian ports (whether or not in connection with research activities in marine areas under Australian jurisdiction), and approval to undertake marine scientific research (without port access) "in Australia's territorial sea, on the Australian continental shelf or to conduct research related to fisheries in the AFZ." Port entry for foreign research vessels designed and equipped to take non-sedentary species of fish comes within the provisions of the Fisheries Act requirements regarding port access, and is dealt with by the Department of Primary Industry.

Art 255, LOSC requires coastal States "as appropriate, to facilitate, subject to the provisions of their laws and regulations, access to their harbours for marine scientific research vessels which comply with the relevant provisions of this Part" (i.e. Part XIII - Marine Scientific Research) The requirements regarding port access seem to comply with the obligations under Art 255, and are capable of fulfilling any

obligations regarding reciprocity of port access arising under the Convention and Statute on the International Regime of Maritime Ports, 1923.

As regards marine scientific research where no port access is involved, the note does not seek to cover all marine scientific research within a 200 mile zone off Australia, (though it does within the territorial sea), rather, it merely covers research in effect covered by existing legislation on the continental shelf, including sedentary species, and the Australian fishing zone (though not including sea installations).

Given that, at best, the current legislative and executive regime touching on marine scientific research could only achieve an imperfect implementation of this part of the Convention, and that we could well find ourselves unable to gain maximum benefits from the new regime which accrue to the coastal State, it seems desirable that we should carefully consider the possibility of a new comprehensive legislative regime for marine scientific research, which covered the territorial sea, the EEZ, and the continental margin.

Art. 255 imposes an obligation, albeit weak, to "endeavour to adopt reasonable rules, regulations and procedures to promote and facilitate marine scientific research" conducted beyond the territorial sea and as noted above, "to facilitate access to their harbours ...." By contrast, Art. 244(1) requires that States and competent international organisations "shall, in accordance with this Convention, make available by publication and dissemination through appropriate channels information on proposed major programmes and their objectives as well as knowledge resulting from marine scientific research".

Paragraph (2) of Art. 244 also requires that States and competent international organisations "shall actively promote" the flow of scientific data, etc especially to developing States Given the use of "shall", these are obligations under the Convention even if not particularly strong ones They would be easily met, however, through aid programmes under ADAB or

IDP auspices or through participation in, or support for, relevant programmes of competent international organisations Nonetheless, it would seem desirable if, as a consequence of ratification, a review was undertaken of our aid programmes in the maritime sector in the light of our obligations under the Convention. These obligations should be viewed alongside the provisions concerning the transfer of marine technology, to which I now turn.

Development and Transfer of Marine Technology

The provisions of LOSC dealing with transfer of marine technology have to be seen against the wider background of attempts within the international community to have technology transferred from developed to developing nations. As with the provisions on marine scientific research, the Convention endeavours to promote a flow of information and marine technology to the developing countries. There are two parts of the Convention dealing with this. First, in the seabed area, there is provision for the transfer of technology to the Authority in the context of seabed mining. Secondly, Part XIV deals with it more generally.

The provisions concerned with seabed mining were, and remain, controversial. As the deep seabed regime is considered elsewhere by G. Quinlan, that topic will not be explored here except to note that the provisions of Annex III of LOSC require contractors who wish to undertake activities in the Area to make certain undertakings: they are to make available to the Enterprise on fair and reasonable terms and conditions the technology to be used in the Area, which the contractor is legally entitled to transfer, or if the technology is not available, to obtain from its owner an assurance that it will be available to the Enterprise; if this is not obtained, the technology is not to be used in carrying out activities in the area, or to acquire, if it can be done without substantial cost to the contractor, the right to transfer to the Enterprise any technology used which is unavailable on the open market and which

he would not otherwise be legally entitled to transfer. (See further Art. 5, Annex III).

In addition, if the Enterprise is unable to obtain on fair and reasonable commercial terms and conditions appropriate technology to enable it to commence recovery operations, the Council or the Assembly may convene a group of States composed of those engaged in activities in the Area, those which have sponsored entities engaged in activities in the area, and other States parties having access to the technology. This group is to ensure that the technology is made available to the Enterprise on fair and reasonable terms and conditions, and each State Party in such a group "shall take all feasible measures to this end within its own legal system". (See further Art. 5(5) of Annex III). One consequence of ratification might therefore be that we may be required to provide such assistance in the event that an Australian company was involved. As well, provision is made for compulsory dispute settlement under Part XI, and the imposition of monetary penalties or suspension or termination of the contract, while disputes as to whether an offer by a contractor is within the range of "fair and reasonable commercial terms and conditions" may be submitted by either party to binding commercial arbitration under UNCITRAL rules, or other rules laid down by the Authority (see further, Art. 5(4) of Annex III) Further, Art. 39 of Annex VI provides that "The decisions ofthe [Seabed Disputes] Chamber shall be enforceable in the territories of the States in the same manner as judgments or orders of the highest court of the State party in whose territory the enforcement is sought". Clearly, the obligation to provide for this enforcement goes well beyond the transfer of technology issue, and it will be returned to in the context of compulsory dispute settlement.

If the technology transfer provisions of Part XI constitute an important factor in the decision for some countries whether or not to ratify LOSC, the provisions of Part XIV (Development and Transfer of Marine Technology) are much more bland, and amount for the most part to little more than an exhortation to

cooperate in facilitating marine technology transfer, either directly or through competent international organisations. Art 266 requires States in promoting cooperation, to have "due regard for all legitimate interests including, inter alia, the rights and duties of holders, suppliers and recipients of marine technology". Presumably, therefore, apart from any changes needed to the Australian laws as a result of Part XI, the legitimate interests referred to would be covered by the existing intellectual property regimes in Australian law. Although much of Part XIV uses the language of best endeavours, some Articles nonetheless signify more than that. Art. 273 requires States to "cooperate actively" with competent international organisations and with the Authority to encourage and facilitate the transfer to developing States, their nationals and the Enterprise, of skills and marine technology with regard to activities in the area. (Note also Art. 144). Presumably this involves some minimal obligation.

Art. 275 imposes an obligation to "promote" and to give adequate support in establishing and strengthening national marine scientific and technological research centres, particularly in developing countries. As the "adequate support" is to be provided through competent international organisations and the Authority (See Art. 275(2)) there is the possible suggestion of an indirect financial commitment, though this is far from certain.

Whatever weight is given to the obligations in Part XIV on technology transfer, they would hardly be significant enough to influence a decision on ratification. On the other hand, the technology transfer provisions of Part XI form an important part of the unease of several of the non-signatory or non-ratifying States and it is currently an issue before Prepcom

Settlement of Disputes

The provision in Part XV for compulsory settlement of certain disputes concerning the interpretation or application

of the Convention is an ambitious element in the overall Convention package in the light of past reluctance to accept compulsory dispute settlement procedures in multilateral Conventions. This Convention also allows "an entity other than a State party" to be a party to a dispute in certain situations (see Part XI Sect. 5 and Art. 285) which would include natural or juridical persons in some circumstances.

For Australia, ratification of the Convention should not cause concern simply because we will become subject to compulsory dispute settlement procedures, as we have had a virtually open acceptance of the compulsory jurisdiction of the International Court of Justice for some years now. Furthermore, Australia has been a party since 1963 to the Optional Protocol on the Compulsory Settlement of Disputes, 1958, which covered the "interpretation of application" of any of the four Geneva Conventions.

Assuming that Australian policy of support for compulsory dispute settlement remains unchanged, the main question to consider is whether we would wish to choose, by written declaration, under Art. 287 the means of dispute settlement we would prefer. The choice is from : the International Tribunal for the Law of the Sea (Annex VI); the International Court of Justice; an arbitral tribunal (Annex VII); or a special arbitral tribunal to deal with disputes concerning fisheries, protection and preservation of the marine environment, marine scientific research, and navigation, including pollution from vessels and by dumping. In the event that the parties have not opted for the same procedures, arbitration is the method to be followed.

The general provisions of Part XV oblige States to settle disputes concerning the interpretation or application of the Convention by peaceful means, and if appropriate, to have recourse to general regional or bilateral agreements that lead to a binding decision. There is also a voluntary conciliation procedure.

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Where a dispute has not been so settled, and it concerns the "interpretation or application of this Convention" it is to be submitted at the request of any party to the court or tribunal having jurisdiction under section 2. However, certain important exceptions are made to this otherwise broad statement Disputes concerning the exercise by a coastal State of its sovereign rights or jurisdiction are subject to compulsory dispute settlement only in the following instances: where it is alleged that the coastal State has contravened provisions regarding freedom of navigation, overflight, or laying of submarine cables or pipelines, or other internationally lawful uses of the sea specified in Art. 58, or where it is alleged that a state in exercising those freedoms has contravened the Convention or coastal State laws conforming to the Convention; where it is alleged that a coastal State has acted in contravention of specified international rules and standards for the protection and preservation of the marine environment Disputes concerning the interpretation or application of the provisions concerning marine scientific research are subject to compulsory settlement, except for those concerning the exercise of the coastal State's discretions under Art. 246 (the granting or refusal of permission to conduct marine scientific research in the EEZ or on the continental shelf) or a decision to suspend or terminate a research project. Although beyond compulsory dispute settlement, these two exceptions concerning marine scientific research are subject to compulsory conciliation under Annex V sect. 2, but the conciliation commission cannot call into question the exercise of the coastal State's discretion to designate certain areas of its continental shelf beyond 200 miles or of its refusal to grant consent for marine scientific research under Art. 246(5). Likewise with fisheries, where disputes are to be settled in accordance with compulsory procedures, except that the coastal State shall not be obliged to submit any dispute relating to its sovereign rights with respect to the living resourses of the EEZ, its discretionary powers for determining the allowable catch, its harvesting capacity, allocation of surpluses to other States, and the the

terms and conditions of its conservation and management laws It is still open to either party to invoke the compulsory conciliation procedure in certain limited circumstances, e g where the coastal State has manifestly failed in its obligations with respect to conservation, or where it has arbitrarily refused to determine the allowable catch, or has arbitrarily refused to allocate to any State any declared surplus. (See further, Art. 297(3)).

There are some optional exceptions to compulsory settlement, set out in Art. 298, which States may declare on signature, ratification or accession. These relate to: disputes concerning sea boundary delimitations (territorial sea, EEZ and continental shelf) or to historic bays and titles; disputes concerning military activities and law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded under Art. 297(2) or (3); disputes in respect of which the Security Council is exercising its functions.

Australia has several historic bay claims, which it could choose to exempt from compulsory settlement. However, these claims have not so far been the subject of international protest or concern and the exemption of them might have the undesired effect of suggesting an unease about them. Most, in any event, appear have been enclosed by straight baselines drawn under Art 4 TSC, and those baselines are currently liable to challenge under the Optional Protocol, as well as under our current acceptance of the compulsory jurisdiction of the International Court of Justice.

Even with our current and prospective seaboundary negotiations, the risk of compulsory settlement has not been a matter of great concern. In sum, Australia has little to gain by taking advantage of the optional exceptions covered in Art. 298, and probably much to lose in terms of our long standing policy supporting the compulsory settlement of disputes.

The Torres Strait Treaty deals with much more than just the delimitation of the territorial sea and of the sea bed: it touches on several of the key points with which LOSC is concerned. It is also apparent that the parties were anxious to ensure that the Treaty accorded as far as possible with the evolving new regime of the oceans that was being negotiated at UNCLOS III. It is hopefully not going to be the source of disputation between the parties, though it does make provision for dispute settlement in Art. 29 which states:

> Any dispute between the parties arising out of the interpretation or implementation of this Treaty shall be settled by consultation or negotiation.

Under Art. 288, the judicial and arbitral bodies established under Art. 287 also have jurisdiction over any dispute concerning an international agreement "related to the purposes of this Convention, which is submitted to it in accordance with the agreement".

The parties might choose to agree to submit a dispute to the International Tribunal for the Law of the sea under Art. 22, Annex VI, because the Torres Strait Treaty concerns subject matter covered by LOSC. Whether or not the Torres Strait Treaty were to prevail over LOSC for the purposes of allowing one party to invoke against the other the compulsory dispute settlement procedures of LOSC will turn on the wording of Art. 311(2), which says:

> This Convention shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under the Convention.

It might be asked whether the provision for compulsory settlement of disputes is of such importance to the LOSC package that even though the Torres Strait Treaty as a whole is clearly compatible with it, the interpretation of this clause to exclude ultimate resort to compulsory settlement of the interpretation or application of LOSC between the two parties might not be

compatible with LOSC. The same point could arise under Art 311(3), if the paragraph is capable of being interpreted to include agreements entered into prior to LOSC.

In the hopefully unlikely event that Australia were to be found in breach of LOSC by means of a compulsory disputes settlement process under the Convention, the question arises as to how Australia would meet its international responsibility Indeed, as Art. 295 LOSC reaffirms that local remedies are to be exhausted before compulsory dispute mechanisms can be initiated, many disputes will have been unsuccessfully pursued through the local courts. If the local statute law is clear, and there is a breach of the Convention, the courts under existing common law doctrine have to apply the local statute law in preference to the international treaty rule. However, in reviewing domestic legislation in the light of the treaty provisions, in many instances, the statutes give discretions to be exercised, and it will be the manner of their exercise which will determine whether or not a breach of the Convention has occurred. Where the enforcement activities of the RAN are in question, these may not be justiciable in local courts in some situations, and the question of compliance with the Convention will, in Australia, fall to be dealt with by the Executive of the Commonwealth alone. In many instances, therefore, it will appropriate for the Commonwealth government to accept that responsibility on the international level

One part of the Convention that will probably arise for consideration in local courts and which perhaps more than any other part of the Convention is likely to become subject to compulsory dispute settlement is Part XII, and in particular those Articles which permit coastal State measures in accordance with generally accepted international rules and standards for the protection and preservation of the marine environment

This is one of the areas specified as being subject to compulsory dispute settlement under Art 297(1). It would seem to embrace Art. 230 which requires that only monetary penalties

are imposed with respect to violations of national laws or applicable international rules and standards for the prevention, etc of pollution of the marine environment, (except where there has been a wilful and serious act of pollution in the territorial sea) Paragraph 3 states:

> In the conduct of proceedings in respect of such violations committed by a foreign vessel which may result in the imposition of penalties, recognised rights of the accused shall be observed.

I shall pass by on this occasion the opportunity to explore the potential scope of "recognised rights of the accused". It will, however, enable the national legal system to be brought into the international arena (as will Art. 292) via the compulsory dispute settlement provisions. Exciting though this paragraph is, it is unlikely that Australia will have much to fear from this possible exposure of our legal system, rather, something to contribute, given the high judicial standards operating here.

Although Art. 296 requires that decisions of a court or tribunal having jurisdiction by virtue of the compulsory dispute provisions are to be final and to be complied with by all parties to the dispute, the decisions do not, except in one instance, require enforcement within the national legal system. (See Art 296, and Annex VI, Art. 33). That one instance is the Seabed Disputes Chamber, the decisions of which under Annex VI, Art 39 "shall be enforceable in the territories of the State Parties in the same manner as judgments or orders of the highest court of the State Party in whose territory the enforcement is sought " No doubt this is provided for because in addition to States, natural or juridical persons may be parties to disputes before the Chamber (Art. 187). It will mean that from the point of view of ratification, however, it will be necessary to ensure that this enforcement capacity is covered in our national law Although on a much grander scale, the enforceability of the decisions of the Court of Justice of the European communites in UK law provides one possible model for Australia to examine

The external affairs power as currently interpreted by the High Court of the Commonwealth Parliament (Constitution, Sect 51(29)) would clearly extend to giving effect to the decisions of international tribunals, as well as making provision for the domestic enforceability of the decisions of the Seabed Disputes Chamber. The only limitation on that power in the present context is where its particular application might involve a contravention of the Constitution. This might arise where the decision involved an alteration of State boundaries, such as might have occurred in the Torres Strait area had any of the islands belonging to Queensland been transferred to Papua New Guinea. It is unlikely that such constitutional constraints as there are will inhibit the Commonwealth Parliament's ability to give effect by legislation if required to any decisions handed down as a result of the dispute settlement processes, whether voluntary or compulsory.

Some Conclusions

It will be apparent that the Convention goes a long way towards meeting the objectives that Australia worked for at UNCLOS III. It is worth recalling that in addition to its interests as a broad margin State, Australia had to balance at UNCLOS III at least two broad, not always compatible, interests On the one hand, as a State with an enormous coastline, it had much in common with those developing coastal States whose objectives were primarily to secure the adjacent living and non-living resources from exploitation by others. On the other hand, it had an interest in maintaining the freedom of navigation across EEZ's and through international straits and archipelagos, because this was of vital strategic importance for our overseas trade routes. Thus, even though Australia is not a major shipping nation, this dependence on seaborne trade required giving support to policies at first sight more appropriate to a maritime power. Mixed in to these differing perspectives, Australia also had as a coastal State a particular interest in the adoption of an effective new regime for the protection and preservation of the maritime environment, though one which

emphasised internationally agreed measures (as opposed to unilateral coastal State action), which again reflected its interest in seaborne trade. (For further discussion of Australia's interests, see M. Landale and H. Burmester, Australia and the Law of the Sea - Offshore Jurisdiction, International Law in Australia, 2nd ed. p.390.)

The major doubts which the Convention raises for Australia would appear to be:

(a) the uncertainty over Art. 82(2), (payments in respect of exploiting the continental margin beyond 200 miles), both as to the amount to be paid, and as to the status of Art 82 for a non-ratifying State;

(b) the intractable problems associated with Part XI, including in particular, the level of contributions required if several major industrial powers remain outside the Convention, and a judgment whether, even if the Convention comes into force, Part XI will be a viable regime, or whether it will only become so after substantial revisions (See further, G. Triggs, The 1982 Convention on the Law of the Sea: A Legal Twilight Zone and the paper prepared by G. Quinlan.)

(c) the uncertain impact, if any, of ratification on our remaining sea boundary negotiations.

Although the provisions on transit passage through international straits, have only minor, and potentially beneficial consequences for Australia, a much more important issue for Australia is whether ratification of the Convention is the only effective means of ensuring access through the straits and archipelagos which lie to our north and in the western Pacific.

In the event that the doubts referred to above are thought to produce unacceptable consequences for Australia, a vital

consideration will be whether they should override the clear advantage of having rights of transit through such waters secured in the Convention, or whether these rights are available through the operation of customary international law. Assuming for the moment that it is correct to assert that these rights are so available, two considerations arise. What could we do if a State chose to disagree with that view, and allowed passage only to those States accepting the Convention regime? We may (or may not) find ourselves in good company, and choose to disregard that attitude. In that event, we may find that an unwelcome complication has been added to certain of our foreign relations in our region. It is highly unlikely that we would, outside the Convention, be able to have the matter subject to compulsory dispute settlement (unless the provisions of Part XV had somehow become part of customary international law, which is unlikely)

Secondly, even if it was accepted that customary international law provided these transit rights, there could be disagreement over critical details. The care taken to draft the innocent passage regime, with agreement still lacking on the rights of warships as well as new uncertainties being introduced, and the similar attention paid to the wording of the transit passage and archipelagic sealanes passage regime in the Convention, should indicate how difficult it would be for a customary law regime to provide a satisfactory basis for resolving such potential disagreements. (For further discussion of the relationship of LOSC and customary international law in the context of passage through straits and archipelagos, see I Shearer, Australia and the UN Law of the Sea Convention, p 43. Proceedings of ACMS Conference "Maritime Australia 1986 Putting it Together.")

This is not to suggest that, within the Convention, these regimes will be properly applied by all States. Indeed, there is some evidence already that this is not so. Within the Convention, however, the area of disagreement is considerably narrowed, and there is always compulsory dispute settlement as

a last resort to resolve any interpretation of the navigation provisions.

Another element to be considered, though well outside the scope of this paper, is whether non-ratification is consistent with the thrust of Australia's foreign policy on North South issues

Turning to the domestic implementation of the Convention, and assuming that it is to be ratified by Australia, some general issues to be considered are:

1 The role of the States in implementing parts of the Convention, and in particular, those parts concerning the territorial sea. In the area of marine pollution, there is already some experience with State laws giving effect in part to certain marine pollution conventions. Certain State laws are also thought to be capable of meeting the obligations we would inherit with respect to marine pollution from land based sources. (For a review of Australia's offshore laws, see R.D. Lumb, Australian Coastal Jurisdiction, in International Law in Australia, 2nd ed p 370, H. Burmester, Australia and the Law of the Sea - The Protection and Preservation of the Marine Environment, p 439.)

2. Some parts of the Convention are already operative in Australian law because their provisions largely incorporate parts of the 1958 Conventions. This is especially so with the regime for exploring and exploiting the resources of the continental shelf, (though the definition of the shelf has been altered since 1958). Other parts of the 1982 Convention have been given effect to the basis that certain provisions reflect customary international law, such as the fisheries provisions for the EEZ, or the recent Sea Installations Bill which appears to rely in part on Art 60, LOSC, as well as other provisions Other Parts, such as Part XII on the Preservation and Protection of the Marine

Environment provide in effect a framework within which certain existing treaties are reaffirmed, while future treaties, or international standards are anticipated It can be expected that the Convention will be implemented in a piecemeal fashion, and it is possible that it may not always be apparent that a particular legislative scheme is giving effect to a Convention provision. Because the Law of the Sea Convention is so different to most treaties, and because most Parts, especially those concerning the EEZ, are intertwined, the incorporation of specific Articles will need to bring with it the remaining Articles of the treaty for interpretation purposes. Possibly this can be achieved by Sect. 15 AB Acts Interpretation Act, 1901, though that section will assist here only where the "treaty or other international agreement ... is referred to in the Act". It may, however, warrant a more radical approach such as the enactment of a broad based Act such as the Seas and Submerged Lands Act, which in addition to asserting the relevant sovereignty, sovereign rights and jurisdiction, and either incorporating the Convention in a schedule, or referentially doing so, would further make the Convention available to Australian courts to assist in interpreting and applying legislation giving effect to the Convention in domestic law. This could include making it available to judges exercising a power of judicial review with respect to e.g. a Ministerial discretion arising under such a statute that gives effect to a Convention obligation.

The precise method or methods of implementing the Convention as a whole that could be adopted in Australia is worthy of study by itself and will not be pursued here. It is hoped, however, that the opportunity will be taken to consider what needs to be done with the importance of the Convention firmly in view This calls for not only imaginative legislative structures, but also a review of the existing management structure for ocean affairs in Australia At present, responsibility for ocean affairs is scattered across several Commonwealth government departments, as well as amongst and within State and territorial

governments. Given that many provisions of LOSC provide a framework for future action, in which international negotiations in some cases leading to further multilateral treaties will figure prominently, it is vital that the occasion of ratification is seen not simply as the completion of a regime but rather a stage in the evolution of an important new regime for Australia, one which should be accompanied by an enhanced perception of the significance of ocean affairs to Australia. Canada has recently established a Task Force for the Oceans, comprising both governmental and non-governmental elements to oversee implementation of the Convention. Some other countries have also enhanced their administrative structures in the light of the rapid changes that have occurred in maritime affairs since the second World War. Whether we should be considering e.g. a centralised Department of the oceans, or a series of regional oceans commissions, an increased role for joint authorities under the offshore constitutional settlement, or some other administrative structure is another story which I am sure all readers who have survived to the end of this paper will be pleased to discover I do not intend to pursue on this occasion