Law of the sea

Australian maritime jurisdiction: territorial sea, contiguous zone, continental shelf, fisheries zone

On 1 June 1978 the Chairman of the Parliamentary Joint Committee on Foreign Affairs and Defence, Senator Sir Magnus Cormack, presented to Parliament[21] a report by the Committee on *Australia, Antarctica and the Law of the Sea*.[22] In March 1977 the Committee had given to its Sub-Committee on Territorial Boundaries a reference in the following terms:

> To consider, investigate and report generally on the effect of Australia's maritime boundaries of current developments of the Law of the Sea including extension of the territorial sea, fishing and/or economic zones including exploitation of resources and particularly how these developments might affect Australia's Antarctic Territory and the problem of pelagic fisheries in the EEZ.

Among the evidence submitted to the Sub-Committee was an information paper entitled "Law of the Sea: Australian Maritime Boundaries" prepared by the Department of Foreign Affairs. The paper outlined the historical background of the law of the sea generally, and then outlined Australia's position with respect to its maritime jurisdiction as follows (Official Hansard Report, 81–4):

> **Present Australian Maritime Jurisdiction**
>
> Australia at present exercises the following jurisdiction over the adjacent sea and seabed.
>
> (i) *Territorial Sea of Three Miles*
>
> Australia has traditionally claimed a three mile territorial sea. The 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone (to which Australia is party) enshrined the rules of customary international law relating to the territorial sea, but left open the question of its width . . . Other states have claimed territorial seas of widths ranging from 3 to 200 miles. In the current Law of the Sea negotiations Australia, together with a large number of states, is supporting the negotiation of a "package" which would include a 12 mile territorial sea. Under the Seas and Submerged Lands Act, the Commonwealth Government, rather than the States, exercises sovereignty over the territorial sea.
>
> (ii) *Contiguous Zone of 12 Miles*
>
> Pursuant to the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, Commonwealth and State legislation

21. Sen Deb 1978, Vol 77, 2227.
22. PP No 198/1978.

provides for the exercise of the control necessary to prevent infringements of customs, fiscal, immigration and sanitary regulations within a 12 mile "contiguous zone" adjacent to the coast.

(iii) *Sovereign Rights Over Continental Shelf*

In accordance with international law and domestic legislation, Australia has sovereign rights over its continental shelf out to the outer edge of the margin for the purpose of exploring and exploiting the natural resources. Under the Seas and Submerged Lands Act, which implements the 1958 Geneva Convention on the Continental Shelf, these sovereign rights are exercisable by the Commonwealth Government. At the Conference, support for the Australian position that coastal States' rights extend to the outer edge of the margin has increased. There is, however, almost universal agreement that coastal states should be under an obligation to share resources derived from mining the shelf between the 200 mile mark and the edge of the shelf. This is a concept to which Australia has been opposed.

The Commonwealth has enacted legislation relating to the exploration and exploitation of petroleum but not with regard to other non-living resources of the continental shelf: the Petroleum (Submerged Lands) Act which, with the mirror States legislation, establish administrative procedures for exploration and exploitation for petroleum in designated areas adjacent to the coasts.

The Continental Shelf (Living Natural Resources) Act regulates the taking of the living natural resources of Australia's continental shelf beyond the territorial sea.

(iv) *Declared Fisheries Zone of 12 Miles*

Commonwealth and State Fisheries Legislation provides for the control of commercial fishing by Australian and foreign fishermen in the declared fishing zones, which extend to a distance of 12 miles from the territorial sea baselines. Australia also has powers with respect to its own nationals in "proclaimed waters".

In the Law of the Sea negotiations, Australia considers that the "package" should also include a 200 mile economic zone which, *inter alia,* would make the coastal state exclusively responsible for the management and conservation of fisheries resources in that zone, but with an obligation to allow others to take surplus stocks on terms and conditions determined by the coastal state.

Australian fishing zone. Establishment of a 200 mile zone

On 13 April 1978 the Minister for Primary Industry, Mr Sinclair, introduced the Fisheries Amendment Bill 1978 into the House of Representatives and explained the purpose of the Bill as follows (HR Deb 1978, Vol 108, 1515–8):

> This Bill is of major significance to the Australian community. It will amend, in actual terms, the *Fisheries Act* 1952 and extend Australian fishing jurisdiction over foreign fishermen out to 200 miles beyond the low water mark, by creation of a 200-mile Australian fishing zone. Australian fishermen are in fact already covered by present fisheries legislation which extends throughout Australian waters as defined in the Act and which extends to the 200-mile limit and beyond.
>
> The Government's intention to bring down this legislation was announced by the Minister for Foreign Affairs (Mr Peacock) in the House on 16 August 1977. It results from a firm decision by the Government to extend Australia's jurisdiction but preferably in the context of an international agreement. It is, in addition to the continental shelf legislation already in place, the first of a number of measures which will be taken to create a full exclusive economic zone, when the nature of that zone is more clearly defined by international agreement. . .
>
> . . . The position has now developed where extension of fisheries jurisdiction to 200 miles is accepted practice in international law, and such extension is no longer likely to be prejudicial to the eventual agreement in other areas being considered at the Law of the Sea Conference.
>
> A further element in the very important exercise of extending our maritime jurisdiction to 200 miles has been our desire to take account of the other nations of our region. Honourable members will recall that at the South Pacific Forum meeting in Port Moresby in August 1977, Australia supported the island countries of the South Pacific and joined in the Port Moresby Declaration, which provided for extension to 200 miles of maritime jurisdiction by the member countries of the South Pacific Forum. It was agreed that the legislative and administrative steps required to establish these zones were to be taken, if possible, by 31 March 1978. There are obviously advantages in having all countries in the region extend their jurisdiction at about the same time. . .
>
> Honourable members will be aware that after the sixth session of the Third Law of the Sea Conference at New York in July and August 1977 an Informal Composite Negotiating Text — referred to shortly as the ICNT and which is in effect a draft Convention — was produced by the Conference Chairman . . .
>
> I refer honourable members, in particular, to draft Articles 61 and 62 of the ICNT. A reading of these will show that whilst the coastal State has sovereign rights over the living resources of the zone it has, in turn, certain obligations with respect to management of the resources in that zone. Briefly these are, to so manage these resources that they are conserved for optimum use of mankind both now and in the future. In this regard Australia will have to assess the resources of the Australian

fishing zone and determine the total allowable catches of these resources. Where Australians are unable or perhaps do not wish to harvest all of the total allowable catches, we will be under an obligation to allow other nations to take that surplus. However, such surplus will be taken under terms and conditions determined by Australia in line with internationally agreed provisions. Accordingly, we will have the right to determine who fishes these surplus stocks and under what terms and conditions.

In this respect it is important that we do not permit foreign fishing vessels to operate in any way that might be detrimental to the interests of Australian fishermen . . .

I turn now to the Bill in detail. The heart of this Bill is the creation in clause 3(a) of an Australian fishing zone which replaces the former declared fishing zone and by virtue of which Australian fisheries jurisdiction is extended from the present 12 to 200 miles. Within this 200-mile zone Australia will have exclusive jurisdiction over the fishing activities of both Australians and foreigners, subject to my earlier comments as to our international obligations. As will be seen in the above definition, certain waters may be excluded from the Australian fishing zone. Two types deserve special mention. First, 'excepted waters' are waters which are specified in a proclamation for that purpose made in accordance with the new section 7A, which is inserted by clause 8 of the Bill. The concept of excepted waters provides the Government with the flexibility to delay or exclude the establishment of the Australian fishing zone in certain areas. In such cases, the proclamation may provide for continuation of the existing jurisdiction in the specified area.

Secondly, 'treaty waters' are waters that are described in an agreement between Australia and another country as waters that are not to be taken to be part of the Australian fishing zone. This recognises the possibility that where Australia's 200-mile zone overlaps that of a neighbouring country, treaties will be negotiated which will define the extent of fisheries jurisdiction of both countries. This will mean in some cases the delimiting line will lie less than 200 miles from Australia. By virtue of this provision the conclusion of such a delimitation agreement will automatically limit the extent of the Australian fishing zone as specified in the agreement . . .

Under the present Act there is provision for the seizure or forfeiture of a boat, equipment or fish under certain circumstances for contravention of the Act. These amendments, in addition to inserting extremely large monetary penalties for various offences against the Act by foreigners, also delete any reference to imprisonment as a penalty and provide, at clause 11, that property seized under the Act may be released on certain conditions, including conditions as to the giving of security for payment of the value of the property if it is forfeited and for the payment of relevant fines. The changes give effect to provisions in the ICNT regarding punishment for offences committed by foreigners in 200-mile zones. This is another international obligation Australia has accepted . . .

Australian fishing zone. Obligation to provide access by foreigners

On 2 November 1978, Mr Sinclair wrote (HR Deb 1978, Vol 112, 3555):

> . . . extension of Australian fisheries jurisdiction carries with it an international obligation to provide access for foreigners to surplus fish resources not exploited by Australians, on terms and conditions acceptable to Australia.

Australian fishing zone. Proclamation of zone

On 22 September 1979, Mr Sinclair announced the proclamation[23] of the Australian Fishing Zone to the House of Representatives as follows (HR Deb 1979, Vol 115, 1463–6):

> I am pleased to inform the House that the Governor-General has approved the proclamation of 1 November 1979 as the date on which the provisions of the Fisheries Amendment Act 1978 not yet in force are to come into operation. From that date Australia will have a 200 nautical mile Fishing Zone in accordance with international law . . .
>
> It will be recalled that when I introduced the Fisheries Amendment Bill 1978 in the Parliament last year I pointed out that when the zone commences we will have international obligations with respect to management of the fisheries resources to ensure their proper conservation and optimum utilisation. These objectives are set out in what will become section 5B of the Fisheries Act. To give effect to its obligations, Australia will, as appropriate, determine total allowable catches, the amount of the allowable catch that will be taken by Australians and the allocation to foreign countries of any available surplus. Foreigners will not be allowed access to fisheries fully exploited by Australians or likely to be so in the near future. In time, as Australians develop the necessary capacity to operate in those fisheries where they do not now operate, the allocation to foreigners will be reduced accordingly . . .
>
> Foreign boats allowed to fish in the AFZ will fall into three categories: Foreign fishing under bilateral arrangement, feasibility fishing and commercial joint ventures . . .
>
> Under the definition of 'Australian fishing zone' the AFZ only includes waters that are 'proclaimed waters' under section 7 of the Fisheries Act, and does not include any waters that are proclaimed to be 'excepted waters' under section 7A of the Fisheries Act. Also, it will not include any waters that are specifically excluded from the AFZ by appropriate terms in any international agreement with another country.
>
> The proclaimed waters will include all waters beyond the territorial limits of Australia or of another country and that are within 200 nautical miles of Australia. Australia for this purpose includes all islands that are part of a State, including Macquarie Island, Lord Howe Island, and all islands that are part of the Northern Territory. The States and the

23. The proclamation is published in the *Commonwealth Gazette* No S 189 of 26 September 1979.

Northern Territory will continue to administer fisheries inside the 3-mile territorial sea, in accordance with and subject to the arrangements that have been agreed under the off-shore constitutional settlement successfully concluded with the States at the recent Premiers Conference. Proclaimed waters are now also to include all waters within 200 nautical miles of each Australian Territory, other than waters within the territorial limits of other countries. I wish expressly to refer in this regard to the fact that the waters up to 200 miles off the Australian Antarctic Territory are to be covered by the new proclamation.

The next step after the proclamation of proclaimed waters will be the coming into force, on 1 November next, of the provisions of the Fisheries Amendment Act 1978 relating to the AFZ. The AFZ, in which Australia controls the operations of foreign fishermen as well as of Australians, also extends 200 nautical miles from the baselines. However, the AFZ would overlap with the existing or prospective 200 mile zones adjacent to Australia's neighbours. Except in the case of Papua New Guinea, to which it shall refer separately, the Government has decided that, pending conclusion of delimitation negotiations with these countries, median lines in accord with Australia's maximum legal entitlement should be used for the interim delimitation of the AFZ in areas between Australia and its neighbours . . .

The Proclamations approved by the Governor-General apply to the waters within 200 miles of the Australian Antarctic Territory. The application of the Fisheries Act to waters adjacent to the Australian Antarctic Territory is based on Australia's sovereignty over the Australian Antarctic Territory. The Government proposes to recommend an additional step under the Act with regard to those waters. As already mentioned, the amendments to the Act last year enable the Governor-General, by proclamation, to declare any proclaimed waters to be excepted waters. When introducing the amending legislation I pointed out that the concept of excepted waters provides the Government with flexibility to delay or exclude the application of the Australian Fishing Zone in certain areas. Against the background of the Antarctic Treaty and Australia's current involvement with other Antarctic Treaty countries in negotiations for the conclusion of a convention for the conservation of antarctic marine living resorces, the Government proposes to recommend to the Governor-General that, in all the circumstances, the appropriate course at this time is to take the further step of excepting Australian Antarctic Territory waters from the AFZ. The exception will not affect the application of the Fisheries Act to any Australian fishing activities off the Australian Antarctic Territory.

Australian Fishing Zone. Exception of Australian Antarctic Territory

On 2 November 1979 the following proclamation relating to Australia's external territories, among others, was published:[24]

24. *Commonwealth Gazette* No S 225 of 2 November 1979.

PROCLAMATION

Commonwealth of Australia
ZELMAN COWEN
Governor-General

By His Excellency the Governor-General of the Commonwealth of Australia.

WHEREAS it is provided by section 7A of the *Fisheries Act* 1952 that the Governor-General may, by Proclamation, declare any proclaimed waters to be excepted waters for the purposes of that Act:

AND WHEREAS the Governor-General by Proclamation under section 7 of that Act published in the *Gazette* on 26 September 1979 declared the waters specified in Schedules 1 and 2 to that Proclamation to be proclaimed waters for the purposes of that Act:

AND WHEREAS the waters declared by that Proclamation to be proclaimed waters for the purposes of that Act include the waters specified in the Schedule to this Proclamation:

AND WHEREAS it is desirable that the waters specified in the Schedule to this Proclamation be declared to be excepted waters for the purposes of that Act:

NOW THEREFORE I, Sir Zelman Cowen, the Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, hereby declare the waters specified in the Schedule to this Proclamation to be excepted for the purposes of that Act.

SCHEDULE

All proclaimed waters within 200 nautical miles outwards of the baselines by references to which the territorial limits of the Australian Antarctic Territory are defined for the purposes of international law.

Given under my hand and the Great Seal (L.S.) of Australia on 31st October 1979.

By His Excellency's Command,
P.J. NIXON
Minister for Primary Industry

God save the Queen!

Australian fishing zone distinguished from economic zone

On 23 October 1979 the Minister for Foreign Affairs, Mr Peacock, said (HR Deb 1979, Vol 116, 2303):

> The declaration referred to by the honourable member does not involve a 200-mile economic zone. I say that because the Leader of the Opposition made the same error at lunch-time today. There is an essential difference between an economic zone — exclusive or otherwise — and a fishing zone. It is a fishing zone which will come into effect on 1 November . . .

Australian fishing zone. Queensland Premier's view

On 18 October 1979 the Queensland Premier, Mr Bjelke-Petersen, said in the Queensland Parliament (Parl Deb (Qd) 1979, Vol 279, 1097):

> At the outset, let me emphasise that the 200-mile fishing zone derives

> from developments in the International Law of the Sea, in which Australia has become involved, and from which Australia achieves a number of welcome benefits. It is also essential that Australia accept certain responsibilities and obligations, which are part of the arrangement. These obligations apply particularly in relation to fisheries, where the position of those nations dependent on fisheries for food must be recognised, but this recognitiuon is subject to management control of the fish stocks of the zone.
> I have accepted that the Commonwealth Government has acknowledged all aspects of its obligations at the international level, and I can understand that that Government must have regard to the whole area of the Australian fisheries zone and not only the area off Queensland . . .

Australian fishing zone. Access by Japanese and Taiwanese

On 17 October 1979 the Minister for Primary Industry, Mr Sinclair, issued a statement announcing the signing of the first bilateral fisheries agreement under Australia's extended 200 mile fisheries jurisdiction. The statement continued (Comm Rec 1979, 1549–50):

> The agreement is with Japan, a country with which Australia has had close fishing ties for many years. The agreement signed is a 'Head Agreement' on fisheries between the Government of Australia and the Government of Japan. It provides for subsidiary agreements to be entered into between the two Governments. Setting out the detailed procedures for the conduct of fishing operations in particular fisheries. The first subsidiary agreement concerns tuna longline fishing in the 200 nautical mile Australian fishing zone (AFZ). It was signed at the same time as the Head Agreement and both agreements will come into force on 1 November 1979, the date of commencement of the zone.
> The Minister said that the Head Agreement provides the basis for future fisheries relations between the two countries. It recognises Australia's sovereign rights under international law with respect to the living resources within the AFZ.

On 21 November 1979 Mr Sinclair wrote in answer to a question (HR Deb 1979, Vol 116, 3343):

> (1) Agreements providing for access by Taiwanese trawlers and gillnetters to the Australian fishing zone as from 1 November 1979, have been signed by myself, representatives of the Kailis Kaohsiung Fishing Company as agent for the Kaohsiung Fishing Boat Commercial Guild and by the Chairman of the Guild.

Australian fishing zone. Prohibition of whaling

On 4 April 1979 the Prime Minister, Mr Fraser, made a statement in the House of Representatives on whales and whaling, part of which is as follows (HR Deb 1979, Vol 113, 1481–2):

> The Government is to prohibit all whaling within the impending 200-mile Australian fishing zone, including any extension of the zone to include a fishing zone off the Australian Antarctic Territory . . .

The Government will continue to be an active member of, and to support, the International Whaling Commission and to support efforts to revise the 1946 International Convention for the Regulation of Whaling. In particular we will seek the extension of the Commission's charter to the conservation of all cetacea. Satisfactory substitutes are readily available for nearly all whale products. Therefore, the importation into Australia of all whale products and goods containing them are to be banned from 1 January 1981 . . .

The Government's decision represents a change in policy from one of conservative utilisation of whale stocks controlled by international agreement to one committed to a vigorous and active policy of protection of whales.

United Nations Law of the Sea Conference. Australian participation

The Seventh and the Resumed Seventh Sessions of the Third United Nations Conference on the Law of the Sea were held in Geneva from 28 March to 19 May 1978 and in New York from 21 August to 15 September 1978 respectively. For a general account of the Sessions, see the Reports of the Australian Delegation tabled in Parliament on 26 September 1978 and 21 November 1979 respectively.[25] The Reports do not contain any statements made by the Australian Representatives at the Conference. The following extracts, however, are from the *Official Records* of the Conference.

1. Continental Shelf

24. Mr BRENNAN[26] (Australia). . . Any proposal which depended on a distance or depth factor was unacceptable as a definition of the continental shelf because it contradicted the governing principle of law — namely, that the continental shelf was the natural prolongation of the land territory.[27]

2. Exploitation of Sea-bed

59. Mr BRENNAN (Australia) . . . Although some people might feel that the negotiations aimed at establishing an international regime for exploiting the seabed were not essential his delegation wished to re-emphasise the great importance which it attached to those negotiations. The Conference on the Law of the Sea had been convened, not only to clear up all of the uncertain areas in the existing legal rules, but also to establish an equitable regime for the seabed.[28]

3. Protection of Marine Environment

16. Mr McKEOWN[29] (Australia) said that, for the protection of the

25. PP No 269/1978; No 360/1979.

26. Mr Keith Brennan, Australian Ambassador to Switzerland and Chairman of the Delegation.

27. Summary Record of the 104th Plenary Meeting (Seventh Session), 18 May 1978, *Official Records*, Vol IX, 70.

28. Summary Record of statement to the 109th Plenary Meeting (Resumed Seventh Session), 15 September 1978: ibid, 107.

29. Department of Foreign Affairs Representative.

marine environment, it was essential to establish a regime that would give the coastal State the power to protect its territorial waters and would at the same time safe-guard the right of innocent passage and freedom of navigation.[30]

The Eighth and Resumed Eighth Sessions of the Conference were held in Geneva from 19 March to 27 April 1979 and in New York from 19 July to 24 August 1979 respectively. See the Reports of the Australian Delegation presented to Parliament on 26 November 1980.[31] The following is an extract from an article on the Conference from a Departmental source (Aust FA Rec March 1979, 154–5):

Australia's objectives at the Conference

Australia's overall objective at the Conference is the early adoption of a comprehensive and widely supported Convention on the Law of the Sea. Particular features that Australia seeks in a comprehensive convention include the following:

- a territorial sea of 12 n.m maximum;
- an exclusive seabed resources area extending to the outer edge of the continental margin or to 200 n.m. offshore, whichever is further, in which a coastal State would enjoy sovereign rights over the living and non-living resources of the continental shelf out to the edge of the margin or to the 200 n.m. boundary where the edge of the margin lies within that boundary;
- an economic zone beyond the territorial sea, extending to a maximum of 200 n.m. from the coast, in which the coastal State would have, consistent with the international freedoms of navigation and over-flight, certain exclusive rights over resources and specific rights and obligations with respect to the preservation of the marine environment; included in these coastal States' rights is the exclusive right to exploit fisheries subject to the principle of rational utilisation with a view to maximisation of the world's food supply, which includes the obligation to admit foreign access to surplus fisheries resources in certain circumstances. Australia also recognises the interests of land-locked and geographically-disadvantaged States in being able to participate in exploiting surplus fishing stocks in the economic zones of their respective regions;
- all States to be under an obligation to protect and preserve the marine environment in accordance with internationally agreed rules and standards;
- satisfactory regimes for transit through and over archipelagos and for passage through international straits, taking into account also the reasonable concerns of archipelagic and coastal States; and
- an international regime for the seabed beyond national jurisdiction ("the Area") including an international organisation ("the Authority")

30. Summary Record of statement to the 36th meeting of the Third Committee (Seventh Session), 20 April 1978: ibid, 151.
31. PP No 276/1980: No 277/1980.

> to manage all exploration and exploitation of the seabed resources of the Area; this regime should operate so as to reconcile the desire of developing countries to preserve the resources of 'the Area' as the 'common heritage of mankind' (that is, community use and control) with that of the technically advanced States to obtain freedom of access to exploit those resources.

The Ninth and Resumed Ninth Sessions of the Conference were held in New York from 3 March to 4 April 1980 and in Geneva from 28 July to 29 August 1980 respectively. The Reports of the Australian Delegation were presented to Parliament on 26 May 1981.[32] Following are extracts from a statement made by the Australian representative, Mr Brennan, in the plenary of the Resumed Ninth Session on 26 August 1980:[33]

> At the New York Session, Australia, a significant producer of all four of the seabed metals, stated that we would prefer a system under which there were no production limitation clauses. The discussion made it clear however that land-based producers generally attach importance to the inclusion of the production limitation mechanisms, and, in a spirit of co-operation, we now accept that such a provision will be included in the text.
>
> Along with the other members of the land-based producers group, my delegation still considers it essential that the formula should be backed up by anti-subsidisation and market access clauses. We are pleased to see the inclusion of a market access clause. Our concern on this issue is that minerals produced from the sea-bed should not be given preferred access to markets in a manner which discriminates against or even excludes land-based production of the same products. In this context the inclusion of this clause in the text is to be welcomed as a step in the right direction. However, whilst these issues have been a major subject for discussion at this Session, no anti-subsidy clause has yet been negotiated. We will continue to seek a satisfactory anti-subsidy provision.
>
> The production policy package recognises certain basic concerns expressed by land-based producers during these negotiations by a number of measures including the limiting of sea-bed mining to an identifiable part of consumption growth by means of a ceiling, a floor and a cap. At the same time however it provides reasonable scope for the development of sea-bed mining even in conditions of low consumption growth. That we regard as an essential element in the package if the common heritage is to be developed; but the checks and balances in the formula appear to us to meet the essential needs of the land-based producers. We therefore support the inclusion of Article 151(2) in the next revision.
>
> On financing the Enterprise, while we fully support the objective of making the Enterprise a viable entity, we consider that States Parties need to know the maximum amount of their contributions

32. PP No 116/1981; No 117/1981.
33. PP No 117/1981, Appendix E, 2–6.

before ratification. We have also drawn attention to the need to avoid a shortfall provision which would act as a disincentive to early ratification of the Treaty. There has been a concerted effort to find a satisfactory solution to these and other outstanding financial issues. We consider the revisions suggested by the Chairman of the First Committee in his Report to be an improvement on the provisions in the present text and support their inclusion in the next revision . . .

We believe that the Second Committee package, and in particular the continental shelf package, is now close to the form which is likely to command consensus. There remain elements in the package which cause difficulty for Australia. In particular, Article 82 on revenue sharing continues to cause difficulty for us both from a practical point of view as well as on grounds of principle. Article 76(8) on the Boundary Commission is also a source of concern. We note that consultations have taken place on a revised compromise text of Article 63 (straddling stocks) and consider that consensus would be enhanced if the renewed concerns expressed on that issue were to be reflected in the revised text. The provisions on innocent passage in Article 21 represent the results of a very carefully negotiated package and we do not believe that reopening that issue would contribute to the achievement of a consensus Convention.

In relation to the new general provisions, my delegation is concerned that in an understandable effort to achieve consensus and to accommodate the special concerns of particular States, some departures from accepted legal concepts have been made. This comment applies to some extent to paragraph 5 of Article 305 and more particularly to paragraph 2 of the new draft article on the protection of archaeological objects. We are particularly concerned that the latter provision may be misleading. My delegation supports the inclusion in the revised text of the draft articles on Final Clauses contained in documents A/CONF.62/L.60 as well as the reordering of the Dispute Settlement text contained in A/CONF.62/59 . . .

Maritime law. Shipping registration legislation. Nationality of ships. Geneva Convention on the High Seas 1958

On 22 May 1980 the Minister for Transport, Mr Hunt, introduced the Shipping Registration Bill 1980 and explained its purpose as follows (HR Deb 1980, Vol 118, 3085–7):

. . . the Shipping Registration Bill is an important step forward in the development of Australia's status as an independent nation. One of the attributes of national sovereignty is the right of a country to determine the conditions for the grant of its nationality to ships. In international law ships have the nationality of the country whose flag they are entitled to fly and it is customary, at least for the larger ships, to require them to be registered in order to secure the right to fly the national flag. The present law governing the registration of ships in Australia, was enacted

by the Parliament at Westminister 86 years ago and is contained in Part I of the Merchant Shipping Act 1894. Originally that law applied throughout the British Empire and it proceeded on the basis that a ship was a British ship if it was owned by a British subject or corporation in any part of the Empire. The Act required all British ships to be registered except certain small ships of less than 15 tons carrying capacity. Registration could be effected at any British port of registry throughout the Empire and this entailed the entry of particulars of the ship and of its owners and mortgagees in the register at the port. The registrar at the port was required to transmit returns at regular intervals to the Registrar-General of Shipping and Seamen at Cardiff and in that way a complete record of all British ships was built up. However this procedure has been abandoned in recent years.

From the commencement of the Statute of Westminister 1931 the various member countries of the British Commonwealth were free to repeal the Merchant Shipping Act 1894 and to establish their own shipping registers. However, under an agreement negotiated at the same time in 1931 the laws of each country were required to adopt a common status of 'British ship' and to follow closely the provisions of Part I of the Merchant Shipping Act 1894. That agreement, the British Commonwealth Merchant Shipping Agreement 1931, was rescinded by all member countries by mutual agreement in 1978. Australia is the only major independent member of the Commonwealth, other than Britain itself, to have continued to operate under the Merchant Shipping Act system and the stage has now been reached where it is essential that we legislate to put an end to this anachronism . . .

In proposing that the Australian national flag should be the proper national colours for Australian ships the Government has taken into account a number of considerations. The first is that at the present time Australians do not have the right to fly the Australian flag at sea.

There are other reasons for terminating the present usage of the Red and Blue Ensigns. Under the Geneva Convention on the High Seas 1958, to which Australia is a party, ships have the nationality of the country whose flag they are entitled to fly. It follows that if Australia is to confer its nationality on ships it cannot perpetuate the practice of permitting a flag other than a flag of Australian nationality to be used as national colours on Australian ships. The Blue Ensign is a flag of British nationality and the Red Ensign is ambiguous because, as I have mentioned, it is authorised under both British and Australian law.

The international principles apply particularly on the high seas and there is less difficulty in permitting a departure from the Convention's principles in the Australian territorial sea and internal waters.