VI—LAW OF THE SEA

Law of the Sea—ports—access to Australian ports by foreign warships

On 26 February 1984 the Minister for Defence, Mr Scholes, issued a statement on the matter: see Comm Rec 1984, 244–245.

On 30 May 1984 the Minister for Defence, Mr Scholes, provided the following written answer to a question on notice in the House of Representatives (HR Deb 1984, 2397):

> The Government has carefully considered the potential environmental effects of accidents involving nuclear powered warships visiting Australian ports. Studies by the responsible Australian authorities, principally the Australian Atomic Energy Commission, indicate that the risk of a major uncontained reactor accident is very low indeed. Nuclear powered warships are allowed to visit Australian ports only in strict accordance with guidelines and detailed practical safety arrangements.
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> Under these arrangements every port visited by a nuclear powered warship must first have been examined by the Australian Atomic Energy Commission to determine whether it meets all the criteria laid down by the Government for visits by such ships. For further information regarding the general conditions under which nuclear powered warships visit Australian ports, I refer the honourable member to the statement by the Minister representing me in the Senate, Senator Evans, on 15 December 1983 (Senate *Hansard*, page 3829).
>
> In regard to ships which may be nuclear armed, it has been a policy of successive Australian Governments not to require our friends and allies to reveal whether their ships making routine visits to Australian ports are carrying nuclear weapons. To do so could result in important information about the pattern of nuclear weapons deployments being revealed to potentially hostile powers. The Government is satisfied that the safety precautions taken on board visiting warships effectively preclude the possibility of an accidental nuclear detonation.

On 27 March 1985 the Minister representing the Minister for Foreign Affairs in the Senate, Senator Gareth Evans, said as part of an answer to a question without notice (Sen Deb 1985, 878):

> The United States has accepted absolute liability for any nuclear damage which might result from a nuclear incident involving the reactor of a United States warship. Australia expects that this will involve full co-operation in assisting with clean-up procedures, including assistance with radiation monitoring and decontamination. Australia would expect similar assistance in the event of a nuclear weapons accident. These matters are the subject of continuing dialogue with the United States. I add, of course, that this is contingency planning of the highest order and no one anticipates that any such accident will occur.

On 23 August 1985 the Minister for Defence, Mr Beazley, provided the following written answer in part in answer to a question on notice in the House of Representatives (HR Deb 1985, 457–458):

> The standard statements issued by both the United States and the United Kingdom Governments in respect of NPW visits to foreign ports commit the

Commanding Officers of such vessels to notify the appropriate host government authority immediately in the event of a reactor accident. Working-level procedures require similar notification for nuclear weapons accidents. Incidents are to be reported to the Minister for Defence.

In the unlikely event of an accident involving a nuclear reactor or a nuclear weapon. Australia is responsible for the overall command, control and coordination of the emergency response. The US and UK would provide the maximum assistance practicable. Under Public Law 93–513 the United States accepts absolute liability for nuclear damage which results from a nuclear incident involving the reactor of a United States warship. The UK Government has provided a unilateral assurance to Australia on reactor accident liability comparable to that given by the US.

Any claims for compensation resulting from a nuclear weapons accident would be dealt with through diplomatic channels in accordance with customary procedures for settlement of claims under generally accepted principles of law and equity. In the case of the United States, settlement of claims would take place in accordance with Article 12 of the Agreement between Australia and the US concerning the Status of US Forces in Australia...Australia is responsible for emergency planning for, and control of, responses to nuclear accidents in Australian harbours and has its own national procedures. This planning is undertaken by State and Territory Governments with Commonwealth assistance.

I would reiterate that there has never been an incident or accident involving nuclear weapons during visits by allied vessels to Australia. Our independent monitoring system has never detected any radiation leaks from any visiting nuclear powered warships.

On 23 August 1985 the Minister for Defence, Mr Beazley, said further in a written answer to a question on notice in the House of Representatives (HR Deb 1985, 496):

The only restrictions that apply to visits to Australia by non-nuclear powered warships of the United States of America and other allied navies are the normal operational ones of navigational safety and berth availability. There are applied in the knowledge that safety procedures on board nuclear capability warships effectively preclude the possibility of an accidental nuclear detonation.

Any request by an allied or friendly government for one of its warships to drydock in an Australian port will be considered on its own merits taking into account technical and safety factors, and the strategic and operational circumstances obtaining at the time.

Law of the Sea—ports—visits by foreign warships—nuclear powered vessels—conditions of port access—liability for environment damage—compensation arrangements

On 14 March 1986 Senator Gareth Evans, the Minister representing the Minister for Defence in the Senate, said in answer to a question (Sen Deb 1986, 1096):

Senator Mason asked me a question today about nuclear accidents. I am able to give him the answer now as follows: Compensation arrangements in the

unlikely event of a nuclear reactor or nuclear weapons accident on board a visiting United States warship are set out in part 3 of Mr Beazley's response to House of Representatives question on notice No. 629, published in the House of Representatives *Hansard* on 10 September 1985, at page 457. I seek leave to incorporate in *Hansard* the text of that answer.

Leave granted.

The answer read as follows —

In the unlikely event of an accident involving a nuclear reactor or a nuclear weapon, Australia is responsible for the overall command, control and co-ordination of the emergency response. The US and UK would provide the maximum assistance practicable. Under Public Law 93–513 the United States accepts absolute liability for nuclear damage which results from a nuclear incident involving the reactor of a United States warship. The UK Government has provided a unilateral assurance to Australia on reactor accident liability comparable to that given by the United States.

Any claims for compensation resulting from a nuclear weapons accident would be dealt with through diplomatic channels in accordance with customary procedures for settlement of claims under generally accepted principles of law and equity. In the case of the United States, settlement of claims would take place in accordance with Article 12 of the Agreement between Australia and the US concerning the status of US Forces in Australia.

Senator GARETH EVANS—With regard to the latter parts of Senator Mason's question, the contribution, if any, by Federal or State governments in the event of a nuclear weapons accident—the United States Government accepts absolute liability for reactor accidents—would, I understand, be a matter for negotiation and I cannot speculate as to the outcome.

On 18 March 1986 the Minister for Defence, Mr Beazley, wrote in part in answer to a question on notice (HR Deb 1986, 1549–1550):

The only controls that apply during visits to Australia by conventionally-powered nuclear weapons-capable vessels of the USA and other allied navies are the normal operational ones of navigational safety and berth availability. These are applied in the knowledge that safety procedures on board nuclear weapons-capable warships effectively preclude the possibility of an accidental nuclear detonation.

On 2 May 1986 the Minister for Resources and Energy, Senator Gareth Evans, said in part in answer to a question without notice (Sen Deb 1986, 2291–2292):

Nuclear-power warship visits to Australia must take place in accordance with the conditions of entry which were first laid down in 1976, reviewed in 1982 and affirmed by me in the Senate on 15 December 1983. The condition relevant to safety planning is that an operating safety organisation, competent to conduct a suitable radiation-monitoring program and able to initiate actions and provide services necessary to safeguard the public in the event of a release of radioactivity following an accident, must exist for the port being visited. That is the basic rule...

While a wide range of foreign warships, including nuclear-powered warships, have visited Australia, there has never been an accident involving

the weapons or the nuclear propulsion systems on board these vessels while in an Australian port. The radiation monitoring procedures activated by Australia during nuclear-powered warship visits have never revealed any leakage of radiation from any of these vessels.

On 19 August 1986 the Minister for Defence, Mr Beazley, provided the following written answer, in part, to a question on notice in the Senate (Sen Deb 1986, 52–53):

Allied warships do not normally operate in Australian territorial waters except in transit to and from visits to Australian ports.

Mr Beazley wrote further in relation to another question on 16 September 1986 (Sen Deb 1986, 481):

There have been no nuclear weapons accidents in Australian waters nor any, as far as the Australian Government is aware, in South Pacific waters.

On 23 February 1987 Senator Gareth Evans said in part in answer to a question (Sen Deb 1987, 415):

[T]he Government remains confident that in view of the extreme remoteness of the possibility of a nuclear reactor or nuclear weapons accident occurring on a visiting United States warship, there is no justification for a moratorium on allied warship visits.

On 17 March 1987 Mr Beazley wrote in answer to a question on notice (HR Deb 1987, 975):

The Government remains prepared to accept visits to all Australian states by allied nuclear powered warships, provided that the proposed visits would comply with the Government's general conditions of entry. Visits by nuclear weapon-capable warships are supported subject only to compliance with standard navigational safety requirements and berth availability. Apart from ports that are located in Commonwealth Government territory, arrangements for port safety in Australia are essentially the responsibility of the State Government concerned.

On 24 March 1987 Senator Gareth Evans said in part in answer to a question (Sen Deb 1987, 1190–1191):

Allied warships make short visits to Australian ports in peacetime primarily for rest and reaction purposes. No foreign warship is permanently based in Australia. There is no blanket approval by the Government for visits by foreign warships, and each visit is approved separately on a case by case basis. The Government does not accept that agreeing to such visits in peacetime makes Australian ports nuclear targets. In the unlikely event of a nuclear conflict, major fleet units of allied navies may become nuclear targets. However, it is not credible that a nuclear conflict would occur unless there has been a dramatic deterioration over a period in relations between the superpowers. In such a period of tension United States warships would be deployed to areas of primary global strategic importance. It is unlikely that any of them would remain operating in Australian waters.

On 26 March 1987 Senator Gareth Evans said further in answer to a question (Sen Deb 1987, 1389):

[U]nder United States Public Law 93–513 it is the policy of the United States that any nuclear damage claim involving the reactor of a nuclear-powered warship be settled by the United States on an absolute liability

basis. With respect to nuclear weapons accidents, compensation would be sought under the well-established legal principles which govern the liability of states for acts which cause damage or loss of life. Furthermore, in the case of the United States, the 1983 agreement between Australia and the United States concerning the status of United States forces in Australia contains provisions regarding claims arising from the activities of United States forces in Australia.

On 27 October 1987 Senator Robert Ray, the Minister representing the Minister for Defence in the Senate, said in answer to a question (Sen Deb 1987, 1279):

> The Australian Government, in accordance with its sovereign responsibility, would take full charge of the management of any accident on Australian territory. For reasons which the Government has stated on many occasions, the Government considers that a nuclear weapons accident in any Australian port is extremely unlikely.

Law of the Sea—ports—access to ports by nuclear powered ships—South Pacific Nuclear Free Zone Treaty

On 8 November 1985 the Minister representing the Minister for Foreign Affairs in the Senate, Senator Walsh, said in answer to a question without notice on the South Pacific Nuclear Free Zone Treaty which Australia signed on 6 August 1985 (Sen Deb 1985, 1846):

> ...seven other members of the South Pacific Forum signed the South Pacific Nuclear Free Zone Treaty. Since then Papua New Guinea has also signed that Treaty. Parties to the Treaty undertake, among other things, not to manufacture explosive devices and not to permit them to be stationed or tested on their territory. It also prohibits the dumping of radioactive waste at sea within the zone and includes restrictions on the export of nuclear material in line with Australia's existing strong safeguard requirements for uranium exports.
>
> The Treaty also recognises the unqualified sovereign right of countries in the zone to decide for themselves such questions as security arrangements and access to ports and airfields by vessels and aircraft of other countries. It also fully respects the principles of international law with regard to the freedom of the high seas. The prohibitions in the Treaty will be binding on Australia when it has verified it and the seven other countries have also done so. The Government is currently considering what implementing legislation will be required before Australia can ratify the Treaty. Preliminary advice is that legislation will probably be required to implement the Treaty's provisions on radioactive waste dumping and on verification, particularly access rights and privileges and immunities of inspection. No decision has been taken about the timing or form of the implementing legislation. Consideration is, however, being given to amending the Environment Protection (Sea Dumping) Act 1981 to cover the Treaty's prohibition on the dumping of radioactive waste.

On 29 November 1985 the Minister for Foreign Affairs, Mr Hayden, provided the following written answer in the House of Representatives to the respective question (HR Deb 1985, 4074–4075):

What period of time would have to elapse before a visiting nuclear-armed vessel, in an Australian port, would be considered as being stationed in Australia in violation of Article 5 of the South Pacific Nuclear Free Zone Treaty.

The question of whether the definition of stationing contained in Article 1(d) of the South Pacific Nuclear Free Zone Treaty should include a time element to cover, for example, the duration or pattern of port visits was considered by the South Pacific Forum's Working Group which drafted the Treaty. It was noted that the principles on a South Pacific Nuclear Free Zone adopted by Forum Heads of Government at their meeting in Tuvalu in August 1984 had explicitly stated that the sovereign right of a country to decide on port access was unqualified. Moreover, the utility of such a time frame was questioned since circumstances of port visits varied considerably. It was also noted that should any Party to the Treaty have doubts or questions concerning the duration or pattern of port visits it would be open to it to invoke the consultation provisions of the Treaty (Article 10) in order to seek clarification.

Law of the Sea—admiralty and maritime jurisdiction—report of the Australian Law Reform Commission

On 2 December 1986 the report of the Australian Law Reform Commission on Civil Admiralty Jurisdiction was tabled in the Senate (Sen Deb 1986, 3118). Following are a number of short extracts from the report. The first deal with international comity and its internal application (paras 59, 278); the second concerns the scope of admiralty jurisdiction (paras 111–154); and the third the need to notify the consul of the State concerned in the case of arrest of a foreign ship (para 298).

59. *The Relevance of 'International Comity'*. In the exercise of the jurisdiction conferred by the Colonial Courts of Admiralty Act 1890 (UK), courts are directed to have the same regard as the High Court in England to 'international law and the comity of nations'.[131] Thus, although the claim would otherwise be within its jurisdiction a Colonial Court of Admiralty cannot entertain a proceeding *in rem* against a ship of a foreign state unless the ship in question was being used at the relevant time for ordinary trading purposes or the immunity is waived.[132] In addition, it is the usual practice for Colonial Courts of Admiralty to decline to exercise their jurisdiction *in rem* in certain cases where foreign vessels are involved until the consular representative of the foreign state concerned has been duly notified.[133] The former rule is no more than an application of ordinary principles applicable

131 s 2(2). See CA Ying, 'Colonial and Federal Admiralty Jurisdiction' (1981) 12 FLR 234, 249.

132 *Compania Naviera Vascongado v Steamship Cristina* [1938] AC 485; *Owners of the Ship Philippine Admiral v Wallem Shipping (Hong Kong) Ltd* [1977] AC 373; *I Congreso del Partido* [1983] 1 AC 244.

133 cf *The Evangelistria* (1876) 2 PD 241; *The Annette: The Dora* [1919] P 105. But see *The Jupiter (No 2)* [1925] P 69. See also para 44 n 52.

by the High Court in its general jurisdiction,[134] but Courts of Admiralty have traditionally been aware of the international or transnational context of the jurisdiction they exercise, and have had regard to arguments drawn from the maritime jurisprudence of other countries and of attempts at international unification of the law made during this century. This tendency owes something to the civil law origins of English admiralty law and procedure, but is also a reflection of current needs for the international recognition of the arrest and judicial sale of ships and of the exercise of jurisdiction based upon such arrest. Although the courts no longer regard themselves as applying (without statutory authorisation) the 'general law of the sea',[135] notions of international comity and of a general maritime law remain influential.[136]

278. *Need for Express Provision*? It was noted in chapter 4 that s 2(2) of the Colonial Courts of Admiralty Act 1890 (UK) requires courts exercising jurisdiction under the Act to have the same regard as the High Court in England to 'international law and the comity of nations'. The question is whether the proposed legislation should contain any provision directing Australian courts exercising admiralty jurisdiction to have regard to international trends and requirements and the decisions of overseas maritime tribunals. On one view such a provision is unnecessary. There is no body of general maritime law which could be picked up by such a provision.[32] Nor does it seem desirable that Australian admiralty courts be given the power to import rules of public international law into Australian law in any special way (that is, in circumstances where they would not do so at common law).[33] Where there are specific requirements of international law (or comity) which local courts exercising admiralty jurisdiction should be regard to, these should be stated in legislation.[34] Australian judges need no specific mandate in order to give due regard to international trends, and to the decisions of admiralty judges in overseas jurisdictions. Legislation in

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134 And now codified for Australia in the Foreign States Immunities Act 1985 (Cth) s 18, based on this Commission's Report No 24, *Foreign State Immunity*, AGPS, Canberra, 1984.

135 cf *Bankers Trust International Ltd v Todd Shipyards Corp: The Halcyon Isle* [1981] AC 221, 232 (Lord Diplock).

136 cf id, 239-41 (Lord Diplock) 244, 247, 250 (Lords Salmon, Scarman, diss).

32 *The Tojo Maru* [1972] AC 242, 290 (Lord Diplock); *Bankers Trust International Ltd v Todd Shipyard Corp; the Halcyon Isle* [1981] AC 221, 232, 238 (Lords Diplock, Elwyn-Jones and Lane): but cf id, 243 (Lords Salmon and Scarman, dissenting) who, at least on the point at issue, recognition of foreign maritime liens, were more receptive to 'the concept of a universal law of the sea' as a guide to resolving uncertainties and to judicial development of the law. However even Lords Salmon and Scarman did not suggest that there was any precise body of rules which could be picked up by a phrase such as 'law maritime'.

33 cf *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529 on the common law rules.

34 See eg para 62, 200 (actions *in rem* against foreign state-owned ships). The need to notify the consul of the flag state when certain types of actions *in rem* are brought against foreign ships is discussed in para 298.

comparable overseas jurisdictions does not contain any equivalent provision, there seems no sufficient need for provision in the proposed Australian legislation.

The Geographical Scope of Admiralty

111. *Introduction.* In drafting legislation based primarily on the power to confer 'admiralty and maritime jurisdiction', questions of the geographical scope of the jurisdiction arise. These do not concern the question of any nexus between the forum and the cause of action: it is well established that admiralty jurisdiction *in rem* is universal. However there are questions about where service of process in an action *in rem* needs to be effected for jurisdiction to be attracted,[77] and where arrest of the *res* can properly be carried out. There are also questions about the extension of admiralty jurisdiction to claims arising 'internally' within Australia (that is, on internal waters).

112. *Service and Arrest of Ships in Motion.* Service on and the arrest of a ship is normally effected while the ship is alongside a wharf or at anchor in a port. The question whether a ship may be arrested while in motion or while stopped but not at anchor (for example, to pick up or drop a pilot) has only rarely arisen. There are two aspects to the question. The first is whether the rules of court would allow such arrest. This in turn largely depends on whether an arrest can, as a matter of fact, be made effective without resorting to the use of force.[78] It is suggested that the question of what constitutes an effective arrest should be left to courts to resolve on the particular facts if a case arises. The proposed legislation (and rules of court)

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77 Jackson (1985) 83, 85.

78 See *Borjesson and Wright v Carlberg* (1878) 3 App Cas 1316, 1320 for the observations of Lord Cairns (with whom Lord Hatherley agreed) on the practice of Scottish courts in allowing arrestment *ad fundandam jurisdictionem*. He noted that some of the judges in the court below doubted whether the ship could be even served with arrestment after she had...commenced her voyage and was in motion; but, be that as it may, it appears to me that the very utmost that could be done would be that those who thus got on board of her might affect the master, whatever might be the consequence of it, with the knowledge that an arrestment was there and was served there on board the ship. But I can find no authority whatever which would justify them in turning the ship about and bringing her back into port.

See also *Dunbar v The Milwaukee* (1907) 11 Ex CR 179 (admiralty arrest effective where sheriff allowed on board moving ship and master agreed to follow sheriff's instructions and proceed to anchorage); *The Rhenania, The Times*, 12 November 1909 (ship in transit through English Channel after leaving English port, hailed by admiralty officer from tug, stopped, allowed officer to board, warrant of arrest read and fixed to the mast. Master asserted that he could not be properly arrested in that position, nearly 2 miles off English coast, and sailed off. On subsequent return to England, fined 100 pounds for contempt of court for 'breaking arrest'). cf *The Largo Law* (1920) 15 Asp MLC 104, 105, where Hill J questioned whether an effective arrest could be made even of a ship anchored in an open roadstead, though he was prepared to assume that it could.

should not explicitly prohibit arrest of a moving vessel, but should simply leave the point open.[79]

113. *Service and Arrest in the Territorial Sea.* The second aspect of the question of arresting ships outside ports is where the ship must be in order to fulfil the requirement for a valid arrest that the *res* must be 'so situated as to be within the lawful control of the state under the authority of which the court sits.[80] It is a question of international law how far off-shore and under what circumstances Australia may assert jurisdiction over foreign ships. There is a further question whether the particular Australian court is empowered by Australian law to assert jurisdiction in ways which are internationally permitted. This latter question is presently addressed by s 380(1) of the Navigation Act 1912 (Cth). This provides:

> Where any district within which any Court has jurisdiction is situated on the sea coast, or abuts on or projects onto any navigable water, the Court shall have jurisdiction over any ship being on or lying or passing off that coast, or being in or near the navigable water, and over all persons thereon or belonging thereto, in the same manner as if the ship or persons where within the limits if the original jurisdiction of the Court.[81]

The international law constraints on arrest of foreign ships in the territorial sea are set out in art 20(2)–(3) of the 1958 Territorial Sea Convention,[82] which provide:

> 2. The coastal State may not levy execution against or arrest the ship for the purpose of any civil proceedings, save only in respect of obligations or liabilities assumed or incurred by the ship itself in the course or for the purpose of its voyage through the waters of the coastal State.

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79 In ALRC Admiralty Research Paper 3 (V Thompson & S Curran), *Draft Legislation: Admiralty Procedure and Rules*, 1985, a provision was proposed in draft rules defining when it is contempt of court to move a ship so as to prevent arrest. After discussion it was agreed that the matter is best left to the general law: cf *The Seraglio* (1885) 10 PD 120.

80 *Castrique v Imrie* (1870) LR 4 HL 414, 429 (Blackburn J) cited with approval in *Aichhorn & Co KG v Ship MV 'Talabot'* (1974) 48 ALJR 403, 404 (Menzies, Gibbs and Mason JJ).

81 Contrast the position in the United States where admiralty courts lack the power to order arrests in the territorial sea as a matter of municipal law: *The Hungaria* (1889) 41 F 109. Hence as a matter of municipal law an oil drilling rig off-shore is outside admiralty jurisdiction and cannot be arrested *in rem : ITT Industrial Credit Co v Phoenix Sea Drill 'Big Foot II'* (1984) AMC 503 (DC WD La).

82 Convention on the Territorial Sea and Contiguous Zone, Geneva, 29 April 1958, 516 UNTS 205 (see also for text, Sch 1 of the Seas and Submerged Lands Act 1973 (Cth)). Art 28(2)-(3) of the Law of the Sea Convention, Montego Bay, 10 December 1982. UN Doc NoA/Conf.62/122, is to identical effect. Although the wording of the 1952 Arrest Convention is capable of being read as allowing arrest of foreign ships transiting the territorial sea on any 'maritime claim' as defined in that Convention, the better view is that the 1952 Arrest Convention was not intended to address the issue and that the 1958 Convention represents the international law rule: see the summary of the extensive discussions within the International Law Commission in YBILC 1956/II, 275-6.

3. The provisions of the previous paragraph are without prejudice to the right of the coastal State, in accordance with its laws, to levy execution against or to arrest, for the purpose of any civil proceedings, a foreign ship lying in the territorial sea, or passing through the territorial sea after leaving internal waters.

Australia is a party to this Convention. In practice attempts to serve or arrest foreign ships on continuous passage have been very rare.[83] In areas beyond the territorial sea international law would not permit any general assertion of civil jurisdiction in the form of arrest of foreign vessels. While the coastal state has the right to make and enforce laws for the management and exploitation of the exclusive economic zone and the continental shelf,[84] this right would not allow arrest in admiralty on an ordinary civil claim. Neither would it appear to allow arrest even where the claim is directly related to an activity involving exploitation of the resources of the zone or shelf, though there may be room for argument on the point. Even if off-shore oil drilling rigs are defined as 'ships' for the purposes of the proposed legislation, they would not appear to be subject to admiralty arrest while moving or while drilling outside territorial waters.

114. *Conclusion.* Australian admiralty jurisdiction should be extended to allow service and arrest in the territorial sea, subject to the limitation in favour of ships in innocent passage provided for in art 20(2) of the 1958 Convention. However it is far from clear that s 380(1) of the Navigation Act 1912 (Cth) extends to the whole territorial sea. The term 'ship being on or lying or passing off that coast' in s 380(1) might well be held to refer to ships which are adjacent or even close to the coast,[85] and it is doubtful whether its meaning would expand to cover any future seaward extension of the Australian territorial sea (say from the present three miles to 12 miles) that might be effected. Since s 380(1) applies to all jurisdictions of the specified courts, not just their admiralty jurisdiction, it should continue in force pending reconsideration as part of the overall reform of the Navigation Act 1912 (Cth). But a specific provision should be inserted in the proposed legislation making it clear that the admiralty jurisdiction of Australian courts

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83 In 1958 Sir Gerald Fitzmaurice of the United Kingdom said that there had never been such an arrest: UN Conference on the Law of the Sea (Geneva, 27 Feb-27 April 1958) *Official Records*, vol 3, 124 (UN Doc No A/Conf.13/69). But for an example see *The Ship 'DC Whitney' v St Clair Navigation Co* (1907) 38 SCR 303 in which the Canadian Supreme Court held that there was no right to arrest in admiralty a foreign ship on innocent passage through Canadian waters on a claim which had no connection with Canada beyond the presence of the *res*. It was assumed but never proven that the ship was in motion at the time of arrest (id, 324). But note that s 383(1) of the Navigation Act 1912 (Cth), when read with the definition of 'Australia' in s 15B of the Acts Interpretation Act 1901 (Cth), allows ships on innocent passage to be detained by an Australian court on civil claims which need not have any connection with Australia. Such a detention would seem to be a clear breach of Australia's oblgiations as a party to the 1958 Territorial Sea Convention, art 20(2).

84 1982 Law of the Sea Convention, art 73, 81.

85 There are no reported cases on s 380.

extends to service and arrest of ships in the territorial sea, subject to the limits on arrest of ships in innocent passage under art 20(2) of the 1958 Convention. There should be no power to serve process on or arrest a ship outside the territorial sea in respect of claims relating to the continental shelf or exclusive economic zone. The matter may however need to be reconsidered later, when the question of the propriety of such extraterritorial service and arrest is better settled internationally.

298. *Notice to Consul when Arresting Foreign Ship.* The English admiralty rules provide:

> Except with the leave of the Court...a warrant of arrest shall not be issued in an action in rem against a foreign ship belonging to a port of a State having a consulate in London, being an action for possession of the ship or for wages, until notice that the action has been begun has been sent to the consul.[134]

This rule continues what Dr Lushington described as the 'ancient practice' of the Admiralty Court.[135] Similar provision is made in the admiralty rules in Canada,[136] New Zealand,[137] and in all the Australian jurisdictions.[138] There is, apparently, no equivalent requirements in the admiralty rules in the United States. Nor is there any suggestion that international law requires such a notification.[139] Rather the rationale derives from

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134 RSC (UK) 0 75, r 5(5). See similarly the County Court Rules 1981 (UK), 0 40 r 4(3) referring to 'a consulate within the district of the court'.

135 *The Octavie* (1863) Br & Lush 215, 217; 167 ER 341, 342.

136 Fed Court Rules (Can) r 1003(3) referring to 'a consulate in the province where the ship is'. There was no equivalent provision in the pre-1970 Rules of the Exchequer Court of Canada in Admiralty. But see *Armanekis v SS Cnosaga* (1950) Ex Cr 445 (court may decline to exercise discretion to hear action against foreign ship involving foreign seamen if accredited representative of flag state objects on reasonable grounds to the proceedings).

137 Ad Rules 1975 (NZ) r 15(2) ('having a consultate in New Zealand').

138 NSW Ad Rules 1952, r 26(b) ('consular representative...if there be one resident in Sydney'); Vic Ad Rules 1975, r 20(b) ('...if there be one resident in Melbourne'); Qld RSC, 0 7 r 11(b) dealing with actions for wages but not for possession and referring to 'consular officer...if there is one resident in Queensland'; Tas RSC 1965, PtIV r 5(c) ('consular representative or agent...if there be one resident in the place of the registry in which the writ...is issued'); SASCR, 0 39 r 7(2)(b) ('...if there be one resident in South Australia'); WARSC 1971, 0 74 r 3(3)(f) ('...resident in Western Australia'); Vice Ad Rules 1883 (UK), r 31(a) referring only to actions for wages, not possession, and to a consular officer 'if there is one resident in the possession' (defined in r 1 as 'colony,...territory'); HCR 0 5 r 8(f) ('consular officer...if there be one within the Commonwealth').

139 The 1952 Arrest Convention makes no reference to the point. But Wiswall (1970) 68, writing of 1859, notes that, *pace* Dr Lushington, the maritime law of other nations had historically considered the consent of the consul as virtually an absolute condition to the entertainment of a wages suit. In recent years the United Kingdom has made a number of Orders under the Consular Relations Act 1968 (UK) s 4 excluding or limiting the jurisdiction to entertain proceedings relating to the remuneration of masters and crew members of ships of specified states, except where a relevant consular officer has been notified of the proceedings and has not

international comity,[140] and more specifically from the notion of *forum non conveniens*. The purpose of the requirement that notice be sent[141] is to give the consul the opportunity to present to the court reasons why it should, in the exercise of its discretion, decline to exercise jurisdiction over the matter.[142] The requirement of notice is obsolete. With the speed of modern communications the owner or operator is sufficiently able to appear and argue *forum non conveniens*, and consular intervention for this purpose seems anomalous.[143] It is difficult to see why possession and wages claims should be singled out for special treatment. With respect to possession actions, Justice Hill suggested in 1919 that there was no justification for special treatment.[144] The basis for special treatment, that a local court cannot properly consider questions of the municipal law of another country and that actions for possession of foreign ships inevitably depend on that law, was even then no longer considered valid. The position with wages claims against foreign ships is rather more involved. It is not only that a question of foreign law may be involved but also that under that law the local consul of the flag state may be empowered to resolve wages disputes arising on ships of that state.[145] But on this basis it is anomalous that the notification provision applies only in actions *in rem*.[146] An action *in personam* for wages would seem to be no less an intrusion on the consul's 'jurisdiction' or functions. McGuffie notes that an informal practice has grown up in some district registries in England of giving notice to the local consulate of impending arrest: 'although it was not part of the original purpose of the rule requiring notice, early notice is often useful because questions of repatriation, provisioning, discipline, etc may often require the

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objected within 2 weeks. These Orders reflect specific treaty commitments. There are no Australian equivalents to these treaties.

140 cf C Parry (ed) *British Digest of International Law*, Stevens, London, 1965, vol 8, 390.

141 Note that it is sufficient to have posted the notice. No service or proof of service is required: McGuffie (1964 & 1975) para 257.

142 *The Golubchick* (1840) 1 Wm Rob 143; *The Nina* (1868) LR 2 PC 38; *The Leon XIII* (1883) 8 PD 121. Under Supreme Court Act 1981 (UK) s 24(2)(a) nothing in the admiralty provisions of the Act shall 'be construed as limiting the jurisdiction of the High Court to refuse to entertain an action for wages by the master or a member of the crew of a ship, not being a British ship'.

143 See eg *Kandagasabapathy v MV Melina Tsiris* [1981] 3 SAfLR 950(N); *Magat v MV Houda Pearl* [1982] 2 SAf LR 37(N).

144 *The Annette: The Dora* [1919] P 105, 114-5, a view endorsed in *The Jupiter (No 2)* [1925] P 69, 75 (Bankes LJ).

145 cf Vienna Convention on Consular Relations, 24 April 1963, art 5(1) (in force in Australia by virtue of the Consular Privileges and Immunities Act 1972 (Cth) s 5(1): see Sch for text) which provides that for ships having the nationality of the state which the consul represents 'consular functions consist in...settling disputes of any kind between the master, the officers and the seamen insofar as this may be authorized by the laws and regulations of the sending State'.

146 cf 8 Brit Digest IL 402.

urgent attention of the local consulate'.[147] Logically, if notice is thought useful, it should be required in all cases of arrest, not merely possession and wages cases. Although the requirement to give notice does not appear to have proven burdensome, it should no longer be required either in its present form or extended to all actions *in rem*. The less that admiralty procedure is encumbered with special requirements of doubtful or marginal utility the better.

Law of the Sea—maritime boundaries—Australia's maritime boundaries

In March 1984 the following article, entitled "Australia's Maritime Boundaries" by PG Bassett, appeared in *Australian Foreign Affairs Record* published by the Department of Foreign Affairs (at 186–191):

> Australia has five immediate neighbours; that is, countries with which we share boundaries in the sea. They are Indonesia, Papua New Guinea, Solomon Islands, France (in respect of New Caledonia in the Pacific and Kerguelen in the Southern Ocean) and New Zealand.
>
> Boundary treaties have been concluded with Indonesia, Papua New Guinea and France. Negotiations with Solomon Islands are well advanced. Only the agreements with France and Indonesia are in force. In the case of Indonesia there are some significant sections of the boundary still to be agreed.
>
> **The Indonesian boundary**
>
> The agreements with Indonesia were concluded in May 1971, when the seabed boundaries in the Arafura Sea from west of Cape York to north of Arnhem Land were established, and October 1972, when the seabed boundary was drawn westward to an area south of West Timor, although a gap (the 'Timor Gap') was left south of what was then Portuguese Timor. The need to extend the boundary further to the west was noted but left for a future occasion. Other matters not dealt with at the time were delimitation of the seabed between Christmas Island and Java and the question of fisheries jurisdiction throughout the whole area. Australia ratified the 1971 and 1972 Agreements in November 1973.
>
> The line agreed in 1972 represented a compromise between the Indonesian view that there was a single continental shelf between the two countries (for which a median line would be appropriate) and the Australian view that there were two shelves, with the Australian shelf extending as far north as the Timor Trough, a long and deep geographical feature (over 3000 metres deep in places and running east-west for hundreds of miles) immediately south of the Timor coast. The agreed line retained under Australian jurisdiction all areas falling within the continuous 200 metre isobath measured from the Australian coast.
>
> The long international conference which debated what was to become of the 1982 UN Convention on the Law of the Sea had great difficulty with

147 McGuffie (1964 & 1975) para 257.

the delimitation of marine boundaries between adjacent or opposite states Australia's negotiating position vis-a-vis Indonesia had been based on the 1958 Geneva Convention on the Continental Shelf. That convention defines the continental shelf as 'the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said area'. It also provides that where the same continental shelf is adjacent to the territories of two adjacent states, in the absence of agreement, the boundary shall be determined by application of the principles of equidistance.

The provisions of the 1982 Convention on the Law of the Sea relating to the continental shelf (especially Article 76) and to boundary delimitation are not perfectly clear. Indonesia's view is that every country is entitled to a continental shelf of at least 200 nautical miles (nm) if no other country's interests are affected (regardless of whether or not the shelf actually extends that far), so that where the adjacent or opposite coastlines are less than 400 miles apart, as in the case of Timor and Australia, a median line would be appropriate. Australia does not accept that view, maintaining, on the contrary, that there are two separate propositions embodied in Article 76 of the Law of the Sea Convention. The first is that the coastal state is entitled to exercise jurisdiction over its continental shelf throughout its natural prolongation. The second is that where the continental shelf does not extend out to 200 nm, the coastal state is entitled to exercise jurisdiction over the seabed, regardless of its nature, out to 200 nm. In our view, the concept of natural prolongation of the continental shelf is expressly preserved in Article 76 of the Convention and indeed is given primacy. Notwithstanding these different interpretations, it is clearly in the interests of both parties to reach agreement on a seabed boundary in the Timor Gap as soon as possible, especially since oil exploration permits have been issued in respect of sites in the area and drilling cannot proceed pending resolution of the dispute.

Following the 1972 agreement, Australia made exploratory soundings with Portugal in 1974 about the Timor boundary and there were further contacts in 1975, but the area of the gap remained undelimited when Indonesia ousted the Portuguese in late 1975. The Portuguese preference had been for a median line delimitation.

There have been five rounds of discussions with Indonesia on the matters not covered by the 1971 and 1972 agreements. These meetings took place in February and May 1979, November 1980, October 1981 and February 1984. Further meetings are foreshadowed. The Governments of Western Australia and the Northern Territory have been closely involved in the negotiations because of their responsibility for administering oil and gas drilling on most of the relevant parts of the continental shelf.

A Provisional Fisheries Arrangement was negotiated with Indonesia also in 1981 to overcome the practical problems of overlapping fisheries jurisdictions. The fisheries delimitation roughly follows the median line, except in the west where it comes close to Ashmore and Cartier Islands.

This arrangement was expressed to be without prejudice to the position of either Government in on-going seabed delimitation negotiations. Jurisdiction over sedentary species is governed by the 1971 and 1972 seabed boundary agreements.

The boundary with PNG

The Torres Strait Treaty with Papua New Guinea was signed in December 1978 after six years of negotiations. Five years later the treaty is still not ratified. There are two main reasons for the delay—the ambitious nature of the Treaty itself, which tries to kill at least six birds with the one stone, and the problems associated with implementation and the sharing of responsibility between the Commonwealth and Queensland. The latter problem raises constitutional and political questions, which have become somewhat clearer following a succession of High Court decisions and after protracted negotiations at official level and exchanges of correspondence at ministerial level.

The previous Commonwealth (ie Australian) Government's decision to proceed with the Offshore Constitutional Settlement introduced an additional consideration during the negotiations. Under the Offshore Constitutional Settlement (OCS), the Commonwealth entered into an arrangement with the States concerning offshore rights, following the High Court decision in *New South Wales v Commonwealth* (1976) 135 CLR 337 which confirmed Commonwealth control beyond the low-water mark. The Queensland view for a long time was that, OCS notwithstanding, the Torres Strait was an area to which special considerations must apply. The Commonwealth was unwilling to accede to all of Queensland's suggestions, but nevertheless recognised that there were clear practical advantages in a co-operative arrangement, especially in the area of fisheries management. Queensland, like the other states, performs important administrative, surveillance and enforcement functions in relation to fisheries on behalf of the Commonwealth. There are also many legitimate State interests in the treaty area. The Australian territory involved, including some islands which are only a few kilometres from the Papua New Guinea coast, is of course part of Queensland, and the normal division of constitutional powers applies. Commonwealth-State co-operation is, therefore, very important if the Treaty is to function properly.

The first objective of the treaty was to provide a solution to the problem of territorial and maritime jurisdiction, which had the potential to disrupt good bilateral relations with Papua New Guinea. However, it went much further than that. The treaty took account of the interests of traditional inhabitants who had enjoyed wide freedom of movement in the area, the livelihood of the Islanders, the interests of commercial fishermen, the interests of mining companies and the need to protect the marine environment. The treaty balances all of these considerations and establishes a 'Protected Zone' to facilitate administration of the novel regime.

There are a number of practical problems of implementation. A Commonwealth Torres Strait Fisheries Bill reflecting the arrangements worked out between Commonwealth and Queensland officials has been

introduced into Parliament. Queensland will introduce complementary legislation. The Commonwealth Fisheries Act will cease to apply in and in the vicinity of the Protected Zone. Papua New Guinea will introduce legislation to cover that part of the Torres Strait and the area 'in the vicinity of' the Protected Zone under its jurisdiction. A Commonwealth Torres Strait (Miscellaneous Amendments) Bill has also been introduced to amend a range of legislation dealing with such matters as immigration, quarantine, customs, wildlife protection and historic shipwrecks.

A key concept in most of the regulations to be proclaimed before the treaty is ratified will be 'traditional activities of traditional inhabitants'. Traditional inhabitants in the Torres Strait area have been given a special status under the treaty, which is intended to protect traditional practices which already exist. Indeed, in a real sense the provisions of the treaty are already being applied.

There is an accepted rule in international law that states which have signed a treaty should not do anything to frustrate its intentions before it comes into force. Both Australia and Papua New Guinea have been scrupulous in observing this requirement. Liaison Officers have been installed at Thursday Island and Daru, as required by the treaty, and, in consultation with capitals and with each other, have been interpreting the requirements of the treaty to local inhabitants and officials. Ratification or no ratification, the Torres Strait Treaty is, in many respects, already working. Thus, ratification will not cause any dramatic change. However, it will bring precision where at present there is rule of thumb, a firm legal basis where at present there is only intent, and the full mechanism for consultation and review essential to preserve that balance of interests which is at the heart of the treaty.

The boundary with France

In September 1980 French and Australian officials met in Canberra to discuss delimitation of maritime boundaries between the Australian Coral Sea Islands and Lord Howe and Norfolk Islands and French New Caledonia on the one hand, and Heard and McDonald Island and the French Kerguelen Islands on the other hand. A draft delimitation agreement was produced and a number of outstanding minor issues relating to delimitation in certain areas of seabed beyond 200 nm zones were resolved through diplomatic channels in the following months. The agreement was based on median principles. It took full account of all Australian and French territory and entitlements under international law and was drafted in such a way as to provide for proclamation by Australia of a full Exclusive Economic Zone (EEZ) at a future date without requiring amendment. Delimitation of the South West Pacific boundary stopped short of 170° east longitude. To go further east might have been thought to involve Australia in the dispute between France and Vanuatu over Matthew and Hunter Islands. However, political considerations aside, the Australian delegation took the view that, in respect of Matthew and Hunter, a trough in the seabed separated these islands from the relevant shelf.

As far as the delimitation in the Southern Ocean was concerned, it was

decided that because of uncertainty as to the configuration of the continental shelf south-west of the agreed line, it was not appropriate to delimit this area at this stage.

The agreement with France was signed on 4 January 1982 and came into force on 9 January 1983 after an exchange of letters by the two Foreign Ministers.

The boundary with Solomon Islands

In October 1978 Australian and Solomon Islands officials commenced discussions on the delimitation of a seabed boundary to divide the common continental shelf and on a boundary between the Australian Fishing Zone (AFZ) and the Solomon Islands EEZ. Agreement was readily reached in 1978 on most aspects of this delimitation. It was agreed that both the continental shelf and AFZ-EEZ boundaries should follow the same median line between the outermost islands on each side. However, the fixing of terminal points of the line had to be postponed pending the conclusion of the Torres Strait Treaty, which established the northern terminal point, and of our delimitation agreement with France in respect of New Caledonia, which established the southern terminal point.

Control points for drawing a median line were located on Mellish Reef for Australia and on Indispensable Reef for Solomon Islands—two on the former and six on the latter. Seven median line points were computed in respect of the seabed boundary—two of which were to be fixed by the Torres Strait Treaty and the Australia-France agreement.

The fishing boundary followed the seabed boundary almost exactly, departing from it near the northern end where the seabed boundary extends beyond 200 nautical miles. One oddity resulting from this divergence is that while the Australia-PNG, Australia-Solomon Islands and Solomon Islands-PNG seabed boundaries will co-terminate, the respective fisheries-EEZ boundaries will not, leaving a triangular pocket of high seas. These high seas pockets occur elsewhere in the south Pacific and can be a nuisance from a fisheries management point of view. International law at present does not provide any relief from this problem. The only remedy it seems is through surveillance.

The Solomon Islands Government has yet to give its final agreement to the text of the treaty.

The boundary with New Zealand

Little has been done as yet on delimitation with New Zealand. Australian survey work has been completed and we now have sufficient information to determine control points for delimitation purposes. In practice, Australia has adopted the median line between Norfolk and Macquarie Islands and New Zealand's island for fishing purposes. New Zealand has accepted this. Although proposals to commence delimitation discussions have been made at various times, no date has yet been fixed and it is likely that another year or two may pass before talks are held.

Law of the Sea—maritime boundaries—talks with Indonesia over the Timor Gap

Meetings of officials of Australia and Indonesia on maritime boundary negotiations were held in Canberra in February 1984 (AFAR, February 1984, 135), in Jakarta in November 1984 (Ibid, November 1984, 1250; Comm Rec 1984, 2258), and in October 1985 (AFAR, October 1985, 1046; Comm Rec 1985, 1873).

For a number of answers given by the Minister of Foreign Affairs, Mr Hayden, on 26 and 29 November 1985, see Sen Deb 1985, 2312–2313 (written answer to a question on notice); HR Deb 1985, 4077–4078.

Law of the Sea—maritime boundaries—Torres Strait Treaty—implementing legislation and ratification

Following the enactment of the Torres Strait Treaty (Miscellaneous Amendments) Act 1984, the Treaty was ratified in Port Moresby on 15 February 1985. The Papua New Guinea Minister for Foreign Affairs and Trade, Mr Giheno, and the Australian Minister for Foreign Affairs, Mr Hayden, issued the following statement (Comm Rec 1985, 124–125):

> The Papua New Guinea Minister for Foreign Affairs and Trade, the Hon John Giheno and the Australian Minister for Foreign Affairs, the Hon Bill Hayden, announced that they had exchanged instruments of ratification which had the effect of bringing the Torres Strait Treaty into force today, 15 February 1985.
>
> The ratification ceremony held at the national Parliament building in Port Moresby was attended by the Minister for Primary Industry, Mr Rabbie Namaliu, from Papua New Guinea, by the Australian Ministers for Primary Industry, Mr John Kerin, and for Aboriginal Affairs, Mr Clyde Holding, and by representatives of the traditional inhabitants of the Torres Strait area from both countries.
>
> The Foreign Ministers expressed their deep satisfaction that the Treaty had entered into force, thus meeting a most important mutual objective of their two Governments. The Ministers recalled that, when Papua New Guinea became independent, both Governments had committed themselves to reaching an equitable and permanent settlement of the many social, legal, political and economic questions involved in the Torres Strait. Following upon a period of intensive negotiations, the Treaty was signed on 18 December 1978. Novel and complex implementing legislation had then to be prepared and passed by the Parliaments of Papua New Guinea, Australia and Queensland before the Treaty could be ratified.
>
> The Ministers said that the Treaty establishes the maritime boundaries between Papua New Guinea and Australia and provides for an equitable distribution of fisheries and seabed resources. A feature of the Treaty to which both their Governments attached importance is the protected zone established by the Treaty which will protect the way of life and livelihood of the traditional inhabitants of the Torres Strait area.
>
> The Ministers noted that the Treaty makes detailed provision for consultation between the two countries on all matters relating to its implementation. They said that both their Governments were determined that consultations with all parties concerned would continue to be pursued

actively to ensure the effective implementation of the Treaty. A joint advisory council would be established on which the local inhabitants of the Torres Strait area would have a significant voice. The council would keep the implementation of the Treaty under review and report to the two Foreign Ministers.

They regarded the ratification of the Treaty as a historic milestone in the course of the continuing development of the close and co–operative relations between two neighbours.

Law of the Sea—maritime boundaries—Torres Strait Treaty—understandings on interpretation of the Treaty

The following Agreed Note of Discussions held on 21 May 1984 was settled between Australian and Papua New Guinean officials (text provided by the Department of Foreign Affairs):

AGREED NOTE OF DISCUSSIONS ON 21 MAY 1984

1. Australia and Papua New Guinea officials met in Port Moresby in the week commencing 21 May 1984 to discuss fisheries and other aspects of the Torres Strait Treaty in preparation for ratification of the Treaty.

2. One of the matters considered was the need for common understanding to be reached on the meaning to be given to certain expressions in the Treaty for the purpose of making instruments and taking administrative action under the respective legislation of each country.

3. The following understandings were reached, subject to approval at the appropriate level in each country.

A. *'adjacent coastal area' for the purpose of assisting in determining the traditional inhabitants of each country (Art.1(m) of the Treaty)*

In relation to Australia the area would be that part of Australia bounded by the southern boundary of the Protected Zone, the meridians of longitude 142°E and 143°E, and the parallel of latitude 11°S.

In relation to Papua New Guinea the area would be that part of Papua New Guinea south of the parallel of latitude 9°S and west of the meridian of longitude 143°30'E together with the whole of the remainder of Parama Island and the villages of Sui and Sewerimabu, subject to the possibility of further areas being included as indicated below (para 5).

B. *'in the vicinity of the Protected Zone' for the purpose of Arts.1(m), 11, 12, 16 and 28*

In relation to Australia the 'vicinity' would be the area of Australian jurisdiction outside the Protected Zone between the meridians of longitude 141°E and 145°E and north of the parallel of latitude 10°30'S.

In relation to Papua New Guinea the 'vicinity' would be the area of Papua New Guinea jurisdiction outside the Protected Zone and south of the parallel of latitude 9°S and west of the meridian of longitude 144°E together with the whole of the remainder of Parama Island and the villages of Sui and Sewerimabu, subject to the possibility of further areas being included as indicated below (para 5).

4. It was agreed that the 'vicinity' would be broader for the purpose of treaty provisions not referred to above, so as to allow for consultation

between the two countries on policy as provided for in the Treaty in Arts.10, 13, 14, 18 & 19.

5. Further investigation was to be made into whether any areas other than those specified should be included in relation to Papua New Guinea. In particular, the village of Samari on Kiwai Island, and its surrounds, was to be considered. However, each side would make its preparations on the basis of the areas referred to in para 3 unless notified by the other side that further areas needed to be considered. It was noted that the areas initially adopted could subsequently be changed if the two countries were later to reach agreement on this.

6. It was noted that the specifying by name of villages as being 'in the vicinity' could create practical difficulties, for example, for allowing freedom of movement, because associated villages or nearby garden areas or transit routes would not be covered. For this reason it was preferable to specify, where practicable, an area demarcated by a line. However, it was reasonable to specify villages where these were self—contained and no problem of access was likely to arise (eg where access was directly from the sea).

Law of the Sea—maritime boundaries—negotiations with Indonesia

On 20 March 1986 the Minister for Resources and Energy, Senator Gareth Evans, said in the course of an adjournment debate in the Senate (Sen Deb 1986, 1377–1378):

Senator McIntosh's speech contained a number of misunderstandings, to put it at its most charitable, which it is important for me, on behalf of the Government, to immediately correct, lest those misapprehensions and misunderstandings spread more widely. At the outset, I should make the point that it is neither accurate nor helpful to the national interest for Senator McIntosh to suggest that the Law of the Sea Convention somehow not only bears upon the present boundary negotiations with Indonesia on the Timor Gap area, but makes inevitable the acceptance of a geographic midline as the necessary outcome of those negotiations. I simply say that the Law of the Sea Convention does nothing of the kind and Australia has a very strenuously maintained position to the contrary.

But, of course, the central thrust of his speech was the allegation that somehow Australia is in breach of international law by virtue of negotiating with Indonesia over the Timor Gap insofar as this involves us in giving recognition to a state acquired by threat or by the use of force. I will just make a few points about that general allegation. Senator McIntosh draws primary nourishment from the United Nations General Assembly declaration of 1970, the so-called friendly relations declaration which states—he quoted it accurately:

> No territorial acquisition resulting from the threat or use of force shall be recognised as legal.

I make it plan that the legal status of this declaration, which is not a treaty in any sense, has long been very hotly contested. It is our understanding that there is no binding international legal obligation not to recognise the acquisition of territory that was acquired by force. In international law, the

legality of the original acquisition of territory by a state must be distinguished from subsequent dealings between third states and the state acquiring new territory. It is the sovereign right of each state to determine what dealings it will have with states acquiring, by whatever means, new territory and to determine whether or not to recognise sovereignty over such a territory.

As the Prime Minister (Mr Hawke) stated in the House on 22 August 1985, in an answer to Mr Peacock, Australia has recognised Indonesia's sovereignty over East Timor since February 1979. Of course, that statement was accompanied by a recognition, again by Mr Hawke which has been expressed by Government representatives on many occasions, of our concern at the way in which East Timor was incorporated. The recognition does not modify in any way the continuing concern at that historical fact.

Let me go on to say that it is perfectly consistent with Australia's recognition of Indonesia's sovereignty over East Timor to engage in negotiations with Indonesia now on the Timor Gap. To engage in such negotiations does not as a matter of international law make Australia a party to the initial acquisition by Indonesia of East Timor any more than Australia's dealings with other sovereign states make Australia a party to the means they used to acquire territory in the first place; nor does it affect the legality of the negotiations; nor does it signify approval of the original acquisition of territory. Again, I make the point that the Prime Minister said in his statement of 22 August 1985 that the Government has expressed to Indonesia its concern at the way in which East Timor was incorporated.

I finally make the point that Senator McIntosh has also referred to Article 301 of the 1982 Law of the Sea Convention. That Article states:

> In exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.

Article 301 prohibits the threat or use of force against the territorial integrity of another state in the context of implementation of the Convention, which of course is not in issue here. It does not affect the legality of dealings between other states and the state which has acquired territory by force.

Senator Kilgariff—Is a joint management possible, Minister?

Senator GARETH EVANS—Of course joint management and a joint development zone are possible and that is the subject matter of the present negotiations. The concept which seems to underlie Senator McIntosh's approach to this is that there must inevitably be a single line solution.

Senator McIntosh—It makes us a party to the incorporation.

Senator GARETH EVANS—I do not accept that and I think there has been enough nonsense espoused on this subject without Senator McIntosh adding more to it on this occasion.

On 30 April 1986 the Minister for Resources and Energy, Senator Gareth Evans, said in part in answer to a question without notice (Sen Deb 1986, 2078):

It is important for Australia's long term liquid fuels energy future that we be

able to explore and hopefully then develop the oil fields which are reasonably thought likely to exist in the Timor Gap area. It is very much in the interests of both countries, not just ourselves, that that exploration and hopefully development take place.

On 12 June 1986 Senator Evans announced that there would be another round of talks between officials on maritime delimitation in Jakarta on 26 to 28 June 1986: see Comm Rec 1986, 939. Following the talks, on 27 June, the Department of Foreign Affairs a brief news release was issued: see AFAR, June 1986, 566.

On 2 July 1986 the Minister for Resources and Energy, Senator Gareth Evans, and the Northern Territory Minister for Mines and Energy, Mr Barry Coulter, announced the award of an off-shore petroleum permit for an area in the Timor Sea adjacent to Ashmore and Cartier Islands, and some 75 kilometres south-west of Jabiru: see Comm Rec 1986, 1092–1093.

Law of the Sea—traditional Indonesian fishing around Ashmore and Cartier Islands—1974 Memorandum of Understanding between Australia and Indonesia

On 17 April 1986, the Minister representing the Minister for Arts, Heritage and Environment in the Senate, Senator Ryan, said in part in answer to a question without notice (Sen Deb 1986, 1878–1879):

> Following breaches of the existing memorandum of understanding by Indonesian fishermen, a new memorandum has been drafted. Under the new proposal, landing rights to all islands would be withdrawn and fishermen restricted to using hand lines from traditional vessels—that is, those propelled only by paddle and/or sail. Fishermen would also be prohibited from leaving their craft in the lagoon to gather sedentary marine organisms. The original rationale for allowing landing rights on Ashmore Reef, that of obtaining fresh water, is not valid. The well on West Island is almost always dry and cholera has been found in the water when it is not. The new memorandum of understanding will be negotiated between the Department of Foreign Affairs and the Indonesian Government. In the interim, surveillance of Ashmore Reef will continue and every effort will be made to enforce the provisions of the existing memorandum.

Law of the Sea—Bays—claims to historic bays—Gulf of Sirte—Libyan claim—United Stated military manoeuvres in the bay—Australian rejection of Libyan claim

During United States manoeuvres in the Gulf of Sirte (or Sidra) in the early part of 1982, the People's Bureau of the Socialist People's Libyan Arab Jamahiriyah in Canberra addressed a Note (PBC 04 270) dated 16 April 1982 to the Minister for Foreign Affairs, Mr Street, as follows (text provided by the Department of Foreign Affairs):

> The People's Bureau of the Socialist People's Libyan Arab Jamahiriya presents its compliments to the Department of Foreign Affairs and would like to take this opportunity to inform the Department of the feelings of the Jamahiriya towards the campaign which is being waged against it by the American Administration.

Within the scope of the United States' Administration's continuous threats against the Socialist Arab Libyan People's Jamahiriya and its people, a decision was taken in Washington by the US Navy Secretary, in the middle of March, 1982, to send the sixth fleet in the Mediterranean to start Military Manoeuvres in the Gulf of Sirte within the following six months.

The Jamahiriya stresses that this Gulf is regarded as an indivisible part of its Territory and internal waters and conducting these US manoeuvres in this particular region contravenes the Libyan announcement issued on October 9, 1973, which said "The Gulf of Sirte, situated in Libyan Territory with its Eastern, Southern, and Western Land Borders, and its Northern Limit which is of latitude 32 degrees and 20 minutes north, is regarded as an indivisible part of its territory and comes under its total sovereignty since it is considered internal waters beyond which starts its Territorial Sea".

The Gulf of Sirte extends deep into the Libyan land. Libyan undisputed sovereignty has been exercised over the Gulf throughout its history. Its geographical location makes it a vital area for the security of the Jamahiriya.

This announcement was transmitted at the time to all Countries and International Organisations. Libya's Representative to the United Nations informed the UN Secretary General of this announcement on October 19, 1973, and confirmed it again on August 20, 1981.

This announcement was referred to in the UN Security Council's Document No AM-S-14636 following the sixth fleet's aggression on the Jamahiriya's Territorial Waters in the Gulf of Sirte.

We regard the American decision to send its war ships to the Gulf as an invasion of the Jamahiriya, because any aggression on the Gulf of Sirte is regarded as an act of aggression on the Libyan Soil and on our freedom.

The United States alone will be responsible for starting a war.

Finally, we would like to ask, what would happen if a foreign country decided to conduct military manoeuvres in the Gulf of Miami in Florida?

The People's Bureau of the Socialist People's Libyan Arab Jamahiriya avails itself of this opportunity to renew to the Department of Foreign Affairs the assurances of its highest esteem and consideration.

The Department of Foreign Affairs responded in a Note (CH 137387), dated 9 June 1982, as follows:

The Department of Foreign Affairs presents its complements to the People's Bureau of the Socialist People's Libyan Arab Jamahiriya and has the honour to refer to the latter's Note (PBCC 04 270) of 16 April 1982, which referred, inter alia, to the Libyan claim to jurisdiction over the Gulf of Sirte.

The Department has the honour to say that the Australian Government does not recognise the validity in International Law of Libya's claim to exercise jurisdiction over the Gulf of Sirte and reserves its rights and those of its nationals with regard to that claim. The position of the Australian Government on this issue was most recently stated in responses by Senator Dame Margaret Guilfoyle, representing the Minister for Foreign Affairs, to a question without notice in the Senate on 25 August 1981 and by the Minister for Foreign Affairs to a Question on Notice (No 3002) in the House of Representatives on 17 November 1981. Copies of the relevant extracts from Hansard are enclosed for the information of the Bureau.

The Department of Foreign Affairs avails itself of this opportunity to renew to the People's Bureau of the Socialist People's Libyan Arab Jamahiriya the assurance of its highest consideration.

Law of the Sea—historic bays—South Australian bays declared historic bays

Two Proclamations were published in the *Commonwealth of Australia Gazette* No S 57 on 31 March 1987 to establish and make provision for the establishment of certain historic bays claimed in respect of areas of South Australian waters. By the first Proclamation:

I, SIR NINIAN MARTIN STEPHEN, Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council and pursuant to section 8 of the Seas and Submerged Lands Act 1973, being satisfied that each of the following bays, namely, Anxious Bay, Encounter Bay, Lacepede Bay and Rivoli Bay is an historic bay, hereby—

(a) declare each of those bays to be an historic bay; and

(b) define the seaward limits of each of those historic bays to be the limits determined in accordance with the Schedule.

Law of the Sea—Australian territorial sea—off-shore constitutional settlement

On 20 March 1986, Mr Barry Jones, the Minister representing the Minister for Resources and Energy in the Senate, provided a written answer to a question on notice regarding the settlement: see HR Deb 1986, 1780.

On 29 May 1986 Senator Gietzelt, the Minister representing the Minister for Transport in the Senate, provided the following written answers in part to a question on notice (Sen Deb 1986, 3054–3055):

The Australian Territorial Sea is that area three nautical miles seaward of the baselines proclaimed in accordance with the international law.

...

The Commonwealth and the States at the Premiers' Conference in June 1979 completed an agreement for the settlement of offshore constitutional issues (known as the Offshore Constitutional Settlement), which took full account of international, national and State interests and produced a solution agreed to by all States on what matters are appropriate for Commonwealth, State or joint administration and how the various agreed arrangements should be implemented. Pursuant thereto the Commonwealth enacted, inter alia, the Coastal Waters (State Powers) Act 1980 and the Coastal Waters (State Titles) Act 1980. The effect of the former Act is to give each State the same powers with respect to the adjacent territorial sea (including the seabed) as it would have if the waters were within the limits of the State. The effect of the latter Act is to vest in each State proprietary rights and title in respect of the adjacent territorial sea (subject to certain exemptions). At international law, although the Commonwealth accepts international obligations, and benefits from rights, under international treaties, the means by which any such obligations are to be given effect domestically is a matter for the Commonwealth. Consistent with international law, responsibility for implementation of such obligations

domestically can rest with the Australian States for areas within the jurisdiction of the States. Although section 6 of each of the Acts mentioned above confirms the position at international law that nothing in those Acts affects the rights and duties of the Commonwealth under international law, any question regarding any adverse effect on an Australian citizen of an alleged failure by Australia to comply with international law is a matter to be determined solely in accordance with arrangements in Australian law, both Commonwealth and State. Section 6 of each of the Acts is of no assistance in this regard.

...

The Coastal Waters (State Powers) Act 1980 and the Coastal Waters (State Titles) Act 1980 apply to the 'coastal waters of the State'. Sub-section 3(1) of each of those Acts contains the following definition:

> 'coastal waters of the State', means, in relation to each State—
>
> (a) the part or parts of the territorial sea of Australia that is or are within the adjacent area in respect of the State, other than any part referred to in sub—section 4(2); and
>
> (b) any sea that is on the landward side of any part of the territorial sea of Australia and is within the adjacent area in respect of the State but is not within the limits of the State or of a Territory.

Section 4 of the former Act further elaborates on the extent of the territorial sea and coastal waters, by way of the following provisions:

> (1) For the purposes of this Act, the limits of the territorial sea of Australia shall be the limits existing from time to time, ascertained consistently with the Seas and Submerged Lands Act 1973 and instruments under that Act and with any agreement (whether made before or after the commencement of this Act) for the time being in force between Australia and another country with respect to the outer limit of a particular part of that territorial sea.
>
> (2) If at any time the breadth of the territorial sea of Australia is determined or declared to be greater than 3 nautical miles, references in this Act to the coastal waters of the State do not include, in relation to any State, any part of the territorial sea of Australia that would not be within the limits of that territorial sea if the breadth of that territorial sea had continued to be 3 nautical miles.

Sub-section 3(1) of the former Act also contains the following definition:

> adjacent area in respect of the State means, in relation to each State, the area the boundary of which is described under the heading referring to that State in Schedule 3 to the Petroleum (Submerged Lands) Act 1967 as in force immediately before the commencement of this Act.

On 3 November 1987 Senator Tate, the Minister for Justice, provided a written answer by the Attorney-General to a question without notice: see Sen Deb 1987, 1618–1619.

Law of the Sea—fisheries—Australian Fishing Zone—Provisional Fisheries Surveillance and Enforcement Arrangement with Indonesia—arrest of foreign fishing vessel

On 8 May 1987 Asche J handed down his judgment in *Chiou Yaou FA v Morris* in the Supreme Court of the Northern Territory (46 NTR 1). In the course of his judgment, His Honour referred to the arrangements between Australia and Indonesia for the provisional surveillance and enforcement of fisheries laws: see at 29–30.

Law of the Sea—Australian Fishing Zone—Ashmore and Cartier Islands

On 6 December 1985 during debate in the Senate on the Ashmore and Cartier Islands Acceptance Bill 1985 Senator Vigor tabled a Memorandum of Understanding as follows (Sen Deb 1985, 3217–3218):

> A memorandum of understanding between the Australian and the Indonesian Governments signed by the Fisheries Division of the then Department of Agriculture and Indonesia's Director of Consumer Affairs in 1974 allows traditional fishermen to fish in the waters of Ashmore and Cartier Islands. I seek leave to incorporate in *Hansard* that short memorandum.
>
> Leave granted.
>
> The memorandum read as follows —
>
> MEMORANDUM OF UNDERSTANDING BETWEEN THE GOVERNMENT OF AUSTRALIA AND THE GOVERNMENT OF THE REPUBLIC OF INDONESIA REGARDING THE OPERATIONS OF INDONESIAN TRADITIONAL FISHERMEN IN AREAS OF THE AUSTRALIAN EXCLUSIVE FISHING ZONE AND CONTINENTAL SHELF
>
> Following discussions held in Jakarta on 6 and 7 November, 1974, the representatives of the Government of Australia and of the Government of the Republic of Indonesia have agreed to record the following understandings:
>
> 1. These understandings shall apply to operations by Indonesian traditional fishermen in the exclusive fishing zone and over the continental shelf adjacent to the Australian mainland and offshore islands.
>
> By "traditional fishermen" is meant the fishermen who have traditionally taken fish and sedentary organisms in Australian waters by methods which have been the tradition over decades of time.
>
> By "exclusive fishing zone" is meant the zone of waters extending twelve miles seaward off the baseline from which the territorial sea of Australia is measured.
>
> 2. The Government of the Republic of Indonesia understands that in relation to fishing in the exclusive Australian fishing zone and the exploration for and exploitation of the living natural resources of the Australian continental shelf, in each case adjacent to:
>
> Ashmore Reef (Pulau Pasir) (Latitude 12° 15' South, Longitude 123° 03' East) Cartier Islet (Latitude 12° 32' South, Longitude 123° 33' East) Scott Reef (Lattitude 14° 03' South, Longitude 121° 47' East) Seringapatam Reef (Pulau Datu) (Latitude 11° 37' South, Longitude 122° 03' East) Browse Islet (Latitude 14° 06' South, Longitude 123° 32' East).
>
> The Government of Australia will, subject to paragraph 8 of these

understandings, refrain from applying its law regarding fisheries to Indonesian traditional fishermen who conduct their operations in accordance with these understandings.

3. The Government of the Republic of Indonesia understands that, in the part of the areas described in paragraph 2 of these understandings where the government of Australia is authorised by international law to regulate fishing or exploitation[1] for or exploitation of the living natural resources of the Australian continental shelf by foreign nationals, the Government of Australia will permit operations by Indonesian nations subject to the following conditions:

(a) Indonesian operations in the areas mentioned in paragraph 2 of the understandings shall be confined to traditional fishermen.

(b) Landings by Indonesian traditional fishermen shall be confined to East Islet (Lattitude 12° 15' South, Longitude 123° 07' East) and Middle Islet (Latitude 12° 15' South, Longitude 123° 03' East) of Ashmore Reef for the purpose of obtaining supplies of fresh water.

(c) Traditional Indonesian fishing vessels may take shelter within the island groups described in paragraph 2 of these understandings but the person on board shall not go ashore except as allowed in (b) above.

4. The Government of the Republic of Indonesia understands, that the Indonesian fishermen will not be permitted to take turtles in Australian exclusive fishing zone. Trochus, beche de mer, abalone, green snail, sponges and all molluscs will not be taken from the seabed from high water marks to the edge of the continental shelf, except the seabed adjacent to Ashmore and Cartier Islands, Browse Islet and the Scott and Seringapatam Reef.

5. The Government of the Republic of Indonesia understands that the persons on board Indonesian fishing vessels engaging in fishing in the exclusive Australian fishing zone or exploring for or exploiting the living natural resources of the Australian continental shelf, in either case in areas other than those specified in paragraph 2 of these understandings, shall be subject to the provisions of Australian law.

6. The Government of Australia understands that the Government of the Republic of Indonesia will use its best endeavours to notify all Indonesian fishermen likely to operate in areas adjacent to Australia of the contents of these understandings.

7. Both Governments will facilitate the exchange of information concerning the activities of the traditional Indonesian fishing boats operating in the area west of the Timor Sea.

8. The Government of the Republic of Indonesia understands that the Government of Australia will, until the twenty-eighth day of February 1975, refrain from applying its laws relating to fisheries to Indonesian traditional fishermen in areas of the Australian exclusive fishing zone and continental shelf other than those specified in paragraph 2 of these understandings.

Jakarta, November 7, 1974.

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1. The word "exploration" was presumably intended, but the original text as well as the *Hansard* entry both use "exploitation".

Law of the Sea—Australian Fishing Zone—meaning of 'in Australia' in the Export Expansion Grants Act 1978 (Commonwealth)

In its unreported judgment handed down on 10 December 1981, the Federal Court of Australia (Evatt, Ellicott, and Deane JJ) said in *GTK Trading Pty Ltd v Export Development Grants Board* in relation to the meaning of 'in Australia' in the Export Expansion Grants Act 1978:

> *Were they produced or processed in Australia?*
>
> We have already stated our view that it is open to the Tribunal to hold that they were processed prior to export. The process to which they are subjected occurs on the mainland and therefore it is clear that they are processed in Australia.
>
> A more difficult question is whether they are produced in Australia.
>
> If the words 'in Australia' are used in a strictly geographical sense and if, as we have said, the production of the lobsters in any event includes the catching of them, those lobsters caught beyond the coastal sea, that is beyond three nautical miles, would not be wholly produced in Australia.
>
> Section 15B(1)(b) of the Acts Interpretation Act 1901 provides that, except so far as the contrary intention appears, any reference to an Act to 'Australia' shall be read as including a reference to 'the coastal sea of Australia'. But this provision does not treat as within 'Australia' that part of the sea which lies above the continental shelf where portions of the lobsters are caught.
>
> On the other hand, it is quite clear that the seabed of the continental shelf is an area over which Australia has sovereignty and that the Commonwealth Parliament has power to legislate in respect of fisheries in the sea above the continental shelf.
>
> In the context of an Act which, as we interpret it, is wide enough to confer benefits in relation to the export of fish and lobsters, the words 'in Australia' in s 4 should not, in our opinion, be given a strict geographical meaning but one wide enough to cover fish and lobsters which are caught in waters above the Australian continental shelf. These are waters which under the Fisheries Act 1952 (Commonwealth) are referred to as 'Australian waters' and to which a distance of 200 nautical miles from the coast are included within the 'Australian fishing zone' defined in that Act. It would indeed be odd if this Commonwealth Act, designed as it is to promote the export (inter alia) of fish, had to be interpreted so as to apply it to those fish caught within the territorial sea (over which fisheries State Parliaments exercise legislative power) but not to those caught above the continental shelf beyond the territorial sea (over which fisheries the Commonwealth Parliament exercises legislative power). It is a conclusion which common sense would resist.
>
> In our view, in the context of this Act, it is not a forced use of language to describe fish caught in the seas above the Australian continental shelf as fish produced 'in Australia'. Where, as in this case, lobsters are caught on the Australian continental shelf by fishermen licensed under Australian law and landed in Australia and then purchased and processed ready for export on the Australian mainland the description of them as goods produced in Australia is even more apt.

This is a construction of the Act which, in our view, clearly promotes the purpose and object underlying it and is therefore to be preferred by us in accordance with s 15AA of the Acts Interpretation Act.

Law of the Sea—Australian Fishing Zone—Torres Strait Treaty

On 21 February 1985 the Minister for Primary Industry, Mr Kerin, announced the establishment of a management regime for the Torres Strait fisheries, in conjunction with the Torres Strait Treaty: see Comm Rec 1985, 168–169.

For a description of the fisheries arrangements in the Torres Strait area for the traditional inhabitants, see the report of the Australian Law Reform Commission on Aboriginal Customary Law (PP Nos 1986/136 and 137, paras 943–948) which was tabled in the Senate on 12 June 1986 (Sen Deb 1986, 3833).

Law of the Sea—Australian Fishing Zone—joint fishing venture with Thailand

On 23 May 1985 the Minister for Primary Industry, Mr Kerin, announced the signing of an agreement for a joint fishing venture involving Australian and Thai interests: see Comm Rec 1985, 761.

Law of the Sea—territorial sea, continental shelf and Australian Fishing Zone—conditions for research by foreign ships

On 21 October 1983 the Department of Foreign Affairs sent the following Note No CH177840 to all diplomatic missions accredited to Australia (text provided by the Department of Foreign Affairs, attachments not included):

The Department of Foreign Affairs presents its compliments to Diplomatic Missions in Australia and non-resident Diplomatic Missions accredited to Australia and has the honour to refer to revised guidelines and procedures recently approved for requests for access to Australian ports by foreign research vessels or to conduct marine scientific research in the territorial sea of Australia, or on the continental shelf or research related to fisheries in the Australian Fishing Zone.

Approval is required for all visits to Australian (including territories) ports by research vessels whether or not they undertake research in the Australian territorial sea, in the Australian Fishing Zone (AFZ) or on Australia's continental shelf. Approval is also required for research vessels not requesting port access, but intending to undertake marine scientific research in Australia's territorial sea, on the Australian continental shelf or to conduct research related to fisheries in the AFZ.

An offer to permit participation in, and access to, the results of any research proposed in the Australian territorial sea, on the Australian continental shelf or relating to fisheries in the Australian Fishing Zone (AFZ) will facilitate consideration of requests for port access.

An offer to permit participation in, and access to, the results of research proposed in the Australian territorial sea or on the Australian continental shelf or of research related to fisheries in the AFZ will facilitate

consideration of requests for permission to undertake such research.

All vessels coming into Australian ports or the Australian territorial sea must comply with relevant Australian health, immigration an customs regulations. For vessels making port calls this includes normal crew documentation and travel documents, as well as visas, for all passengers including scientific personnel. The Captain of the vessel, in accordance with established practice, is to inform local Immigration Authorities should any crew member abscond or become absent without leave while the vessel is in an Australian port. Freight and baggage are subject to quarantine and customs regulations.

Vessels for which approval is given for research shall comply with the Australian Ship Reporting System. The vessel shall also report the following details to the Australian Coastal Surveillance Centre within the stated time frames:

- position report every 24 hours at a time to be determined
- intention to enter AFZ—24 hours in advance
- intention to enter port—36 hours in advance (except in emergency)
- intention to leave Australian territorial sea, continental shelf or AFZ—24 hours in advance.

Vessels shall display their international radio call sign at all times unobscured in a position on the vessel where it would be clearly visible from the sea or the air. The call sign is to be displayed in letters/figures one metre high with a stroke width of 12.5 centimetres in either white on black or vice versa or black on international safety yellow.

Persons wishing to search for and take certain sedentary organisms from the Australian continental shelf are required to hold a permit issued under the Continental Shelf (Living Natural Resources) Act. Applications for permits should be made to the Department of Primary Industry.

Foreign research vessels designed and equipped to take, process or carry non-sedentary species of fish and which enter an Australian port should conform with the requirements of the Fisheries Act relating to port entry by foreign fishing boats. Operators therefore should contact the Department of Primary Industry on this matter prior to any proposed port entry.

The Government representative in Australia of the country concerned shall advise the Department of Foreign Affairs in writing of any requests by vessels to which these guidelines apply for port access to Australia or its territories, or to conduct marine scientific research in the territorial sea or on the continental shelf, or research related to fisheries in the AFZ. In the case of vessels from countries not represented in Australia, requests should be made through established channels to the Department of Foreign Affairs.

Requests for visits by any vessel covered by these guidelines shall be accompanied by the details set out in Annex A. Details set out in Annex A shall be provided as early as possible but generally a minimum of six months in advance of the proposed port visit or expected starting date of the marine scientific research project. The details set out in Annex B shall be provided no less than two months before the proposed port visit or expected starting date of the proposed marine scientific research project.

The Department of Foreign Affairs avails itself of this opportunity to renew to Diplomatic Missions in Australia and non-resident Diplomatic Missions accredited to Australia the assurances of its highest consideration.

Law of the Sea—fisheries—Agreement between the South Pacific Forum countries and the United States concerning fisheries access to the Pacific

On 27 March 1987 the Minister for Primary Industry, Mr Kerin, issued the following statement (Comm Rec 1987, 414–415):

The Australian Government will next week sign the South Pacific Tuna Access Treaty in Port Moresby, the Minister for Primary Industry, the Hon John Kerin, announced today. The Treaty will be signed by the Minister for Resources and Energy, Senator Gareth Evans, on behalf of the Australian Government.

The Treaty, between member governments of the South Pacific Forum and the United States, has been negotiated over two years and provides controlled access for US tuna boats to a significant part of the waters of the South and South Western Pacific. Mr Kerin said:

> This will include access to very productive fishing grounds adjacent to Papua New Guinea, the Federated States of Micronesia and Kiribati. Access to the 200-mile Australian fishing zone will be limited initially to restricted waters in the Coral Sea and be subject to careful monitoring and review. Access to the AFZ adjacent to Cocos (Keeling) and Christmas Islands is under review, in consultation with the local communities.
>
> The Treaty will regularise US fishing in the region and ensure Treaty countries receive a fair return for the fish taken from their fishing zone. It would also ensure continued access to the important US market for marine produce if a US tuna vessel was seized for illegally fishing in the member states' fishing zones.
>
> I expect also that the Treaty will provide valuable data on the commercial potential of fish resources in the Coral Sea and could generate further benefits for the Cairns region, because of the use of Cairns as a support base for US tuna fishing vessels.
>
> The Treaty signifies resolution of a sensitive issue which has hindered relations between the South Pacific countries and the US. Efforts can therefore be directed toward assisting in the more rational development and management of the tuna resource.

The US purse seine fishing vessels will be subject to comprehensive provisions under the Treaty and under South Pacific laws. The Treaty will be supported by US law. The US fleet will be required to provide information on fish catch and also to carry Pacific Island observers. Mr Kerin said: 'Australian officials will closely monitor the activities of the US fleet, particularly for any catch of dolphins'.

The Treaty prohibits US access to areas closed for conservation or other national purposes, such as the protection of local fishing interests. Mr Kerin said:

> No access will be provided to national nature reserves or other protected areas and future access to the Australian fishing zone will

depend on US industry performance and its compliance with the conditions of the Treaty and applicable Australian laws.

The financial package negotiated involves payment of $US60 million over five years, to be shared among participating countries, largely on the basis of the amount of fish taken in their respective fishing zones.

As little fishing is expected in our zone, Australia's share is expected to be small. It will, however, be quite significant for those island governments which have productive yet largely underutilised fishing zones.

On 3 April 1987 the Minister for Foreign Affairs, Mr Hayden, and the Minister for Primary Industry, Mr Kerin, issued a further statement on the Treaty: see Comm Rec 1987, 454. On 13 May 1987 the Acting Minister for Foreign Affairs, Senator Gareth Evans, said in part in answer to a question concerning the arrest on 5 May 1987 by Kiribati of a United States tuna vessel for allegedly fishing without a licence in Kiribati's exclusive economic zone (Sen Deb 1987, 2739–2740):

In fact, if anything, the arrest confirms the desirability of early ratification of the treaty. The treaty requires ratification by 10 members of the Forum Fisheries Agency, including Kiribati, Papua New Guinea and the Federated States of Micronesia, before it enters into force. Australia has sent its instrument of ratification to the Government of Papua New Guinea, which is the depository. There has been no detection of any fishing by United States tuna vessels in Australia's territorial waters, to answer that part of the honourable senator's question. International law recognises the sovereign rights of coastal states to explore, exploit, conserve and manage fisheries as well as other resources in the EEZ to which they are entitled. The avenues of interrogation, surveillance, detention and punishment available to coastal states in the South Pacific in cases of trespass in their territorial waters are determined by the coastal state involved. For example, both Australia and New Zealand, in consultation with the island states, undertake surveillance in the South Pacific to this end.

On 28 October 1987 the Minister for Resources, Mr Peter Morris, introduced legislation in the House of Representatives to give effect within Australia to the obligations imposed by the Treaty: see HR Deb 1987, 1619–1620.

Law of the Sea—fisheries—illegal fishing vessels—Australian interception of an Indonesian vessel—Indonesian interception of a Taiwanese vessel

On 7 October 1987 the Minister for Justice, Senator Tate, said in answer to a question in part (Sen Deb 1987, 792):

On 2 October 1987, at 12.50 hours, a Northern Territory police aircraft sighted a vessel displaying the Indonesian flag near Lawson Island. Lawson Island is east of Croker Island, approximately 160 nautical miles east of Darwin. Nine persons were sighted on the vessel and a small craft was also sighted leaving the island for the vessel. A coastal surveillance aircraft was diverted to maintain a watching brief and the Australian Customs Service vessel *Jabiru* was alerted for immediate response.

An Australian Federal Police coastal protection unit member and an

officer from the Australian Quarantine Inspection Service accompanied the response vessel, which departed Darwin at 15.30 hours on the same day. The Indonesian vessel was tracked by coastal surveillance aircraft from Lawson Island to McCluer Island and finally to New Year Island, where it was eventually intercepted by the response vessel and boarded at 07.10 hours on 3 October 1987. The Indonesian vessel had also landed at New Year Island. The vessel—a 12-metre type 2 fishing vessel *Bunga Rampi*, with a crew of 15—was seized under the provisions of the Quarantine Act and taken in tow to Darwin, arriving at 09.05 hours on 5 October.

The master of the vessel was interviewed by quarantine and Customs officers in the presence of a representative of the Indonesian consulate in Darwin. At the conclusion of the interview and upon consultation with the Director of Public Prosecutions, the master was charged under sections 20 and 29(1) of the Quarantine Act and section 58(1) of the Customs Act.

On 27 November 1987 the Minister for Foreign Affairs and Trade, Mr Hayden, issued the following statement (News Release No M180):

ATTACK ON TAIWANESE FISHING VESSEL

The Acting Minister for Foreign Affairs and Trade, Senator Evans, said today that the Australian Government was concerned about the loss of life arising from an alleged armed attack at sea against a Taiwanese fishing vessel.

The vessel, *Li Chyun 1*, which arrived in Darwin last night, is part of a joint fishing venture between the Kailis group of companies of Perth and the Kaohsiung Fishing Boat Commercial Guild of Taiwan. It was allegedly attacked in Indonesian waters by an Indonesian patrol boat on 23 November with the loss of 3 lives. The attack reportedly occurred south west of Enu Island off the Irian Jaya coast.

Senator Evans said that according to the vessel's master, the *Li Chyun 1* and its sister ship the *Li Chyun 2* had permission to fish in Indonesian waters and had been in the area for five months. Senator Evans said that without wishing to pass judgment on the circumstances which might have led to the incident, the Australian Government believed that if it was necessary for the Indonesian patrol boat to intercept the vessels it should have been possible to do so without causing the loss of life and damage which had occurred.

He added that the *Li Chyun 1* is now in Darwin harbour and its crew is receiving humanitarian assistance from local police and immigration authorities.

Law of the Sea—continental shelf—off-shore installations—legislation—Sea Installations Bill 1987

On 7 October 1987 the Minister for the Arts, Sport, the Environment, Tourism and Territories, Mr John Brown, introduced the Sea Installations Bill 1987 and explained the purpose of the Bill in part as follows (HR Deb 1987, 890–892):

There have been several proposals for establishing off-shore installations on the continental shelf beyond the territorial sea, mostly, to date, in the Great Barrier Reef area. Some of these can be dealt with under existing arrangements involving the Great Barrier Reef Ministerial Council and the Great Barrier Reef Marine Park Authority, both of which involve continuing

Commonwealth and Queensland co-operation on policies and day to day management. However, proposals are now being made which require regulation beyond the scope of those arrangements.

This legislation provides a framework not only to ensure that new developments are technically sound and environmentally acceptable, but also to provide a basis for the application of important Commonwealth laws in an area of Commonwealth responsibility where presently no general body of civil or criminal law applies, and for State or Territory laws to be adopted as Commonwealth laws. These provisions are parallel to those already applying under the Petroleum (Submerged Lands) Act, which regulates off-shore petroleum and mineral exploration and extraction. That Act and the Bills are based on the belief that the most efficient approach is to adopt State and Territory laws and to develop administrative arrangements involving State and Territory administrations. This approach also takes account of the satisfactory arrangements we have with the Queensland Government for day to day management of Great Barrier Reef Marine Park activities by the Queensland National Parks and Wildlife Service.

It is important that off-shore installations not be used as a basis for evasion of Australian laws, particularly those regulating customs, migration, taxation and quarantine. The proposed legislation will deal with this by requiring contact with the installations to be from the mainland or an adjacent Territory, and by including provisions to ensure that the laws in question can be efficiently and effectively applied.

Law of the Sea—continental shelf—Elizabeth and Middleton Reefs—proclamation of marine nature reserve—protection of the marine environment

On 10 June 1987 the Minister for Arts, Heritage and the Environment, Mr Barry Jones, issued the following statement, in part (Comm Rec 1987, 898):

The Minister for Arts, Heritage and Environment, the Hon Barry Cohen, today announced the Government's intention to proclaim a marine national nature resource at Elizabeth and Middleton Reefs. Mr Cohen said the move was an important step for the protection of a unique marine area which supports a great diversity of species, including the endangered Black Cod, *Epineephelus daemelii*. It would also be the first marine protected area in this region.

Elizabeth and Middleton Reefs are situated in Commonwealth waters about 600 kilometres off the east Australian coast, about 200 kilometres north of Lord Howe Island. The proposed protected area covers about 1880 square kilometres.

The 'Elizabeth and Middleton Reefs Marine National Nature Reserve' was declared on 11 December 1987. For diagrams of the maps that illustrate the area of the reserve, see Commonwealth of Australia Gazette No GN34 of 23 December 1987, 1871–1872.

Law of the Sea—marine pollution—London Dumping Convention—ratification by Australia

On 23 August 1985 the Minister for Arts, Heritage and Environment, Mr Cohen, announced that Australia had ratified the London Dumping Convention:

see Comm Rec 1985, 1362. On 10 October 1985 he issued the following statement (ibid, 1759):

> The Minister for Arts, Heritage and Environment, the Hon Barry Cohen, announced today that the Commonwealth Government has decided to amend the Environment Protection (Sea Dumping) Act to prohibit the dumping of radioactive wastes and other radioactive matter at sea. He said:
>
> > The Government is vigorously opposed to the dumping of radioactive wastes at sea. At the South Pacific Forum meeting in August the Prime Minister signed the South Pacific nuclear free zone (SPNFZ) treaty which commits parties not to dump radioactive waste at sea within the zone and to prevent the dumping of radioactive waste in their territorial sea. Amendment of the Sea Dumping Act will apply this ban to Australian vessels and in Australian waters. Australian waters as defined under the Sea Dumping Act extend 200 nautical miles out from Australia's coastline.
>
> Mr Cohen said that the Environment Protection (Sea Dumping) Act implements the London Dumping Convention, which Australia ratified on 21 August 1985.

On 16 October 1985 the Minister for Resources and Energy, Senator Gareth Evans, announced that the Australian delegation to the ninth meeting of the London Dumping Convention in September had succeeded in its basic objective of maintaining the moratorium on ocean dumping: see Sen Deb 1985, 1315.

Law of the Sea—conservation of marine living resources—Antarctic seals

On 7 June 1985 the Minister for Science, Mr Jones, announced that legislative changes had been made to enable Australia to ratify the 1972 Seals Convention: See Comm Rec 1985, 864.

Law of the Sea—protection and preservation of the marine environment—Australian legislation to give effect within Australia and coastal areas to international conventions

On 19 February 1986 the Minister for Transport and Minister for Aviation, Mr Peter Morris, introduced the Protection of the Sea (Prevention of Pollution from Ships) Amendment Bill 1986, and explained the purpose of the Bill as follows (HR Deb 1986, 869–871):

> The purpose of the Bill is to enable coverage of all ships in the territorial sea and coastal waters of Australia by Federal marine pollution legislation. It represents a further step in the legislative process leading to the ratification by Australia of the International Convention for the Prevention of Pollution from Ships, 1973, as amended by the Protocol of 1978. The Convention and Protocol, often referred to as MARPOL 73–78, will be implemented chiefly by the Protection of the Sea (Prevention of Pollution from Ships) Act 1983. The Bill for that Act passed through the Parliament during the autumn sittings in 1983 with bipartisan support. It was essentially the same as one introduced by the former Government, which lapsed as a result of the dissolution of Parliament.

The purpose of the MARPOL Convention is to control operational discharges of oil and other harmful substances from ships and to minimise the possibility of accidental discharges of such substances. In practical terms the aim of early Australian ratification is to prohibit discharges of oil and noxious chemicals within the Great Barrier Reef region and other areas protected by the Conventionl It will also allow Australia to enforce more stringent construction and operating standards on visiting ships, for example, segregated ballast tank and crude oil washing requirements.

...

The MARPOL Convention represents only one aspect, though an extremely important one, of the Government's commitment to give effect to international conventions promoted by the International Maritime Organisation. As honourable members will be aware, the IMO is a specialised agency of the United Nations, concerned with promoting the safety of shipping and the protection of the marine environment. Its main objective is to provide a forum for co-operation among its members and to develop appropriate legislation and practices.

Australia is a foundation member of the organisation and has been active in developing many conventions. It has recently been elected to the Council of the IMO. The Hawke Government's active participation in the organisation's work is demonstrated by Australia becoming party to the following conventions:

The International Convention for the Safety of Life at Sea, 1974 and its 1978 Protocol;

the 1983 Amendment to the International Convention on Load Lines 1966;

the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969 and the Protocol Relating to Intervention on the High Seas in Cases of Pollution by Substances other than Oil, 1973;

the International Convention on Civil Liability for Oil Pollution Damage, 1969 and its 1976 Protocol;

the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978;

the International Convention on Maritime Search and Rescue, 1979; and

the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972.

...

Let me now turn to the Bill itself. As I have previously stated, its sole object is to enable the early Australian implementation of the MARPOL Convention by extending the Federal marine pollution legislation to cover all ships in the territorial sea and the sea on the landward side of the territorial sea. This action has become necessary because of the significant and continuing delay which has occurred in the enactment of the complementary State and Territory legislation which is at present needed to enable the implementation of this Convention. I can assure the House that the present

Bill does not infringe the rights of any State or Territory because it contains a saving provision which will ensure that the Commonwealth legislation will not apply when appropriate State or Territory legislation is in force to cover areas within the relevant jurisdiction.

...

The subject matter of MARPOL, dealing as it does with measures for preventing marine pollution, is often very complex. The need to keep up with constantly changing technical standards leads to quite frequent amendments proposed by the International Maritime Organisation. In order to ensure that the Australian legislation gives full effect to the Convention, it is necessary to ensure that the enabling Act remains consistent with the Convention as it is in force internationally. It thus becomes essential to amend the Federal Act from time to time. The Bill before the House would enable amendments made by the International Maritime Organisation, agreed to by ATAC and endorsed by the Federal Government, to take effect throughout Australia until such time as the individual State and Territory governments amend their own legislation. For this reason alone, I am confident that the principles embodied in this Bill will be readily accepted by all concerned in the development and enforcement of marine pollution legislation.

Law of the Sea—protection and preservation of the marine environment—legislation to regulate sea dumping of radioactive waste

On 27 May 1986 the Acting Minister for Arts, Heritage and Environment, Mr Scholes, introduced the Environment Protection (Sea Dumping) Amendment Bill 1986 into the House of Representatives, and explained the purpose of the Bill as follows (HR Deb 1986, 4039–4040):

The Government strongly opposes the dumping at sea of radioactive waste and other radioactive matter. The purpose of the present Bill is to give effect to this policy by amending the existing legislation which controls dumping in Australian waters and by Australian citizens. The principal Act to be amended is the Environment Protection (Sea Dumping) Act 1981. The Act provides for protection of the environment by regulating the dumping into the sea and the incineration at sea of wastes and other matter. It was supported on both sides of the Parliament and received royal assent in 1981. The present Government brought the Sea Dumping Act into effect in March 1984. In August 1985 Australia ratified the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, which is commonly referred to as the London Dumping Convention. As a contracting party to the Convention, Australia subsequently co-sponsored a resolution adopted at the ninth consultative meeting, held in September last year, which provides for an indefinite suspension of the dumping of radioactive wastes at sea pending further studies and assessments. Several other international conventions are also relevant.

In conformity with the Government's policy of vigorous opposition to the dumping of radioactive waste at sea, the Prime Minister (Mr Hawke) signed the South Pacific Nuclear Free Zone—SPNFZ—Treaty on behalf of Australia on 6 August 1985. When it comes into effect, the Treaty will, amongst other things, prohibit the dumping of radioactive waste at sea

within the Treaty area, including the territorial sea of contracting parties. Parties to the SPNFZ Treaty will be required to prevent the dumping of radioactive matter in their territorial seas and not to assist or encourage the dumping of radioactive matter at sea anywhere within the Treaty area.

Another international agreement, the Convention for the Protection of the Natural Resources and Environment of the South Pacific Region—SPREP—is at an advanced stage of drafting. This Convention would, amongst other things, regulate the dumping of wastes at sea and preclude the sea dumping of radioactive matter anywhere in a defined South Pacific region. The SPNFZ treaty places a legal obligation on its parties to work towards agreement upon a SPREP Convention which will ban the sea dumping of radioactive materials. The present Bill will amend the principal Act to enable Australia to give effect to prospective obligations under both the South Pacific Nuclear Free Zone Treaty and the SPREP Convention. As it presently stands, the sea dumping Act prohibits the dumping of high level radioactive waste and other high level radioactive matter at sea, but, paralleling the London Dumping Convention, it allows dumping under permit of other radioactive wastes and materials. I should add that no such permits have been sought under the provisions of the Act.

I turn now to the substance of the amending Bill. The purpose of the Government is to prohibit the dumping at sea of radioactive waste. As honourable members may know, all substances are to some extent radioactive, although for most their activity is negligible. It is thus necessary to make a definition which will clearly distinguish the radioactive substances whose dumping is to be prohibited under the Act from all other substances. This is to be done by establishing a threshold radioactivity level of 35 becquerels per gram, which is just marginally above the natural level of activity of the common element potassium. The unit of measurement of radioactivity, the becquerel, relates to the rate of radioactive decay of a substance. One becquerel represents one spontaneous disintegration of the nucleus of an atom per second.

So that honourable members may be assured that the proposed 35 becquerels per gram threshold limit is very low, I can advise that the activity of ordinary granite may range up to 15 becquerels per gram or more, Australian beach sands, which are mined for their mineral content, may have an activity of about 30 becquerels per gram, whilst potassium chloride, a common constituent of fertilisers, has an activity of about 18 becquerels per gram. For comparison, the uranium yellowcake produced from uranium mines has an activity of about 22,000 becquerels per gram. There should be no environmental effects attributable to the trivial radioactivity of dumped materials which are below the specified threshold level of activity. This definition is, in the view of the Government, fully consistent with the draft definition adopted for the purposes of the SPREP Convention.

The Act does not apply in relation to a vessel, aircraft or platform belonging to one of the defence forces, reflecting a similar exemption in the London Dumping Convention. However, it will continue to be the practice that the defence forces will observe the requirements of the Act, as amended. I have initiated an exchange of letters with the Minister for Defence (Mr

Beazley) to this effect.

Another proposed amendment to the Act clarifies that disposal of material into the seabed, or subsoil beneath the sea, by the dropping of containers designed to penetrate into the soft sediments of the sea floor, amounts to disposal at sea. The technical possibility of such a method of disposing of radioactive wastes has been raised overseas.

Consistent with the Government's view on the respective roles of Commonwealth and State authorities in off-shore areas, the present Act provides a mechanism for disapplying its provisions to the extent that equivalent State legislation applies in relation to the coastal waters of a State. Coastal waters are essentially the territorial sea within the three-mile limit. This mechanism is to remain, but it will not apply to the sections of the Act which prohibit the dumping, loading for dumping or incineration at sea of radioactive materials.

Having given thought to the prospective implementation of complementary Commonwealth and State legislation to control sea dumping, the Commonwealth Government has concluded that there will need to be some kind of memorandum of understanding between the Commonwealth and individual States to ensure that administration is made as simple and efficient as possible for permit applicants and the administering authorities. The Commonwealth must also be satisfied that the obligations it has under the London Dumping Convention, and those it will assume under the SPNFZ Treaty and the SPREP Convention, will be fully met. Accordingly the wording of the relevant section of the present Act is to be amended to provide a discretion in its disapplication in favour of equivalent State legislation. The Commonwealth's intention is to exercise that discretion in favour of suitable State legislation provided that an appropriate memorandum of understanding on administrative procedures is also entered into with the State concerned. Finally, a minor amendment to the Act will ensure that, where State legislation does apply, it will not be necessary for the Commonwealth to issue a permit for the loading of waste in addition to the permit for dumping of that waste in coastal waters issued under State legislation.

On 20 August 1986 the Minister for Arts, Heritage and Environment, Mr Cohen, said in reply to debate on the Bill, in part (HR Deb 1986, 355):

> The honourable member for Denison (Mr Hodgman) made a number of references to the Soviet Union and its dumping practices in the high seas. He also mentioned the whole nuclear involvement of the Soviet Union in a number of respects. This matter should really be raised in the debate on the South Pacific Nuclear Free Zone Treaty Bill. Australia has no jurisdiction to control activities of foreign countries on the high seas.

Law of the Sea—protection and preservation of the marine environment—protection of the sea legislation

On 8 October 1986 the Minister for Transport and Minister for Aviation, Mr Peter Morris, introduced the Protection of the Sea Legislation Amendment Bill 1986 into the House of Representatives. Parts of the Minister's second reading speech explaining the purpose of the Bill were as follows (HR Deb 1986, 1676–1679):

The purpose of this Bill is to amend four Commonwealth Acts to enable Australia to implement a number of anti-pollution initiatives and to improve aspects of the existing legislation. The Bill represents a further major step in marine pollution prevention and control in Australia. Honourable members will be aware that the Government is committed to ensuring Australia's acceptance of conventions which have benefits for Australia and which will enhance our reputation internationally. Accordingly, our national transport policy supports the promotion, conclusion, ratification and application of transport conventions under the auspices of the United Nations and its specialised agencies, in particular the International Maritime Organisation, IMO.

...

As an island nation, Australia, with its extensive coastline and spread of territorial waters, possesses national assets of immense economic and recreational worth. Accordingly it is of fundamental importance that we face up to our responsibility and ensure that we continue to provide a high level of protection for our marine environment. I believe this Bill has the capacity to further improve marine environment protection by prohibiting the discharge of harmful substances into the sea. It is incremental to and consistent with the approach taken by this Government towards the marine environment on previous occasions. The Bill currently before the House contains amendments to the Protection of the Sea (Prevention of Pollution from Ships) Act 1983 and the Navigation Act 1912, which will enable Australia to implement annexes III, IV and V of the International Convention for the Prevention of Pollution from Ships 1973, or MARPOL, as it is commonly known. This will place Australia in a position to exercise control over the discharge of ship sourced pollutants of all types.

MARPOL, as the 1973 Convention and its 1978 protocol are commonly known, is a significant departure from previous pollution conventions, as the one treaty addresses ship sourced pollution in all the various forms. Australia signed the Convention, subject to ratification, in 1973. Contracting states to MARPOL are obliged to apply annexes I and II, which deal with oil and noxious liquid substances respectively. Annexes III, IV and V are optional and respectively deal with pollution by harmful substances carried in packaged form, sewage and garbage. Legislation to bring annexes I and II of the Convention into force was passed by Federal Parliament in the autumn sittings of 1983, with bipartisan support. Amending legislation extending the operation of the Protection of the Sea (Prevention of Pollution from Ships) Act to include all ships in the Australian territorial sea and coastal waters also received bipartisan support and was passed in the autumn sittings 1986. The current Bill will enable Australia to implement fully the remaining requirements of this Convention.

I should point out that MARPOL annexes III. IV and V will be implemented by way of complementary State, Commonwealth and Territory legislation in accordance with an agreement reached by the Ministers on the Australian Transport Advisory Council, ATAC, and endorsed by the Government. The annexes, therefore, will be accepted by Australia when all

the necessary legislation is enacted by all governments, and they will enter into force for Australian when the annexes enter into force internationally.

Annexes III, IV and V of MARPOL will each enter into force internationally 12 months after the date on which a minimum number of 15 states, with not less than 50 per cent of the gross tonnage of the world's merchant shipping, become party to them. Although these conditions have not yet been fulfilled, progress is being made and annexes III and V are expected to enter into force within the next 18 months. There is not as much international support for annex IV, which could result in its entry into force being less certain.

I will briefly summarise the contents of annexes III, IV and V. Annex III contains regulations for the prevention of pollution by harmful substances carried by sea in packaged forms, or in freight containers, portable tanks or road and rail tank wagons. The annex contains specific requirements relating to the packaging and carriage of such substances. Discharges by jettisoning of harmful substances are totally prohibited except where safety of life or the ship is involved. The master or the owner of a ship is required to notify the appropriate authority at least 24 hours prior to loading or unloading such substances. To assist with the implementation of these requirements internationally, the international maritime dangerous goods code is being revised to cover pollution aspects.

I believe that the evolutionary change of attitudes to environment protection is reflected in this Bill. With the introduction of these amendments, paragraph (c) of section 250 of the Navigation Act 1912, inserted in 1912, will now be removed. This provision authorised the master of a ship to throw overboard any dangerous goods shipped without his knowledge and specifically exempted such a master from any liability whatsoever.

Annex IV of the Convention contains regulations for the prevention of pollution by sewage from ships, and applies to all ships over 200 gross tons or those certified to carry more than 10 persons. All discharges of sewage from Australian ships are prohibited, except under conditions specified in the Bill. No discharges are permitted within the Great Barrier Reef area. In addition to the discharge requirements, annex IV contains requirements relating to periodical surveys and the issue of an international sewage prevention certificate. Valid certificates must be carried on board a ship and be produced when a ship applies for clearance to leave an Australian port.

Annex V contains regulations for the prevention of pollution by garbage. The complete prohibition placed on the disposal into the sea of plastics, including synthetic ropes and fishing nets, is a feature of this annex. Additionally, specific minimum distances have been set for the disposal of the principal types of garbage, including dunnage. The permissible degree of discharge is directly related to the degradability of the waste. Again, disposal of garbage in the Great Barrier Reef area is prohibited.

I believe that a significant effect of this annex will be a reduction in the quantity of litter and waste material which washes up onto our beaches and coastline. From experience in my own constituency I know that the beaches in New South Wales on occasions suffer this problem. No doubt you too,

Mr Deputy Speaker, have experienced this. The cleanliness of Australian beaches should be enhanced as a result of this legislation. Additionally, there have been complaints from the fishing industry concerning the problems caused by the disposal of garbage at sea; in particular, concern regarding the fouling and consequent damage of fishing nets. For these reasons, I believe the controls proposed by this Bill will be welcomed by all concerned.

The introduction of these new controls into Commonwealth legislation is based on the legislative arrangements recommended by the Australian Transport Advisory Council, which requires that complementary Commonwealth, State and Northern Territory legislation be enacted before Australia can ratify annexes III, IV and V of MARPOL. The proposal is therefore in accordance with long standing arrangements between the Commonwealth, States and Northern Territory for control of ship sourced pollution.

A second aim of the Bill is to update existing legislation to reflect the 1985 amendments to annex II and protocol I of the MARPOL Convention. These were adopted by the International Maritime Organisation in December 1985 and have also been endorsed by the Australian Transport Advisory Council.

Annex II deals with the prevention of pollution by noxious liquid substances carried in bulk. These amendments will enter into force internationally on 6 April 1987. They are the result of general agreement that the original provisions of annex II, developed in the early 1970s, needed revision to take account of subsequent technical developments. The amendments are recognised by shipping and pollution specialists in government and the shipping and chemical industries as being more in tune with actual conditions encountered aboard chemical tankers than were the original annex II provisions. Additionally, they are designed to make annex II easier for administrations to implement, as the need for on-shore facilities for the reception of chemical wastes is reduced.

The amendments to protocol I of MARPOL incorporate new comprehensive mandatory incident reporting requirements. These new pollution reporting obligations and the accompanying guidelines are designed to speed communication, enabling authorities to respond quickly and to be better informed in the event of actual or potential accident spillages, cargo losses and illegal discharges. The simplification and standardisation of ship reporting principles and procedures were the major aims of the protocol I revision and have consistently been supported by Australia at International Maritime Organisation meetings. The standardised procedures will avoid the confusion caused by the variety of reporting requirements, imposed by individual authorities, as ships move from one area to another.

As on previous occasions during the development of MARPOL, Australia has argued strongly for the special protection measures to safeguard the Great Barrier Reef region. Special recognition of this unique area is contained in the Convention. This level of protection is maintained in the proposed amendments, which specifically prohibit discharges of chemicals, sewage and garbage in the Reef region.

The third function of the Bill is to enable Australia to implement the 1984 protocol to the International Convention on Civil Liability for Oil Pollution Damage 1969. The Convention is implemented in Australia by the Protection of the Sea (Civil Liability) Act 1981, which entered into force on 5 February 1984 and will be amended by this Bill. The 'polluter pays' concept, contained in the Convention and the new protocol, is designed to ensure that compensation is available to those suffering oil pollution damage as a result of maritime casualties. Owners of ships carrying more than 2,000 tonnes of oil are required to maintain insurance or other financial security against the risk of such an eventuality.

The 1984 protocol amending the civil liability convention was developed to overcome the adverse effects of inflation on the real values of the limits of liability. The protocol adopts a minimum for vessels of less than 5,000 gross tons of three million special drawing rights, as defined by the International Monetary Fund. This is equivalent to approximately $A5.8m. For larger vessels, liability is calculated on the basis of the vessel's tonnage, with an overall maximum for the ship's liability of 59.7 million SDRs, or $A114.5m. As an example, a tanker of 39,000 gross tons which is insured to a limit of $A10.35m under existing legislation will be required to be insured under the 1984 protocol to a limit of $A33.5m. This reflects a threefold rise in the real value of the level of compensation available and will ensure that the damage that such a ship can cause will be more effectively compensated.

Other amendments effected by the 1984 protocol include extension of the geographic scope of the Convention to cover incidents occurring in the 200-mile zone. This will afford additional protection to sensitive areas such as the Great Barrier Reef and safeguard existing and potential fisheries in the Australian fishing zone. The scope of the legislation will also be extended as tankers in ballast and combination carriers are now included in the Convention coverage.

Extensive consultations between Federal and State officials resulted in agreement on adoption of the protocol. This was accepted and has been recommended by ATAC Ministers. The text of the protocol has been discussed with industry groups representing insurers, shipowners and cargo interests, and no objections have been raised. Although the benefits to a coastal state of the expanded scope and increased limits provided by the protocol are readily apparent, the additional costs are extremely difficult to predict.

Shipowners will have to arrange increased insurance cover. However, the nature of shipping insurance, which is provided largely by protection and indemnity clubs on a mutual indemnity basis, makes it impossible to predict the cost involved. Furthermore, whether a cost increase would be reflected in increased freight rates and charges in the existing highly competitive international freight market is far from certain.

Finally, the Bill will align references to the tonnage of ships in the Protection of the Sea (Shipping Levy Collection) Act 1981 with the International Convention on Tonnage Measurement of Ships 1969. Australia is already a party to this Convention, which entered into force in 1982. The absolute tonnages of certain types of ships for levy purposes will undergo

substantial variation following the determination of new tonnages under the 1969 Convention, although existing ships are not required to be remeasured for tonnage purposes until 1994. In the intervening period an owner may opt to measure a ship under the Convention or by the traditional method embodied in the Navigation (Tonnage Measurement) Regulations. The amendment proposed by the Bill will compensate for the variation between each measurement regime and cater for ships whose tonnage has been calculated under either regime.

I believe the amendments contained in the Bill will result in substantial improvement in both the control of ship sourced pollution and compensation available for damage caused by a pollution incident, and will maintain Australia's position in the international forefront in the field [of] marine pollution convention implementation.

The Bill was enacted as Act No 11 of 1986.

Law of the Sea—control of marine pollution—Torres Strait Treaty—Protected Zone—South Pacific Regional Environmental Convention—conventions on control of pollution from ships

On 17 February 1987 the Minister for Arts, Heritage and Environment, Mr Cohen, provided the following written answer to a question on notice (HR Deb 1987, 102):

Consultations with Papua New Guinea (PNG) regarding the possible pollution of Australian waters of Torres Strait from Ok Tedi mining operations have taken place at High Commission and Ministerial levels, and between officers. The matter was also discussed at the inaugural meeting of the Torres Strait Joint Advisory Council in July 1986.

The Council, which was established by the Torres Strait Treaty ratified by the Australian and PNG Governments on 15 February 1985, noted that there had been expressions of public concern in both countries but that there was to date no scientific evidence of pollution in the Torres Strait area resulting from the effects of mining operations on the Fly River discharge into the Gulf of Papua. The Council also recommended that close co-operation between the Australian and PNG Governments continue to be pursued actively and that both Governments take all necessary measures to ensure that pollution of the Torres Strait area does not occur.

On 1 May 1987 the following answer to the respective question without notice was given in the Senate (Sen Deb 1987, 2187):

Senator ZAKHAROV—My question is addressed to the Minister representing the Minister for Foreign Affairs. Has the Convention for the Protection and Development of Natural Resources and Environment of the South Pacific Region come into force and is Australia a signatory to that Convention? Further, is the Australian Government satisfied that France is respecting Article 12 of the Treaty referring to pollution resulting from nuclear tests?

Senator GARETH EVANS—The situation is that the Convention has not come into force and will not do so until 10 parties have ratified it. Eight countries have signed the Convention so far and a number of other countries will examihe the question of signature in accordance with their normal

constitutional procedures. Australia is not yet a signatory to the Convention. France has signed it and the two protocols but has not ratified it.

As to the question of French compliance with Article 12 of the Convention, in 1983 scientists from Australia, New Zealand and Papua New Guinea visited the Mururoa test site at the invitation of the French Government to investigate and report on possible radioactive contamination of the environment at and around Mururoa and the consequences of any contamination. The report of that team, which is known as the Atkinson report, was critical of some aspects of the French testing program, but overall found that there was no immediate cause for alarm. The Atkinson report expressed some concern about the possible long term consequences of continued testing, particularly radioactive groundwater leakage into the Mururoa Atoll lagoon in the next 500 to 1,000 years. France claims that this conclusion is based on a premise that presumes five times the level of testing that has actually occurred over the past 10 years.

On 2 November 1987 the Minister for Foreign Affairs and Trade, Mr Hayden, provided the following written answer in part to a question on notice (HR Deb 1987, 1869):

Eleven South Pacific countries have so far signed the South Pacific Regional Environmental Program Treaty (SPREP Convention) and its Protocols:

> Cook Islands, Federated States of Micronesia, France, Marshall Islands, Nauru, New Zealand, Palau, Tuvalu, United Kingdom, United States and Western Samoa.

Of these, Cook Islands and Marshall Islands have already ratified the Convention and its Protocols and are now parties to the Convention and its Protocols.

In addition to those who have signed, countries eligible to become parties to the Convention and its Protocols include:

> Australia, Fiji, Kiribati, Niue, Papua New Guinea, Solomon Islands, Tonga, Vanuatu and any other country subject to the prior approval of three-fourths of the parties to the Convention or Protocols concerned.

Law of the Sea—Safety of Life at Sea Convention—applicability in Australia

On 23 August 1985 the Minister for Transport, Mr Peter Morris, provided the following written answer to a question on notice in the House of Representatives (HR Deb 1985, 547):

The International Convention for Safety of Life at Sea, 1974 (SOLAS) and the Navigation (Loading and Unloading—Safety Measures) Regulations (LUSM) are policed on both foreign and Australian registered ships by marine surveyors appointed under section 190 of the Navigation Act 1912.

Under the control provisions of regulation 19 of Chapter 1 of the Convention, surveyors inspect ships to ensure that the condition of the hull, machinery and equipment corresponds substantially with the particulars of the certificate. In addition they ensure that ships are in a seaworthy condition so as not to endanger passengers and crew.

Under the LUSM regulations surveyors inspect ships to ensure that the cargo gear complies and that loading and unloading operations are being

performed in a safe manner. Where possible these inspections are being performed on arrival at the first port of call in Australia.

In the case of foreign ships, customs officers, on behalf of the Federal Department of Transport, check the validity of the safety certificates required under the SOLAS Convention.

Law of the Sea—United Nations Convention on the Law of the Sea—rights of transit through and over archipelagic States

The following letter dated 24 December 1985 by the Minister of Foreign Affairs, Mr Hayden, was published in the *Australian Financial Review* on 30 December 1985:

I am writing in regard to the article by Michael Byrnes "Sea law change will make dream come true" which appeared in your issue of December 20, 1985.

The article does not convey accurately either the general import of the Law of the Sea (LOS) convention or its implications for the rights and duties of Indonesia, particularly in regard to sea and air traffic through and over the Indonesian archipelago.

The LOS convention seeks to ensure a balance between the rights of archipelagic states and the rights of other states to sea [passage] and overflight of archipelagic waters.

The inclusion in the convention of provisions on archipelagos was promoted by the claims already made by a number of states, including Indonesia in 1960.

Article 49 of the LOS Convention recognises the sovereignty of an archipelagic state over the waters enclosed by archipelagic baselines drawn in accordance with the convention and to the airspace over them. That sovereignty however, must be exercised subject to the other provisions of Part IV of the convention, principally the Right of Archipelagic Sea Lanes Passage (Article 53).

In sea lanes and air routes designated by an archipelagic state, all ships and aircraft have the right of archipelagic sea lanes passage.

If no sea lanes or air routes are designated, the right of archipelagic sea lanes passage may be exercised through regular international routes.

In areas of archipelagic waters which are not internal waters or designated archipelagic sea lanes, ships of all states enjoy the right of innocent passage. The right may be temporarily suspended, but archipelagic sea lanes passage cannot be suspended.

As a signatory to the Law of the Sea convention, Australia accepts the concept of archipelagic waters as an equitable balance between the interests of archipelagic states and of maritime states.

The impression conveyed by Mr Byrnes' article, that Australian maritime and air traffic interests are prejudiced by the convention, and in particular by Indonesia's impending ratification of it, is therefore quite incorrect.

Australia's shipping and air passage rights through the Indonesian and other archipelagos are, as Mr Byrnes suggests, extremely important. The LOS convention, contrary to Mr Byrnes' assertion, reinforces those rights.

Law of the Sea—International Maritime Organization—Conventions to which Australia is not a party

On 18 November 1987, the Minister for Land Transport and Infrastructure Support, Mr Duncan, provided the following written answer (HR Deb 1986, 2358):

> Australia has yet to become a party to the following International Maritime Organisation conventions and protocols:
>
> (a) Special Trade Passenger Ships Agreement 1971 and its 1973 Protocol on Space Requirements;
>
> (b) Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material, 1971;
>
> (c) International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 and its 1976 and 1984 Protocols;
>
> (d) Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974;
>
> (e) Convention on Limitation of Liability for Maritime Claims, 1976;
>
> (f) Torremolinos International Convention for the Safety of Fishing Vessels, 1977;
>
> (g) 1984 Protocol to the International Convention on Civil Liability for Oil Pollution Damage, 1969.

Law of the Sea—ships—United Nations Convention on a Code of Conduct for Liner Conferences—question of ratification by Australia

On 11 March 1986 the Minister for Transport, Mr Peter Morris, provided the following written answer in part to a question on notice (HR Deb 1986, 1137–1138):

> Australia has not yet made any decision on the United Nations Convention on a Code of Conduct for Liner Conferences (Liner Code). The question of ratification of the Liner Code is complex and the Government is anxious to ensure that its approach to the Code is fully consistent with our national objectives and our international obligations.

Law of the Sea—right of innocent passage—Persian Gulf—attack on vessel and death of Australian citizen—protest by Australian Government

The following Aide Memoire was handed to the Iranian Charge d'Affaires in Canberra at the Department of Foreign Affairs on 25 October 1984 (text provided by the Department of Foreign Affairs):

> The Australian Government is seriously concerned that an Australian citizen, Mr Gary Bryan, was killed as a result of an attack on the vessel "Pacific Protector" which was sailing in international waters in the Persian Gulf on 19 October. The attack occurred at or about 0705 hours GMT on 19 October. The location of the vessel was 26 degrees 14 minutes North and 52 degrees 23 minutes East.
>
> The Australian Government has reason to believe that the aircraft which carried out this attack was an Iranian military aircraft.
>
> Australia has on a number of occasions expressed its official concern at

attacks on neutral shipping in the Gulf. Australia firmly supports customary international law which guarantees freedom of navigation on the high seas.

The Australian Government strongly condemns the attack on the "Pacific Protector" as an illegal and unprovoked act which was in clear breech of international law relating to the innocent passage of unarmed merchant vessels.

The Australian Government wishes to protest formally to the Islamic Republic of Iran for this action which resulted in the death of an Australian citizen.

Law of the Sea—freedom of navigation—Persian Gulf—mining of ship

On 26 July 1987 the Minister for Foreign Affairs, Mr Hayden, issued the following news release (No M89):

STATEMENT IN RESPONSE TO THE STRIKING OF A MINE IN THE PERSIAN GULF BY THE US VESSEL "BRIDGETON"

The Minister for Foreign Affairs and Trade, Mr Bill Hayden MP, said today that it was a matter of deep regret that the US registered vessel "Bridgeton" had struck a mine during its voyage to Kuwait.

The laying of mines in waters in which the vessels of another state have rights of access or passage, and the failure to give any warning or notification, was a breach of the principles of humanitarian law. Mr Hayden said that these general principles are properly regarded as legally binding on all States.

Mr Hayden reaffirmed Australia's deep commitment to the right of freedom of navigation.

Mr Hayden said that the Australian Government had made clear its deep concern about attacks on civilian shipping and a possible widening of the war on many occasions. The Government had appealed to Iran and Iraq for an immediate ceasefire leading to negotiations, without pre—conditions, on a comprehensive settlement.

There was now a serious danger of further incidents in the Persian Gulf. Mr Hayden urged restraint on all parties involved and called on Iran and Iraq to adhere to the Security Council Resolution 598 calling for an immediate ceasefire in the war between Iran and Iraq.

Mr Hayden said that he had welcomed Security Council Resolution 598, and had arranged for the Government's favourable response to the Resolution to be brought to the attention of Iran and Iraq.

Law of the Sea—freedom of navigation—Persian Gulf—right of self-defence

On 22 September 1987 the Acting Minister for Foreign Affairs, Senator Evans, issued a news release: see No M130.

On 23 September 1987 the Prime Minister, Mr Hawke, said in part in answer to a question without notice (HR Deb 1987, 564):

Fundamental to Australia's response is our unqualified commitment to the rights of freedom of navigation. The fact is that the laying of mines in the waters in question was unquestionably a breach of international law. On the basis of the information available, the Australian Government believes that

the United States acted in self-defence in response to a clear threat to the safety and security of its ships and of the crews of those ships. If freedom of navigation in the Gulf is to be maintained, as it must be, clearly a settlement of the Iran-Iraq conflict is essential.

On 20 October 1987 the Minister for Foreign Affairs and Trade, Mr Hayden, said in answer to a question without notice (HR Deb 1987, 1082–1083):

The Government has been briefed by the United States concerning the latest incidents in the Persian Gulf between the United States and Iran. In essence, the United States flagged tanker *Sea Isle City* was attacked in Kuwait territorial waters on 16 October by a missile believed to have been fired by Iranian forces. On 19 October United States naval vessels, having provided prior warning, struck an Iranian platform in international waters in the Persian Gulf. According to the United States Secretary of Defense, the Iranian platform had been used to mount radar surveillance, report on convoy movement, launch small boat attacks against non-belligerent shipping and, last week, to fire at United States military helicopters.

As Senator Evans said on 22 September in relation to the *Iran Ajr* incident, Australia maintains an absolute commitment to the right of freedom of navigation, including the right of all countries of the Persian Gulf to export their oil. All attacks on merchant shipping are condemned and deplored by the Australian Government as a violation of international law.

The United States response to the attack on the *Sea Isle City*, according to the information presently available, was conducted within its inherent right of self-defence under Article 51 of the United Nations Charter and represented a proportionate response to an ongoing threat to American vessels and crews. The Security Council has been notified of the United States action. These latest incidents add to the importance of further efforts by the United Nations Secretary-General to seek a ceasefire and negotiated settlement to the Iran-Iraq war on the basis of United Nations Security Council Resolution 598. Australia will continue to work to encourage the achievement of that objective.

On 7 December 1987 the Minister for Defence, Mr Beazley, said in part in answer to a question without notice (HR Deb 1987, 2851):

Basically, all the ships in the Gulf, in addition to being generally committed to freedom of navigation, operate in defence of vessels under their own flag. There are a couple of exceptions to this general rule. It seems that the Soviet Union follows the practice of offering protection to Eastern bloc vessels generally, given the events that occurred last week when a Romanian tanker got itself into trouble and was effectively protected by a Soviet destroyer that came to its assistance. The other exception—there may be others but I am aware of two—involves the Royal Navy, which has offered escort facilities to Australian vessels operating in the Gulf. One Australian vessel actively receives assistance or escort from the British whenever it enters the Gulf. The other three or four vessels that operate in the Gulf receive information on safe passage times from the Royal Navy and also receive escort assistance under what is called the buddy system. If they wish to avail themselves of that arrangement, they are allowed to join a British convoy passing through the Gulf.

Also on 7 December 1987, in the Senate, the Minister representing the Minister for Defence, Senator Robert Ray, said in answer to a question without notice (Sen Deb 1987, 2572–2573):

> Five Australian merchant ships go to the Gulf regularly, and on average there are 12 visits a year. In addition, about 12 Australian fishing vessels operate in the Gulf area under joint venture arrangements. There were also 221 ships carrying Australian cargo in the Gulf in the first half of 1987, demonstrating the international character of shipping and the level of activity in the Gulf serving Australian interests. Australia has made no request for protection for its shipping; nevertheless, support has been provided by the British naval presence. For instance, the *BP Achiever* has been escorted by Royal Navy vessels on the grounds that the British have a majority ownership of BP. Other shipping has received information or informal protection under the 'buddy system' whereby vessels schedule their sailing times to coincide with Royal Navy convoys or Royal Navy patrols. Otherwise, countries with warships in the area recognise only an obligation to protect their own flag vessels.
>
> The Government's consideration of the issues will be conducted on the basis of Australia's national interests. These include, firstly, our trade of $2.5 billion with Gulf countries; secondly, our commitment as a major trading nation to the principles of freedom of navigation and the safety of merchant shipping; and, finally, our policy of neutrality and strict even-handedness in our dealings with both Iran and Iraq.

Law of the Sea—ports—mining of ports—Nicaragua—International Court of Justice

On 30 May 1984 the Attorney-General and Acting Minister for Foreign Affairs, Mr Bowen, said in the House of Representatives in answer to a question without notice (HR Deb 1984, 2452):

> This matter has been the subject of world-wide interest. Prior to the International Court of Justice interim judgment on 10 May the Australian Government, through our Minister for Foreign Affairs, Mr Hayden, had already indicated to the United States the Government's concern at the mining of Nicaraguan ports, which was obviously a breach of international law. The interim decision of the Court confirms that view. The court made a decision that there should be a ceasing of any action restricting the access to or egress from Nicaraguan ports and called for its prohibition by the principles of international law. However, the United States has reacted by stating that there is nothing contained in that interim ruling which is inconsistent with United States policy, which, of course, must cause some concern not only to people in Australia but also to the other countries which protested at the time about the United States action. That includes the United Kingdom, Canada, Spain, Germany and a number of other countries.
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> Also, in the United States, as the honourable gentleman will be aware, this matter has been the subject of pretty keen debate in the Congress as to the actions of the Administration there in breaching international law. I say that because the Court's order of 10 May is only an interim order. There has to be a full hearing of the case. Of course, the United States has objected to

the jurisdiction on the basis that it, the United States, has made a declaration that the Court's jurisdiction should not apply to disputes in any Central American state for a period of two years. So if the declaration of the United States Administration were adopted, that would be tantamount to trying to remove the jurisdiction of this matter from the International Court of Justice. We think that is wrong, too. The Court itself, though, has to address its mind to the question of jurisdiction now. But I think that all people, in the free world anyway, would share the concern which has been expressed about the mining of Nicaraguan ports. From our point of view that concern has been made clear to the United States and will continue to be made clear to the United States.

On 21 August 1984 the Minister for Foreign Affairs, Mr Hayden, wrote in answer to a question on notice in the House of Representatives (HR Deb 1984, 120):

I am aware of the criticism which has been expressed of the mining of Nicaraguan ports. The Australian Government is also concerned about the activity of counter-revolutionaries (contras) against Nicaragua and concern has been made known to the United States. On 21 May, I announced that Australia would make a contribution to an international humanitarian relief program to assist civilians displaced by the fighting in Nicaragua.

The matter was raised with the United States in the above terms on more than one occasion. Although the expression of concern was noted, it was made clear that the pressures exerted on the Nicaraguan regime were considered to be justifiable actions by its opponents.

Law of the Sea—piracy—seizure of the Achille Lauro by terrorists

On 8 October 1985 the Acting Minister for Foreign Affairs, Senator Gareth Evans, issued the following statement (Comm Rec 1985, 1772):

The Acting Minister for Foreign Affairs, Senator the Hon Gareth Evans, said today that the Australian Government deplored the illegal seizure of the Italian cruise ship *Achille Lauro* by a group of Palestinian terrorists.

The ship was seized on 7 October while en route from Alexandria to Port Said in Egypt and there are reported to be about 110 passengers and 340 crew members on board. The hijackers are demanding the release of about fifty Palestinian prisoners held in Israel.

Senator Evans said that the Department of Foreign Affairs was seeking to confirm whether any Australians were on board the ship.

He recalled his statement of 2 October deploring the Israeli raid on Tunis and repeated the Australian Government's firm belief that terrorism was an unacceptable means by which to pursue political objectives. The seizure of the *Achille Lauro* and threats to execute the passengers and blow up the ship were a deplorable act in which the lives of innocent civilians were needlessly threatened.