State Taxes Convention

Big things in the sea

Presented at Darwin Convention Centre on 19 July 2023

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Contents

1. Big Things

There are big things in the sea.

First we must understand them, their physical character, use and value.

Next we must find them, and work out how they are a taxable part of our economy.

Ships can be very valuable, and at present remained crewed. They are usually chattels, and thus usually fall outside notions of "dutiable property". But that is not the end of the matter, since sale of a chattel/goods, in combination with land, can be an issue.[1] And chattels/goods can come into calculation under landholder rules.

Moreover, being moveables, they tend to change hands outside taxing jurisdictions. Even if the rule about a ship being deemed to be sited at its home port has a wider application than some special purposes of the conflicts of laws (which might be doubted), the number of Australian-flagged merchant ships is limited. While there are some Australian crewed merchant ships, the vast majority of large ships coming to our ports are foreign-flagged with crews recruited offshore.[2]

Whether oil and gas platforms are within the limits of a State or Territory will obviously depend on the location of the resource. Such platforms remain crewed[3] and the crew and their families absorb State and Territory resources. By the same token, there is the potential for development of remote areas, in servicing such resource projects. This is possibly an area where State Agreements might assist in providing some certainty about the ability to develop a resource, whilst likewise assuring a flow of State revenue in some form or another. However, recent experience with State Agreements tends to discourage reliance on a State Agreement being a statute, as any reason to diminish the assessment of sovereign risk.

Cables and pipes tend to be buried, or in the case of pipes buried as they move inshore, based on the engineering evidence we have seen. The value of these assets would be important to establish, though the costs of laying them appear significant. These are not facilities which are constantly attended from the sea, once built.

Undersea mining may well have happened for hundreds of years, but the current excitement to do with Nauru's notice to ISA concerns a resource likely to be outside the exclusive economic zones (**EEZ**s) of all nations. The real opportunities here may be in onshore processing once a certain level of crude processing at sea has been undertaken.

Electricity generation by waves, tide and wind offshore is an exciting area, though some of it remains in development. In one way or another, these facilities are firmly attached to the seabed, so as to give mechanical resistance or for the purpose of positioning. These facilities do seem to be attended

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[1] Eg Vic section 10(1)(d); NSW section 11(1)(j) but excluding a ship or vessel.

[2] It was reported last year that there are only 13 large commercial vessels registered in Australia. Refer Jacob Greber, "Joyce to boost Australian merchant 'navy'", *Australian Financial Review*, 11 May 2022, viewed online on 10 July 2023.

[3] We have not reviewed the literature about HR and these platforms, as that literature assumed human attendance. There does appear to be a literature addressing the unusual HR situation of such facilities. However, unsurprisingly, there is pressure to reduce human resources demands, as evidenced by articles we found about the fabrication stage (seemingly onshore): eg (a) Dr. Oskar Kwok Lum Lee, "Automation of Oil Rig Fabrication", viewed on 4 August 2023 at http://oilit.com/papers/shipconstructor.pdf ; and (b) Nguyen Tu Anh, "Human Resource Issues in Rig Construction in Vietnam", a Bachelor's Thesis, National University of Singapore, linked at https://scholarbank.nus.edu.sg/handle/10635/221683

by personnel, although there is some work being undertaken (as one might expect) to automate some aspects and thus reduce wage costs.

We have not dealt at any length with jetties, groynes, wharves and the like. These kinds of developments do appear to be fixtures or affixed to the land and seabed. Whether they form part of the land in a State or a Territory may depend on the interpretation given to "land" and to two kinds of provisions:

- Interpretation legislation which provides that the law of a particular State applies in and in relation to the coastal waters of that State, and the seabed and subsoil beneath (and the airspace above) for coastal waters – "as if" the coastal waters of that State were within the limits of the State.
- Section 14 of the *Seas and Submerged Land Act 1973 (Cth)*, which preserves for each State certain historic bays, gulfs, estuaries, rivers, creeks, inlets, ports and harbours.[4]

1.1 Ships

1.1.1 Physical characteristics – largest ship - storage/transfer units

Displacing 564,763 tons, the "Seawise Giant" is reputed to have been the largest ship ever built.

She projected 82 feet down into the water, which was far too deep for most major ports.

At 1,550 feet long and a beam of 226 feet, she was too wide for the inter-ocean canals.

Fully laden, she was prohibited from negotiating the 32 mile wide English Channel as well as the Malacca Straits. This was because of her large turning radius, and sluggishness in "answering her helm" (changing direction). Her inertial momentum also made passage of these waters too hazardous for other shipping. She is reputed to have taken 5.5 nautical miles to stop from top speed.[5]

Sadly for the "Seawise Giant", she was damaged in 1988 during the Iran-Iraq War, though later salvaged and restored to service. She was converted to a floating storage and offloading unit moored off of Qatar at the Al Shaheen Oil Field. Finally, she was sold to Indian shipbreakers, beached and scrapped, with the scrapping process completed in 2010. She had been launched in 1979.[6]

That story raises a number of basic issues for the revenue lawyer.

Reportedly, the bulk of the "Seawise Giant" actually resisted the spinning of the Earth on its axis. At some limiting point, even for a vessel able to sail under its own power, there must be a question about what constitutes sufficient solidity and bulk for something to constitute land. But that is speculative.

Certainly, whilst a self-propelled ship, the "Seawise Giant" was a chattel. There are the usual issues about mobile chattels, in terms of taxing rights, even if the chattel falls within a local definition of

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[4] Refer to the litigation, which assumed Victoria's taxing rights for harbour works at the Port of Portland: *Port of Portland Pty Ltd v Victoria* (2010) 242 CLR 348.

[5] These details are mostly provided per an article by Jim Bloom, "Tankers: The Ships that Fuel the World", in *Sea Classics*, June 2008, Volume 1, part 6 page 32. However the stopping distance is per an online story by Peter Preskar, "The Fantastic Supertanker 'Seawise Giant' – the largest self-propelled ship ever built", self-published at the "Medium" website and viewed on 6 July 2023: https://short-history.com/seawise-giant-9958784d7132.

[6] See article at Wikipedia on "Seawise Giant", viewed 6 July 2023.

dutiable property or the like. But there is a special rule for ships, deeming them to be taken to be at their "home port" if on the high seas (but not territorial waters), for some conflict of law purposes.[7]

Once moored at an oilfield, as a floating storage and offloading unit (**FSOU**), perhaps something different happens. The vessel is moored for a different use. Reportedly, its anchor "as built" weighed 36 tons. This presumably was when it was in service as a mobile vessel.[8] Something weighing 36 tons, even if standing of its own weight on land, must pose a challenge in terms of not being part of the land if there is some element of permanence. For a ship used for transport, there would be no permanence – but not so for a storage unit. But this is where we run into issues of whether seabed is land. We have no details of the way in which the "Seawise Giant" was fixed, when in service as a FSOU.

1.1.2 Market for "fixed" ships

The prevalence of such storage/transfer units does raise a real issue of characterisation for tax authorities.

There does indeed seem to be a global demand at the moment for Floating Storage Regassification Units (**FSRU**) and similar types of plant for storing oil.[9]

To illustrate the market, there was a report in February 2013 of the completion of a FSRU for Italy's OLT Offshore LNG Toscana. The FSRU was intended to have a 20 year design life and to be located 12 nautical miles off of north-west Italy in the Tyrrhenian Sea near Livorno.

The gas was to be transferred onshore through a 36.5 kilometre long pipeline, 29.5 kilometres of which are at sea, with 7 kilometres on dry land.

The FSRU was formerly an LNG carrier "Golar Frost", built in 2004 in Korea with a design draught of 11 metres, girth of 48 metres and length 288.6 metres. It was converted at Drydocks World in Dubai, but prior to conversion had a storage capacity of 135,000 cubic metres of LNG.[10]

1.1.3 Personnel

While unmanned vessels are being used for discrete purposes, such as oceanography, the time will shortly come when oceangoing vessels are unmanned. Felski & Zwolak, of the Polish Naval Academy, recently wrote:[11]

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[7] Dicey & Morris, *Conflict of Laws* (16th Edition) Volume 2, pp 1345-7. See a tax case to the contrary, *Trustees Executors & Agency Co v IRC* [1973] Ch 254. On examination, it would seem that there are narrow purposes for which the ship is taken to be at its home port, and these purposes seems to be about how you give effect to a transaction, rather than whether the ship will be subject to a revenue law under some fiction. For example, the topic is dealt with under the heading "Sale of moveables" in one of the texts referenced by Dicey & Morris, by Ernst Rabel, *Conflict of Laws: A comparative study*, volume 3, pages 74-75 (Ann Arbor, University of Michigan Law School, 1958). McNair, *Legal Effects of War* (4th Edition) pp. 441-445 gives contradictory examples, which show the weakness of such a presumption, even in the context of ship sales.

[8] Refer the article by Peter Preskar, *op cit.*

[9] Nasdaq OMX's News Release Distribution Channel, "The global floating storage regassification unit (FSRU) market is expected to grow by 80.92MT during 2021-2025 …", viewed at ProQuest on 6 July 2023.

[10] "Drydocks in floating storage unit success, TradeArabia, 6 February 2013". Viewed at Pro Quest on 6 July 2023.

[11] Felski & Zwolak, "The Ocean-Going Autonomous Ship—Challenges and Threats" (2020) 8(1) Journal of Marine Science and Engineering 41

> Currently, autonomous or remotely controlled platforms are used at sea, primarily as carriers of various measuring devices. This applies particularly to hydrography, oceanography and off-shore technologies. However, these are still operations carried out mostly nearshore, usually in controlled test areas or outside the shipping routes.
>
> Many companies, mostly from Scandinavian countries and Japan, are working on full-size autonomous ships with the goal of obtaining cargo vessel or even passenger vessel capabilities. Kongsberg and Rolls-Royce seem to be conducting the most advanced work. They have just received funding from the European Commission (the 'Autoship' project) in the amount of 20 million euro from 27.6 million of the total project costs. In this framework, within two and a half years, two autonomous ships will be built with the option of remote control and all the necessary infrastructure. The tests are to be carried out during the two pilot demonstration campaigns on the sea routes from the Baltic corridor to the largest ports of the European Union. It can be expected that the success of these experiments will also lead to the fact that in the future some existing ships will be reconstructed to such a standard, which may prove to be a cheaper solution.

It seems that manning will thus be reduced, and control will be centralised. At least in the first instance, however, it seems likely that personnel onboard will be reduced, not eliminated:[12]

> Before crews are removed from vessels, they most likely will be reduced to minimum operating levels while certain tasks are automated. Reducing a vessel's crew while increasing onboard automation does not automatically reduce the amount of duties required of the remaining onboard crew. For this concept to be fully understood, one must be cognizant of all of the duties and responsibilities of a ship's crew.

Regardless of whether there are personnel aboard ship, at least in the near future, merchant shipping will not be wholly unattended. The model most likely to gain attraction in the near term involves some direction by personnel located remotely. The ship will have some level of autonomy - such as a state known as "Directed control" - but with decisions residing with the human operator:[13]

> Under Directed control some degree of reasoning and ability to respond is implemented into the Unmanned Vessel. It may sense the environment, report its state and suggest one or several actions. It may also suggest possible actions to the operator, such as e.g., prompting the operator for information or decisions. However, the authority to make decisions is with the operator. The unmanned vessel will act only if commanded and/or permitted to do so.

There is an issue about operator training. On one view, sufficient experience at sea is needed to operate from land.[14] At least for the time being, this is a self-limiting factor, and there will presumably need to be attended vessels for a while yet.

In short, issues regarding employment taxes for crews will not completely disappear, but there will be an increase in issues about remote work.

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[12] Hannaford, Elspeth. "Risks and Benefits of Crew Reduction and/or Removal with Increased Automation on the Ship Operator: A Licensed Deck Officer's Perspective." (2021) 11(8) Applied Sciences 3569.
[13] Felski & Zwolak, op cit.
[14] Ibid

1.2 Oil and gas platforms

Offshore platforms have something of a history. They have been built for a number of different uses over the years including:

- Army support units
- Surveillance activities
- Navigational purposes
- Oil and gas.[15]

The first offshore oil platform was driven in 1887.[16] It was only about 90 metres out into the ocean.

Nowadays, there is a variety of different ways of building an oil and gas platform offshore platform. Engineering requirements, including depth of water, govern choice.

Remember, even once the platform is in place, there will be a well drilled, sometimes several thousand metres, below the seabed.[17]

Typically, an offshore complex can include:

- The production platform
- Living quarters
- Wellhead platform
- Riser platform
- Satellite platform
- Flare platform

A satellite platform can be connected to the main platform via subsea cables (for power and for control signalling), and via infield pipelines (for the transfer of crude oil or gas). The distance between the satellite platform and the main complex may be up to several kilometres.[18]

These are very complex structures, and a glance at any of them shows that they are covered, every inch, in machinery.[19]

1.2.1 Economic value of resource

According to Britannica:

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[15] Samie, *Practical engineering management of offshore oil and gas platforms* (Elsevier, Amsterdam, 2016), Chapter 1. This book was viewed electronically, so pagination will be inaccurate if given, hence reference to chapters.
[16] Ibid, Chapter 1.1.
[17] Ibid, Chapter 1.2.
[18] Ibid, Chapter 1.2.
[19] Srinivasan Chandrasekaran, *Offshore semi-submersible platform engineering*, (Taylor & Frances Group, 2021), viewed as an online book and therefore references are given to chapters and parts of chapters. See here Chapter 2.1.2.

> "Submarine hydrocarbons
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> Deposits of petroleum and natural gas under the seafloor are the most valuable and sought-after fuels of the contemporary world economy. Shallow seas and small ocean basins, such as the South and East China Seas, have notable reserves, but exploitation of some deposits has been hindered by territorial disputes. Among the countries bordering the Pacific Ocean and its marginal seas, the proportion of production from submarine reserves varies widely, from less than half in Indonesia and Japan to nearly all in Australia and Malaysia."[20]

In shallower waters, say in the Arctic, drifting ice can be a hazard for a fixed platform. Therefore, artificial islands have been constructed instead of a platform.[21] Naturally, there must be an issue about whether that then comprises land, though there will then be issues about whether the land is the subject of control by any particular system of law.

More usually, the industry uses platforms. Up to a depth of about 500 feet or 152 metres, a fixed platform with either concrete or metal legs planted into the sea floor can be used.[22]

But in deeper waters, drilling can be done either from free-floating platforms or from platforms which are made to rest on the bottom. This is possible in waters up to about 5,000 feet (1,524 metres). In practice:[23]

> "Floating rigs are most often used for exploratory drilling and drilling in waters deeper than 3,000 feet (914 metres), while bottom-resting platforms are usually associated with the drilling of wells in an established field or in waters shallower than 3,000 feet."[24]

Instead of a platform, it is possible to use a drilling ship.[25]

> "This is an oceangoing vessel with a derrick mounted in the middle, over an opening for the drilling operation. Such ships were originally held in position by six or more anchors, although some ships were capable of precise manoeuvring with directional thrust propellers. Even so, these drill ships roll and pitch from wave action, making the drilling difficult. At present, dynamic positioning gear systems are affixed to drill ships, which permit operations in heavy seas or other severe conditions."

Even where we are using floating technology, all such technologies "involve the use of fixed (anchored) systems, which may be put in place once drilling is complete and the drilling rig demobilised".[26]

Even when you are dealing with a platform which is described as "semi-submersible", either the legs on the platform have been flooded so as to make contact with the ocean floor, or the semi-submersible platform is tethered to the ocean floor by cables.[27]

It will only be in the case of a platform wholly using dynamic positioning, or a drilling ship using same, that there will not be solid attachment to the ocean floor.

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[20] "Pacific Ocean", *Britannica Library*, Encyclopedia Britannica, 29 July 2021, accessed 6 July 2023.
[21] "Petroleum production", *Britannica Library*, Encyclopedia Britannica, 22 January 2021, accessed 6 July 2023.
[22] Ibid.
[23] Ibid
[24] Ibid.
[25] Ibid.
[26] Ibid.
[27] Srinivasan Chandrasekaran, ibid, Chapter 2.1.2.

1.2.2 Personnel

We found the literature sparse. The literature, such as it is, indicates that oil and gas production platforms remain manned. There does seem to be an emphasis now on skilled staff, though some tasks remained for unskilled workers.

Describing arrival at one platform off of the Orange County's coast, Patrick Mott of the *Los Angeles Times* wrote:[28]

> "Once on the platform, the workers fan out to varied jobs that compel them to work, eat, sleep and play in an islandlike isolation a tantalising 17 miles off the county's coast … They are surrounded by deep ocean in federal waters, yet they are on a static structure supported by several submarine legs that plunge 265 feet to the bottom of the ocean, making the platforms immobile islands.
>
> …
>
> 'Every little space out here is used to its absolute potential' Huben said. 'Everything is so eminently practical that this place has a kind of beauty of its own. And you're finding out new things all the time, things on the platform that you haven't noticed before. …
>
> Huben presides over the electronic nerve center of the complex, a room … whose walls are covered with switches gauges and other devices that monitor each stage of the path the oil takes – from the time it enters the platform through a series of drilling connectors, to the time it leaves for Long Beach through a 16-inch pipe."

We were unable to find more contemporary information about manning levels on production platforms, but we gather that production platforms remain manned, at least to some degree.

1.3 Cables

1.3.1 Communications

The history of undersea cables pre-dates the telephone. There was an undersea cable laid for telegraph purposes in 1850, between England and France.[29]

An initial attempt was made to span the Atlantic in 1858, but the insulation failed. The cable was abandoned. The first transatlantic cable which enjoyed lasting success was laid in 1866.[30]

A technological difficulty with using longer undersea cables was overcome with the use of telephone repeaters, which had a sufficiently long life, in the 1950s.[31]

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[28] Mott, "Life on an oil rig", *Los Angeles Times* 5 January 1989.
[29] "Undersea cable", *Britannica Library*, Encyclopedia Britannica, 21 July 1998, accessed 6 July 2023.
[30] Ibid.
[31] Ibid.

In those days, we were reliant on vacuum-tube technology, so laying such repeaters at depth (up to 2,000 fathoms or 3,660 metres) seems now quite an achievement. This was done with the first transatlantic telephone cable, Scotland-Newfoundland, 1956.[32]

1.3.2 Power

There is also a use in transmission of power. We see power cables laid under rivers, and across lakes and bays, but obviously "Sun Cable" raised the possibility of long-distance transmission of power on an intercontinental basis. The "Sun Cable" concept was initially a 4,200 kilometre undersea transmission cable from Darwin to Singapore.[33]

While the focus of "Sun Cable" now appears to be more on development of renewable energy onshore for use in Australia, it is instructive to note the very large costings mentioned recently in relation to the development.[34]

> "Internal Sun Cable costings show the cost of one version of the project in its original incarnation – including the solar development and undersea cable – had ballooned to $65 billion earlier this year, significantly higher than the original $35 billion cost."

No revenue authority can ignore something of that magnitude.

Whilst the above costings include onshore facilities, a significant part of the value would have been in the 4,200 kilometres of undersea cable.

1.3.3 Engineering

There is a good deal of engineering thought going into submarine cable. Quite apart from issues of regulation of laying and the necessary precursor, undersea surveys, there is a practical aspect. You have to look for the most cost-effective approach to path planning for the cables. In short:[35]

> "The latest submarine telecoms industry report shows that 99% of international communications are carried over submarine cables. The performance of such a critical infrastructure has great impact on businesses and consumers.
>
> For example, Amazon found that every 100 milliseconds of latency (ie, the time delay in sending data from one location to another, which is directly related to the cable length) cost them 1% of profit, and Google estimated that every 100 milliseconds of latency reduce traffic by 4%."

Although the literature we have examined for the purposes of our research is now looking a little dated, even in 2019, it was being projected that the spend on submarine cable projects worldwide between 2016 and 2018 would:

- Total about USD 9.2 billion;

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[32] Ibid.
[33] "Singapore not our focus, says new Sun Cable investor Quinbrook", *Australian Financial Review*, 31 May 2023 5 am, viewed on line 6 July 2023.
[34] Ibid.
[35] Wang and Others "Cost-effective path planning for submarine cable network extension", IEEE Access, volume 7, 2019 pages 61883-61895.

- Represent a five-fold increase over the previous three years.[36]

All factors pointed to large demand, given the then bottlenecks in 2019. Indeed, in 2019 it was said: "data bandwidth demand is envisioned to double every two years for the foreseeable future".[37]

In terms of what a particular State or Territory might have to grapple with, if it was considering how far a cable might be attributable to territory controlled by the State or Territory, two things stand out:

- There are two basic engineering choices available in terms of landing the cable. It could either go to a single "cable landing station" or the cable might provide for branching, so that multiple cable landing stations are engaged.[38]

- The path of the cable will not be determined solely by attempting to run the shortest length of cable (thus reducing latency). Rather:[39]

> "While length certainly adds to the basic construction cost of a submarine cable, its life-cycle cost depends also largely on various natural and human factors that are of concern to the submarine telecoms industry. They typically include volcanic eruptions, earthquakes, water depth, seabed slope, sediment hardness, human activity such as fishing and anchoring. In addition, in path planning for submarine cables, it is important to avoid environmentally sensitive regions and prohibited areas. For ease of maintenance and repair, it is also necessary to keep a safe distance from existing man-made submarine infrastructure."

There does seem to be a quantity of cables laid which are not buried or only partially buried. These are more susceptible to damage, for example by fishing and anchoring.[40]

But where you wish to bury a cable, and the water is relatively deep, you use a remotely operated vehicle usually to assist in that process.[41]

One of the factors which can determine path of the cable is thus sediment hardness:[42]

> "In areas where the cable needs to be buried, soft and loose sediment types are commonly preferred, and rocky seabed terrains need to be avoided because of the difficulty in burying. Where rocky regions are unavoidable, other forms of protection for cables are available including double armoring of the cable, articulated pipes and cable anchors."

[36] Ibid.
[37] Ibid.
[38] Ibid, page 61884.
[39] Ibid. (Underlining added)
[40] Ibid, page 61887.
[41] Ibid, page 61886.
[42] Ibid.

1.4 Pipes

The international regulation of pipelines differs from the regulation of cables.[43] And there are significant international pipelines, as came to public attention with the explosive events in 2022 involving the Nord Stream gas pipelines.[44]

However, pipelines are of lesser significance to Australia than undersea cables, and we cannot see that the differences in regulation internationally are materially going to give a different result than the situation with cables.

The engineering required to lay the Nord Stream 2 gives a clue about options available if other long pipelines are contemplated in our hemisphere.

The Nord Stream 2 pipeline was a duplication of the existing Nord Stream, and runs 1,230 kilometres from Russia, through five EEZs, to Germany.

In order to choose a safe route in a complex seascape (which included unexploded ordnance from wars), a seabed survey was required.

The pipes themselves have a diameter (presumed internal diameter) of 1.15 metres and are 12 metres long each. 200,000 pipes had to be constructed. The metal pipe was doubled in weight by application of a concrete coating. This enabled the pipe to sit stably on the deep ocean floor and also provided additional protection.

Pipe laying vessels were laying up to 3 kilometres of pipe per day. The system enabled an element of flex between the pipes so that the pipes could negotiate most of the ocean bottom, but:

- where the pipes would be subject to stronger currents, for example in shallower water, the pipes were laid in trenches to provide additional stability;
- where the ocean bottom was so rugged that there would be any great length of unsupported pipe, fill had to be applied to the ocean bottom for the pipe to sit on;
- where the pipe would cross existing infrastructure such as a cable or another pipeline, a rock mattress was provided to minimise interaction between the pipe and the other infrastructure.

Thus, we see that inshore pipes may well be laid in trenches, instead of being freestanding on the ocean bottom.[45]

1.5 Undersea mining

We have already dealt with oil and gas mining above. Another topic involves undersea mining for base metals.

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[43] Gemma Andreone, "The Exclusive Economic Zone", being Chapter 8 in Rothwell & Ors, *The Oxford Handbook of the Law of the Sea*, page 178.

[44] The Nord Stream 1 & 2 undersea gas pipelines, which connected Russia to Germany, were damaged by explosions on about 26 September 2022 European time. Refer "Who blew up the Nord Stream pipelines?", The Economist, 8 March 2023.

[45] I found it difficult to obtain documentation about the engineering behind Nord Stream 2. However there is a video at YouTube on the "Practical Engineering" channel, "the engineering behind Russia's deadlocked pipeline: Nord Stream 2".

At the moment, we do not perceive that this will be an issue for State revenue authorities for some time.

However, the activity internationally illustrates why that is so, and indicates the potential means of exploitation, which again probably will not engage the State revenues for the short term.

At time of writing, the two years' notice given by The Metals Company (a mining company sponsored by Nauru) to the International Seabed Authority (**ISA**) in Jamaica, that Nauru intended to commence deep sea mining, had expired. We understand that about 3 weeks of intense negotiations ensued, at the scheduled 28th session of ISA in Jamaica.[46]

Starting with Nauru's notice, ISA had had two years to formulate rules governing commercial exploitation. Those rules were not finalised by the deadline, 9 July 2023, requiring ISA to consider and provisionally approve the application by The Metals Company.[47] But it would appear that ISA has pushed out the deadline for making regulations about offshore mining for another 2 years.[48]

Materially, the only area of seabed which had been opened for exploration in this way was the Clarion-Clipperton Zone (CCZ), an area of the Pacific Ocean encompassing 6,000,000 square kilometres between two of the long, straight "fracture zones" in the crust beneath the Pacific.[49]

This is an interesting part of the ocean floor. As described by *The Economist*:[50]

> "A patch of the Pacific Ocean seabed called the Clarion-Clipperton Zone (CCZ) is dotted with trillions of potato-sized lumps of nickel, cobalt, manganese and copper, all of which are of interest to battery-makers … Collectively the nodules hold an estimated 34 m tonnes of nickel alone – more than three times the … estimate of the world's land-based reserves. Companies have been keen to mine them for years. With the coming exploration, on July 9th, of an international bureaucratic deadline, that prospect looks more likely than ever."

1.5.1 The technology for the CCZ

The Economist describes the mining method for these potato-sized clumps as follows:[51]

> "Since the nodules are simply sitting on the bottom of the ocean, the firm plans to send a large robot to the seabed to hoover them up. The gathered nodules will then be sucked up to a support ship on the surface through a high-tech pipe, similar to ones used in the oil-and-gas industry.

[46] Personal communication from a participant to one of the authors. Generally, see ISA's website, especially: https://www.isa.org.jm/sessions/28th-session-2023/
[47] "Deep-sea mining may soon ease the world's battery-metal shortage", The Economist, 2 July 2023.
[48] It is difficult for non-participants to understand what has occurred. The documents posted, and language used, by ISA could hardly be less transparent. See the decision of the ISA Assembly, 28 July 2023, ISBA/28/A/16. See reportage by EC Alberts, "Deep-sea mining rules delayed two more years; mining start remains unclear", at the Mongabay website – https://news.mongabay.com/2023/07/deep-sea-mining-rules-delayed-two-more-years-mining-start-remains-unclear/
[49] Paraphrasing "Race to the bottom", The Economist, 10 March 2018, in the "Technology Quarterly" section dealing with ocean technology on that occasion.
[50] *The Economist*, 2023, ibid.
[51] Ibid.

> The support ship will wash off any sediment, then offload the nodules to a second ship which will ferry them back to shore for processing. The surplus sediment, meanwhile, will be released back into the sea at a depth of around 1,500 metres, far below most ocean life."

Much of the attention about seabed mining has been on the environmental impact. The authors of the present paper take no position on the environmental impact as the authors do not have the necessary expertise. We feel it necessary to add this caveat, because the issue is quite contested. We are merely describing someone else's proposal.

Visual inspection of pictures of the equipment proposed for this mining indicates to us that it is likely to constitute chattels, though some of the research we have seen does, in the future, contemplate actual excavation of the seabed to a greater extent than simply turning over nodules or mining the walls of volcanic pipes. The ships, both permanently at the mine site and ferrying the ore, will also constitute chattels, most likely.

This will not always be the case. In inshore waters, it is known that some mining has occurred, for example following a coal seam or ore body out under the sea. Also, Anglo American has been mining diamonds at modest depth, off of Namibia, from the "SS Nujoma" since 2016.[52] However we do not perceive this involves any novel issue.

1.5.2 Personnel

The undersea equipment is necessarily uncrewed. The ships present the same issues discussed above.

1.6 Electricity generation

1.6.1 Technology

Wind, wave, and tidal power generation is well-studied. There is a French patent of 12 July 1799 for a wage energy converter.[53]

At one level, each form of energy capture is distinct.

For example, wave vs tide energies are sometimes treated as separate subjects.[54] That said, wave energy remains in developmental phase.[55] But there are claims that it is moving toward commercial viability.[56]

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[52] Anglo American's website, viewed 11 July 2023.
[53] Partially reproduced in Ning, Dezhi & Ding, Boykin (Ed's), *Modelling and optimization of wave energy converters,* (Taylor & Francis Group, 2022), chapter 1 by Mahon, Ning, Ding & Sergiienko "Wave energy converter systems – status and perspectives" page 5.
[54] Wikipedia entry for "wave power" differentiates. Viewed 9 July 2023.
[55] Ning *et al., op cit.* page 5
[56] Ibid.

Further, Dr Nataliia Sergiienko at the University of Adelaide is working on the combination of hybrid wind/wave platforms.[57] And there appear, to the layperson, to be some basic engineering requirements that make these items sufficiently similar to treat together for present purposes.

What each form of technology appears, to these observers, to have in common is a robust connexion to the seabed. This is vital in the case of wave and tidal power, to generate the height differentials, for example by a floating device as against the seabed, from which power is harnessed.

Beyond that, we observe that:

- Cases about wind power on land have involved the closest examination of the actual equipment used.[58]
- While inshore it is possible to firmly affix part of the equipment to the seabed, there is quite a deal of research and experience about “floating” wind turbines.
- Whilst the solid body of the floating structure has underwater elements, which a sailor has described to me as in the nature of a keel (an underwater part of a ship which is leaded for weight and which gives the ship stability), there is no doubt that the whole structure is firmly anchored to the ocean floor.

1.6.2 Personnel

It seems that wind farms, including substations, may be able to be left unattended for substantial periods, as technology develops. There is work on reducing personnel requirements even for the substations:[59]

> Digitalization, automation and autonomation have provided enormous opportunities for the energy industry to increase productivity and reduce costs related to operation and maintenance of assets. (The) Offshore wind energy industry is very cost sensitive, as the margins are low and competition is tight. Thus, it is crucial to reduce the levelized cost of energy, by reducing the capital, operations, and maintenance expenditures, and increase the generated electrical energy. A substation is a part of the entire wind farm that collects and exports power generated by the wind turbines. It significantly contributes to the wind farm capital (7.5-9%) and operations and maintenance expenditures. Substations are intended to operate unmanned at only a few visits. However, these installations shall have lifts, cranes, boat landings, helicopter deck and accommodations which makes the sheer size of the structure as the main manoeuvring and cost challenging. Self-installing and lifting concepts are developed and deployed to eliminate the need for expensive and risky lifting vessels. However, the configuration of the substation is highly dependent on the maintenance philosophy and how the substation is served, how frequent and how fast it shall be served. These maintenance issues are directly related to the operations and maintenance expenditures, i.e. manning and equipment cost, but they also influence the substation's configuration where redundancy of equipment (maintenance work can be done

[57] Staff page at the university’s website, viewed 9 July 2023 - https://researchers.adelaide.edu.au/profile/nataliia.sergiienko
[58] For example, there were photographs in the judgment of Payne JA in *SPIC Pacific Hydro Pty Ltd v Chief Commissioner of State Revenue* (2021) 113 ATR 24; 2021 ATC 20-788. Though there were no pictures, apart from maps of the site, there was excruciating levels of detail in the trial decision in *AWF Prop Co. 2 Pty Ltd v Ararat Rural City Council* [2020] VSC 853, which was a case about fire services levy in the Victoria. The decision of Richards J was affirmed in *Valuer-General v AWF Prop Co. No. 2 Pty Ltd* (2021) 65 VR 327.
[59] Tolstow, K. T., A. Beiky, and I. El-Thalji. "Maintenance Philosophy for an Unmanned Platform: A Case Study for an Offshore Wind Substation." IOP Conference Series Materials Science and Engineering 1201, no. 1 (11, 2021)

while the system is uptime), storage areas for spare parts, equipment to enable repair or replace work (fast replacement like plug and play modules) and accommodation or shelter are allocated.

2. State Agreements

Where a State or Territory will likely provide services to a project, or to workers and their families, it may nevertheless be difficult to obtain revenue directly from the project.

Of course, deals could be done about harbour dues, royalties (to the extent that the State or Territory claims some entitlement), road or rail transport tolls or rates, and imposts on land on shore. And a proponent may desire certainty, relief from numerous bureaucratic hurdles, and to time cash outflows more flexibly (eg defer earlier royalties etc.) to allow capital to be devoted to direct development costs.

The provision of facilities in remote locations, where the facilities integrate with the wider network of such facilities in a State or Territory, may be of great value to the proponent of a scheme. The continued provision of such services, in a way which is agreeable to the proponent and the State or Territory, is sometimes set up by a State Agreement.

Although fine in principle, such State Agreements have constitutional and practical flaws that require consideration.

State Agreements were once quite fashionable. It was said in the late 1980s:[60]

> The majority of Australia's largest mining and mineral processing projects, and a good many other major projects of a capital-intensive nature in this country, are operating under the terms of an agreement between the developers and the Government of the State where the project is located.

The function has been described this way:[61]

> "Most of these agreements have concerned mining or other extractive industries and have involved the granting to the private corporation of special legal rights, powers, privileges and immunities. The legal regime agreed upon is usually impossible or difficult to achieve within the framework of existing law, and its accomplishment therefore requires legislative action."

Various advantages, beyond providing a special regime for the development to occur, have been pointed out.

First the developer does not have to run the gauntlet of considering whether the State, as party, can justify its actions in terms of the doctrine of executive necessity.[62]

> "If the executive act of the government party is sought to be justified as an exercise of a statutory discretion, the problem becomes one of deciding whether the statute conferring the discretionary power overrides the statute imposing the obligation alleged to have been infringed. The solution of this problem will depend on general principles regarding the effect and operation of statutes. If an undertaking by the Crown or some other public body is converted into a statutory duty, then clearly the statutory provision imposing that duty will be valid and binding – unless it happens to be unconstitutional – and it will remain so until overridden by subsequent statutory enactment or by an act authorised by statute."

[60] Warnick, "State Agreements", (1988) 62 ALJ 878.
[61] Campbell, "Legislative approval of government contracts", (1972) 46 ALJ 217.
[62] Campbell, above, page 218. (Underlining added)

A second advantage for the developer is as a "means of obtaining exemptions and immunities from the operation of laws otherwise applicable to them, as well as privileges".[63]

Thus:[64]

> "If a government decides that a pioneer industry or development company should be assisted by being relieved of tax liability, and enters into an agreement to that end, the agreement to exempt from tax is legally ineffective until given statutory force."

A further advantage seen is an agreement with the State government to establish facilities in a remote area with little or no existing facilities.[65] Other perceived advantages with State Agreements are listed by Barnett as follows:[66]

- Project security. State Agreements are "facilitating documents" as opposed to "statutes performing regulatory functions". They are only able to be "changed by mutual agreement in writing between the parties", according to this 1996 article by the then Western Australian Minister for Resources Development.
- Security of tenure – tenure is secured typically by the developer complying with development obligations.
- Advantages to the State in terms of development.
- Formalising the "whole of government support" for a project.
- Alleviating impact of other legislation.
- Overcoming issues about local government rates, regulating impact of taxes and charges, and facilitating compliance with zoning.
- Dealing with any resumption issues.
- Avoiding duplication of statutory reporting obligations, for example in relation to environmental reports that are able to be dealt with specifically under the State Agreement, rather than complying with other obligations.

2.1 Reality – Ability to be changed by State

The unhappy reality with State Agreements has been that the agreement, although given force of statute, can nevertheless be overridden by subsequent statute of the same polity.

This is now a function of the limitations in the *Australia Act 1986*. Section 2 conferred full plenary powers of legislation upon the parliaments of the States, and section 3 terminated the application of the *Colonial Laws Validity Act 1865* insofar as any law made by a State Parliament after commencement of the 1986 Act was concerned.

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[63] Campbell, above, pages 218-219.
[64] Campbell, above, page 219.
[65] MacDonald, "The negotiation and enforcement of agreements with State governments relating to the development of mineral ventures" (1977) 1 Australian Mining and Petroleum Law Journal 29.
[66] Barnett, "State Agreements", AMPLA Yearbook 1996, 314, from 317. Mr Barnett went on to become Premier.

The only exception which is material is the saving of the ability to impose "manner and form" restrictions on amendments to certain laws, by section 6 of the *Australia Act 1986*. That provision says (underlining added):

> "Notwithstanding sections 2 and 3(2) above, a law made after the commencement of this Act by the parliament of a State respecting the constitution, powers or procedure of the Parliament of the State shall be of no force or effect unless it is made in such manner and form as made from time to time be required by a law made by that Parliament, whether made before or after the commencement of this Act."

Curiously, the Australian Capital Territory is unaffected by this, and so the manner and form provision in section 26 of the *Australian Capital Territory (Self-Government) 1988 (Cth)* provides that the ACT Assembly may pass a law "prescribing restrictions on the manner and form of making particular enactments", with the effect of entrenching a law. This is not expressed as being only laws about constitutional matters or how laws are passed generally by the Assembly. There is a safeguard, in that the entrenching law has to be submitted to a referendum.

We see no equivalent provision in the *Northern Territory (Self-Government) act 1978 (Cth)*, though we find Northern Territory law very difficult indeed and this might be referred for specialist advice to a Territory practitioner.

In short, there is no simple way of gaining an assurance, by insertion of an entrenchment provision, that a State Agreement will not be overridden by an ordinary Act of the same parliament, if the government changes or attitudes change.[67]

2.2 Examples of disputes

2.2.1 COMALCO Agreement

There is an area around what was formerly the small mission station of Weipa, which historically was recognised "as one of the world's largest deposits of bauxite".[68] The deposit varied in depth from 10-30 feet over an area of thousands of square miles. Of that, 200 square miles were considered, by about 1962, "to be of commercial value involving over 1,000,000,000 tons of ore".[69]

A partnership called COMALCO or the Commonwealth Aluminium Corporation Pty Ltd, was formed between Consolidated Zinc Corporation and an American group, Kaiser Aluminium and Chemical Corporation.[70]

As at 1961, about 40,000 tons had been extracted mostly for investigation. This was exported to Japan to COMALCO's existing works in Tasmania at Bell Bay.[71]

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[67] There is considerable intellectual interest in the question of entrenchment. However I find it unnecessary to cite it in detail. Principally, refer Chapter 5, "Manner and form" in Twomey, *The Constitution of New South Wales* (The Federation Press, Sydney, 2004), at pages 268-322 and Chapter 9, "Amendment of the constitution" in Taylor, *The Constitution of Victoria* (The Federation Press, Sydney, 2006) at pages 462-520.

[68] Driscoll, "Weipa, a new bauxite mining area in North Queensland" (1962) 47 *Geography* 309-310.

[69] Ibid.

[70] Ibid.

[71] Ibid, pages 309-310.

The plans reported to the world by Mr Driscoll in *Geography* in 1962 were described as follows:[72]

> "Eventually, probably by 1964, an alumina plant will be established Lorim Point fed by conveyer belts from the main working areas. A loading wharf at this point will be connected to Albatross Bay by a deep-water channel (21 or 33 feet) which is being dredged through the offshore bar. The area around Jessica Point will become the site of a township of between 3,000 and 5,000 people, although the present population is about 100. The mission station and airstrip will be moved, the former across the Embley River to Hays Point, to make way for these developments."

What ultimately occurred, of course, was that the alumina refinery was set up in Gladstone. But as at 1962, the intention was by 1966 to export alumina to New Zealand (as there was already development of a site for a new aluminium smelter at Bluff connected to the Lake Manapouri Hydro-Electric Scheme); and to what was then Australia's only aluminium smelter at Bell Bay, Tasmania.

At that point there was a mere suggestion of setting up another aluminium smelter in Australia, connected to the Blair Athol coalfield. Evidently, the decision was ultimately made to site first an alumina smelter, and then an aluminium smelter, in Gladstone.

Initially the alumina smelter had its own electricity generation capacity, which was coal fired.[73] Ultimately, the Gladstone Power Station was purchased by aluminium interests, and supplies the needed power.[74]

2.2.2 History of the development

Aluminium is sometimes described as electricity in solid form. When the Commonwealth of Australia agreed with Tasmania that ingot aluminium should be produced in Tasmania for the purpose of the war effort in late 1944, the agreement between the Commonwealth and Tasmania specifically provided that supplies of electricity required for the production should be obtained from the Hydro Electric Commission of Tasmania and that Tasmania was to take necessary steps to ensure supply of that electricity at a rate satisfactory to the newly established Australian Aluminium Production Commission.[75]

Curiously, the Weipa bauxite deposit (though previously appreciated) was said to have only been "discovered" in 1955.[76]

The Bell Bay smelter in Tasmania produced its first aluminium in 1955, at a time when it was still under government ownership.[77]

At one time, Weipa was said to be the largest bauxite mining and shipping centre in the world. Nearly two-thirds of the bauxite was, at that time, refined to alumina in associated plants at Gladstone and in Italy. Alumina was then reduced to primary aluminium in COMALCO operated smelters at Bell Bay,

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[72] Ibid.
[73] Personal observations when visiting the site some decades ago.
[74] Website of "nrg", viewed 5 July 2023.
[75] *Aluminium Industry Act 1944 (Cth)*, Schedule, clause 7 of the agreement.
[76] COMALCO, "COMALCO in Brief", (COMALCO, Melbourne, 1978), viewed on 6 July 2023 at John Oxley Library, SLQ.
[77] Ibid.

Tasmania and at Tiwai Point, New Zealand. (Paraphrasing here from a COMALCO document acknowledged in footnotes.)

To get up the bauxite mine, The Commonwealth Aluminium Corporation Pty Ltd entered into a State agreement with Queensland in 1957.

That Act was entitled *The Commonwealth Aluminium Corporation Pty Ltd Agreement Act of 1957* (Qd). The formal parts of the Act referred to the Premier and Chief Secretary of Queensland being "hereby authorised to make, for and on behalf of the State …" with COMALCO, "the Agreement a copy of which is set out in the Schedule to this Act".

Section 3 of the Act provided that, upon the making of the Agreement, "the provisions thereof shall have the force of law as though the Agreement were an enactment of this Act", and that there should be a proclamation notifying the date of making the Agreement.

There is a lengthy agreement set out in a Schedule. Other schedules deal with grants of leases, both land tenure and mining tenements. And one schedule sets out the metes and bounds of two areas dealt with.

The Agreement provided by clause 3:

> "This Agreement may be varied pursuant to agreement between the Minister and the Company with the approval of the Governor in Council by Order in Council and no provision of this Agreement shall be varied nor shall the powers and rights of the Company hereunder be derogated from except in such manner."

The Agreement provided for the provision of very substantial development at the remote location of and around the Weipa bauxite mine. Very large rights were given to the company, including prospecting rights for coal, the rights to win timber, stone, clay, sand, gravel and aggregate, as well as the right to draw water from the sea and estuaries.

It is possible to imagine just how much bureaucracy was cut through in a few words of this Agreement.

The company was even given the right to dam the river, within certain limits.

It is impossible to enumerate here the variety of topics to do with development of a whole new town and mine in a most remote location, dealt with in the 50 or so pages of this most important Act. It is also impossible to exaggerate the importance of this development to Queensland in general, but also to northern Queensland and Gladstone in particular.

What could possibly go wrong?

2.2.3 Dispute

Without the form of agreement contemplated by clause 3 of the State Agreement, the Queensland Parliament enacted a royalties Act in 1974, under whose regulations the royalties payable by COMALCO were increased despite the 1957 Agreement.

COMALCO sought a declaration, relevantly, that the 1974 Act was invalid because it derogated from COMALCO's rights under the State Agreement.

By majority, the Full Court of Queensland found:

- Clause 3 of the State Agreement (quoted above) did not prescribe a manner and form requirement in terms of *The Colonial Laws Validity Act 1865*.

- Thus the 1957 Act for the State Agreement could be repealed by normal legislative process, in this case by legislating provisions in a royalties Act which were inconsistent with the State Agreement Act.

The logic is actually more complex than this, but it is sufficient to say that the State had its way.

The *COMALCO Case* signalled that there was real sovereign risk in dealing with Queensland, but later events have shown that it was not a uniquely Queensland issue.[78]

2.3 Mineralogy v WA[79]

In 2001, Mineralogy made an agreement with the State of Western Australia.

It was about iron ore processing.

In 2008, it was varied by consent.

The original and variation agreements were then included as schedules to the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002 (WA)*.

The effect of the State Act was that the Agreement and Variation Agreement were part of the State Act (by virtue of the local *Interpretation Act*). The agreement, as varied, was ratified and implementation of the agreement was authorised by the State Act. The State Agreement "operates and takes effect despite any other Act or law".[80]

However, the proponents fell out with the State over proposals submitted to government, said to be within the terms of the State Agreement. The State Agreement provided for arbitration of a dispute. Disputes were sent to arbitration, and arbitral awards made. One of the disputes submitted to arbitration, successfully, by the proponents was about inordinate delay, and about whether earlier arbitration steps precluded a claim for damages for breach of the State Agreement. Without commenting on the merits of any of this, suffice to say that arbitral awards in favour of the proponents have been made, but that the legislature then passed Bills effectively denuding those awards of any effect and value.

The three main propositions put up by the proponents, in arguing that the passage of the Bill contravened section 6 of the *Australia Act* in the manner of its enactment were:

- The amending Act was said to answer the description of "a law made … by the Parliament of [Western Australia] respecting the constitution, powers or procedure of the Parliament of [Western Australia".

- Clause 2 of the State Agreement answered the description of "a law made by that Parliament".

[78] *Commonwealth Aluminium Corporation Limited v Attorney-General* [1976] Qd R 231.
[79] *Mineralogy Pty Ltd v Western Australia* (2021) 393 ALR 551; 95 ALJR 832.
[80] Here paraphrasing paragraphs 2-3 of the judgment of the High Court of Australia.

- Clause 32 of the State Agreement prescribed a requirement as to "manner and form" in which a law was to be "made" by the Parliament of Western Australia.[81]

In short, these arguments were rejected.

Hence, it is difficult to see what security a State Agreement gives with this latest decision by the High Court of Australia. The safeguards potentially available under the *Colonial Laws Validity Act 1865* have been reduced, it would seem, by the passage of the *Australia Act*. There are restricted circumstances in which a "manner and form" requirement will be upheld, and a mere State Agreement will probably not qualify.

Nevertheless, for reasons given earlier, State Agreements offer a razor to cut through inordinate red tape, albeit with a *quid pro quo* being exacted financially.

For some projects, they will represent the best value proposition a State can offer, in return for assurance of revenue.

[81] Paraphrasing from the High Court judgment at paragraph [75].

3. Zones of the sea

As a brief revision from last year,[82] we mention the maritime zones and boundaries so that the relative control over areas offshore will be understood.

3.1 Baselines

Zones out to sea are measured from baselines.

The low water line is the normal baseline. These baselines are drawn by national governments in accordance with the UN Convention on the Law of the Sea or UNCLOS. The reason why it is necessary to draw the baseline is that claims seaward can begin at a baseline at or offshore from the mainland. The baseline will be offshore:

- Where there is a closed bay, and the baseline can be drawn to close that bay.
- Where there are fringes of islands.
- Where an island itself generate its own territorial sea, and thus the baseline might be on the beach of that island.
- Due to closing the mouth of a river that flows directly into the sea.
- At harbour works.
- At parts of the seabed exposed at low water.[83]

Once a baseline is drawn, other lines or zones can be calculated. One of the zones, however, does not depend on the baseline, being the continental shelf. Australia lays claim to its continental shelf internationally.[84]

3.2 Territorial sea

The territorial sea claimed by Australia is 12 miles from the baseline.[85]

3.3 Contiguous zone

The contiguous zone, as opposed to the territorial sea, confers some sovereign rights, but no right of sovereignty. It extends 12 miles from the limits of the territorial sea. Australia claims an EEZ.[86]

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[82] Marks, "Jurisdictional Boundaries and Immunities", 2022 State Taxes Conference, Canberra, 28 July 2022.
[83] Refer generally to Churchill, and others, *The Law of the Sea* (4th Edition) page 55.
[84] *Seas and Submerged Lands Act 1973*, section 11.
[85] Ibid, Part II Division 1.
[86] Ibid, Part II, Division 1A.

3.4 EEZ

The EEZ extends 200 miles from the baseline. Again, while conferring some sovereign rights, it confers no right of sovereignty.

3.5 Continental shelf

Australia claims both an EEZ and its continental shelf internationally. It is possible for the continental shelf to extend beyond the EEZ. The position seems to be:[87]

> "The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas but extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance."

We find how the limits are defined internationally particularly difficult to deal with, but note that there is unlikely to be a State taxes issue dependent upon the breadth of the continental shelf.

3.6 Relations between Commonwealth and States

The Commonwealth laid claim to the territorial sea by section 6 of the *Seas and Submerged Lands Act 1973*. But section 14 reserved to the States certain historic features such as historic bays and harbours.

This meant that the Commonwealth suddenly picked up many areas of regulation in which it had no expertise and no interest, such as collisions between small vessels.

In a settlement with the States within the succeeding decade, to which effect was given by a number of Acts passed by States and the Commonwealth, States were given legislative powers over "coastal waters". The States were also given power over:

- Subterranean mining that was adjacent to the land of the State.
- Ports, harbours and other shipping facilities, installations and dredging.[88]

But the "coastal waters" were limited to three miles.

The Northern Territory was dealt with by separate legislation. As Derrington & White summarise:[89]

> "The situation of the Northern Territory was dealt with in similar terms by its own two Acts. The *Coastal Waters (Northern Territory Powers) Act 1980* (Cth) had some variations from the terms of the Act for the states but otherwise gave legislative power to the NT Legislative Assembly over its coastal waters, seabed, subsoil, and airspace. The second Act was the *Coastal Water*

[87] Churchill, and others, above, pages 229-230.
[88] Paraphrasing Derrington & White, *Australian Maritime Law* (4th Edition) page 52.
[89] Ibid, page 53 (footnote omitted from quote).

> *(Northern Territory Title) Act 1980* (Cth) and, as might be expected, it gave title in much the same way as it did the state Acts."

State and Territory interpretation legislation was then amended. For example, section 47A of the *Acts Interpretation Act 1954 (Qd)* provides that the laws of Queensland "apply in and in relation to" the coastal waters of Queensland, the seabed and subsoil beneath, and the airspace above, the coastal waters of Queensland, as if the coastal waters of Queensland (as extending from time to time) were within the limits of Queensland.

The essential question then is whether the words "as if" mean that something within the coastal waters is deemed to be within Queensland. A further question is whether something affixed to the seabed is part of "land".

4. How the States and the NT deal with "coastal waters"

The settlement with the Commonwealth has been described as leaving an "unsatisfactory situation".[90]

4.1 No pattern laws for adoption

Derrington & White say that the resulting mosaic of laws, including UNCLOS is "too much for the Australian federal constitutional structure to deal with".[91]

One aspect which deserves comment is the failure of the States and the Northern Territory to adopt pattern legislation to deal with the strip of ocean about which they may legislate under the *Coastal Waters (State Powers) Act 1980 (Cth)*.

An example is found in the payroll tax:

- NSW, Victoria, South Australia, Tasmania and NT use the drafting technique of referring to "this jurisdiction", which encompasses the "coastal waters".
- The other payroll tax laws do not expressly refer to them.
- There is general drafting that may get to the same result:
    - The Northern Territory, South Australia, and Western Australia separately grasp the nettle by:
        - NT – in the *Off-Shore Waters (Application of Territory Laws) Act 1985 (NT)*, section 3, as requiring its laws to be read as applying to the coastal waters, and deeming reference to "the Territory" to include same.[92]
        - WA – likewise by *Off-shore (Application of Laws) Act 1982 (WA)*, section 3;
        - SA - *Off-shore Waters (Application of Laws) Act 1976 (SA)*, section 3
    - Queensland, NSW and Victoria make provision in their interpretation laws that:
        - The legislation is to be read as operating to the full extent of the jurisdiction's legislative powers – eg section 9(1)(a) of the *Acts interpretation Act 1954* (Qd).
        - The laws of the State apply to the coastal waters (with some exceptions) as if they were within the limits of the State – eg section 47A of that Act.
        - This is done in Qld[93] and NSW.[94] Victoria gets there by quite different language.[95]

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[90] Derrington & White, *Australian Maritime Law* (4ed) page 54
[91] *Ibid.*
[92] I have greatly summarised more elaborate and extensive drafting in section 3 of the *Off-Shore Waters (Application of Territory Laws) Act 1985 (NT)*.
[93] Section 9(1)(a) and Part 12 of the *Acts Interpretation Act 1954 (Qd)*
[94] Section 31 and Part 10 of the *Interpretation Act 1987 (NSW)*
[95] Sections 6 and 57(2)(a) of the *Interpretation of Legislation Act 1984 (Vic)*

So the interpretation legislation in Queensland has these provisions:-

"9 Interpretation of Act in relation to Parliament's legislative power

(1) An Act is to be interpreted as operating—

(a) to the full extent of, but not to exceed, Parliament's legislative power; and

(b) distributively.

(1A) Without limiting subsection (1)(a), it is declared that subsection applies (and always applied) to the legislative power conferred on Parliament under the Coastal Waters (State Powers) Act 1980 (Cwlth), section 5 and the Coastal Waters (State Title) Act 1980 (Cwlth), section 4.

(1B) Subsection (1A) does not apply in relation to the substantive criminal law, and the law of criminal investigation, procedure and evidence, under the cooperative scheme as defined under the Crimes at Sea Act 2001, section 3.

…

Part 12 Application of particular State laws to coastal waters

47 Definitions for pt 12

In this part—

cooperative scheme means the cooperative scheme as defined under the Crimes at Sea Act 2001, section 3.

criminal laws means the substantive criminal law, and the law of criminal investigation, procedure and evidence, within the meaning of the cooperative scheme.

laws of the State means the laws, whether written or unwritten and whether substantive or procedural, that are from time to time in force in the State, but does not include—

(a) laws of the Commonwealth; or

(b) criminal laws.

47A Application of laws of the State to coastal waters

The laws of the State apply in and in relation to—

(a) the coastal waters of the State; and

(b) the seabed and subsoil beneath, and the airspace above, the coastal waters of the State;

as if the coastal waters of the State, as extending from time to time, were within the limits of the State.

47B Laws with specific application not to apply

(1) Nothing in this part makes a provision of the laws of the State applicable in or in relation to a particular place—

(a) to the extent the provision is incapable of applying in or in relation to that place; or

(b) if those laws expressly provide that the provision does not extend or apply in or in relation to that place; or

(c) if those laws expressly provide that the provision applies only in a stated locality in the State that does not include that place.

(2) A provision of the laws of the State is not to be taken to be a provision to which subsection (1) applies merely because it is limited in its application to acts, matters and things within Queensland waters, coastal waters or the adjacent area, however described, of the State.

47C Extent of jurisdiction in relation to coastal waters

(1) A person who has a function or power conferred on the person under a law for the purposes of or in connection with a provision of the laws of the State has and may perform the function for the purposes of or in connection with that provision, as applying because of this part, as if the coastal waters of the State, as extending from time to time, were within the limits of the State.

(2) All courts of the State are invested with jurisdiction in all matters arising under the provisions of the laws of the State, as applying because of this part, as if the coastal waters of the State, as extending from time to time, were within the limits of the State.

47D Constitutional basis

In addition to any other power under which the provisions of this part may be enacted, the provisions of this part are enacted under the legislative power of Parliament as extended by the Coastal Waters (State Powers) Act 1980 (Cwlth), section 5 and the Coastal Waters (State Title) Act 1980 (Cwlth), section 4.

47E Saving

Nothing in this part limits any law, other than this part, that provides for the application of the laws of the State, or any part of those laws, beyond the limits of the State.

Note—

Some Acts have special application provisions, for example, the following—

• Fisheries Act 1994, section 11

• Offshore Minerals Act 1998, section 16

• Petroleum Act 1923, section 7A

• Petroleum (Submerged Lands) Act 1982, section 14.”

But the diversity of drafting – and its opacity, by referring to map references in some cases – make this difficult to follow. And solutions pronounced on the drafting in one State or Territory will not be easily generalised.

Care must be taken, as legislation on the Northern Territory, South Australia, and Western Australia model, and the Victorian provisions, seem to extend beyond the 3 nm coastal waters, in various ways.

Under section 80 of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), there is an extension of State and Territory laws beyond the 3 nm coastal waters, to the outer bounds of the continental shelf, for the waters (offshore waters) allocated to that State or Territory. But this is more limited that one might imagine:

- There is a list of purposes for which that laws are applied, to do with the purposes of that Commonwealth Act.
- The State or Territory law is applied as a law of the Commonwealth.

- Section 80 does not include a tax law.[96]

The *Offshore Minerals Act 1994* (Cth) follows the same pattern, excluding State and Territory tax laws from being applied laws.[97]

Then there are curiosities. Queensland's *Off-shore Facilities Act 1986* (Qd) deems fixed off-shore facilities to be harbour works. It deems moored offshore facilities to be ships. Queensland law is extended to such facilities.

So, it would seem that if someone struck oil in Port Curtis, the tenor of the Act probably equates seabed with land.[98] But if you drilled from a drilling ship which was anchored, instead of a platform, it is deemed to be a ship.

All this adds up to a mish-mash of offshore laws, that few understand and that cause unexpected results.

4.2 Fishing cases

The cases about fishing are most instructive.

We are dealing with a question which is complicated by the difference between public international law, and the way in which the subject matter is treated as a matter of domestic law. As Michael White says (underlining added):[99]

> "In international law and practice a sovereign state only recognises and deals with another sovereign state and the details of internal organisation and power sharing within that state are not relevant. It is simple for unitary states as only the one legal entity exists, but when it comes to federations, such as Australia, the United States, Canada, etc, it becomes complex. When this principle of law and state practice is transferred to jurisdiction over the offshore areas, the internal States have their rights and obligations fully recognised in domestic law but in international law the other sovereign states do not recognise them at all."

Mr White goes on to say, in discussing the sharing of petroleum, mining and installation laws between the Commonwealth and the States, that:[100]

> "It may be observed, however, that the resulting matrix of laws is so complex that some uncertainty must arise as to how and when they apply. There are numerous offshore activities relating to petroleum exploration and exploitation, which include the equipment concerning oil and gas platforms and ships, the ships and helicopters servicing them, the pipelines, exploration activities, seabed installations and all of the associated infrastructure, as well as the personnel who operate them all.
>
> In short, beyond the three mile limit the adjacent State or Northern Territory laws are applied in relation to petroleum activities but with many exceptions. Where the exceptions apply then the Commonwealth laws apply."

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[96] Section 85 of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006 (Cth)*
[97] Sections 428 & 431 of the *Offshore Minerals Act 1994 (Cth)*
[98] Section 4(a) of the *Off-shore Facilities Act 1986 (Qd)*
[99] Michael White, *Australian offshore laws* (The Federation Press, Sydney, 2009), page 39.
[100] Ibid, pages 55-56.

Mr White also notes the position in relation to external territories and the Greater Sunrise Area.

The cases about fishing are more numerous, and illustrate some opportunities. We realise that fishing cases are not necessarily top of mind for State revenue practitioners and administrators, but they can be referred to briefly and do give some important points which arise from the Commonwealth-States settlement.

Mapa Pearls Pty Ltd v Haliotis Fisheries Pty Ltd[101] is a dispute about the validity of leases granted by the Victorian Crown over coastal waters and subjacent seabed off of Gabo Island and Tullaberga Island in eastern Victoria. The purpose of the leases was for culturing pearls within abalone. The technique is to hold the abalone in cages affixed to the seabed, and to harvest the pearls from the abalone once the pearls are formed.[102]

The leases were granted under the *Land Act 1958 (Vic)* and were registered under the *Transfer of Land Act 1958 (Vic)*.

But there were persons who already had rights under the *Fisheries Act 1995 (Vic)* by way of access licences or quota units, to fish commercially for abalone and sea urchin in the same areas. It was said that, prior to the grant of the leases, the commercial activities of the opposing parties had co-existed, and that the areas in question had also remained open to recreational users.

At first instance, the Victorian Supreme Court declared the leases were void. The Court ordered that the leases be deleted from the register.

The lessee then sought leave to appeal to the Victorian Court of Appeal. It was successful and its appeal was allowed.

In support of their success at first instance, the respondents contended amongst other things that the area the subject of the purported leases was not “Crown land in Victoria” within the meaning of the *Land Act (Vic)*. It was said that the areas were outside the territorial limits of the State and that the areas were not “Crown land” in terms of the operative statutory provision.

But the term “land” is defined in the *Interpretation of Legislation Act* (Vic) as relevantly extending to “land covered with water”. Whilst the lease areas lay outside the territorial limits of Victoria (relevantly low water mark) they were nonetheless “owned by Victoria” by virtue of the *Coastal Waters (State Title) Act 1980 (Cth)*. So Victoria had title to the seabed beneath the “coastal waters” of the State including the lease areas.[103]

Then the question was whether Victoria could legislate with respect to seabed within its coastal waters. That power was given by the *Coastal Waters (State Powers) Act 1980 (Cth)*.

And the Court of Appeal also referenced section 57 of the *Interpretation of Legislation Act (Vic)* which provided that the provisions of the laws in force in Victoria should apply to or in relation to an act done or omitted to be done at a place in the offshore area which is within the outer limits of the coastal waters of Victoria, and any act done or omitted to be done in the offshore area by a person connected with Victoria. It extends to any matter, thing or circumstance existing or arising in the offshore area which involves or relates to persons connected with Victoria.

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[101] [2023] VSCA 108.
[102] Paraphrasing from paragraph [1] of the Court of Appeal’s judgment.
[103] Ibid, paragraphs 266-268.

Such laws are to be read as if the offshore area were part of Victoria. Relevantly these leases were in the coastal waters, so it was unnecessary to comment upon "offshore area" more generally.[104]

Putting these things together, the Court of Appeal found:

- The words "all Crown land in Victoria" used in the Victorian *Land Act* should be construed as extending to the seabed within the coastal waters (so far as was relevant for this case). There was no "general principle that 'land' does not include the sea-bed".[105]

- The Victorian *Interpretation of Legislation Act* plainly applied the laws of Victoria to the "offshore area", and again relevantly we are dealing in this case only with the coastal waters. There seemed to be no contrary intention to such application, in the context of Victoria now having title to land beneath the coastal waters and legislative power in respect of that land and those waters.[106]

- The intention could be confirmed from the *Land Act* itself, which expressly extended to land below the surface of water by virtue of the definition of "land" in the *Interpretation of Legislation Act*. There was other internal confirmation of this elsewhere in the *Land Act* because it referred to Crown lands including beds of streams and lakes for the purposes of a jetty landing and so forth.[107]

- Further, the statutory history of the *Land Act* told against confining that legislation as being read only as extending to the territory of Victoria.

Lavender v Director of Fisheries Compliance[108] is a New South Wales Court of Appeal decision about convictions for breach of regulations made by New South Wales about the abalone fishery.

The local regulatory background is complex, but we think it sufficient to refer to conclusions of greater scope and generality which are as follows:

- The regulation in question did operate both within the limits of New South Wales and its "coastal waters", but also outside the limits of New South Wales and the coastal waters.

- As to operation within New South Wales and its coastal waters, there was no inconsistent Commonwealth legislation.

- As to operation outside New South Wales's coastal waters, its operation was supported by the New South Wales legislation under which the regulations had been made, and there was no relevant inconsistency with Commonwealth legislation.

- There was nothing to the argument that the *Coastal Waters (State Powers) Act 1980 (Cth)* was invalid. And to the extent relevant, that Commonwealth legislation also supported the operation of the regulation outside the limits of New South Wales.

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[104] Ibid, paragraphs 269-271.
[105] Ibid, paragraph 275.
[106] Ibid, paragraphs 278-279.
[107] Ibid, paragraph 280.
[108] (2018) 336 FLR 37

- The *Coastal Waters (State Powers) Act 1980 (Cth)* and the corresponding legislation vesting title in the State of New South Wales were not invalid in accordance with section 123 of the *Constitution* because they did not alter the limits of New South Wales.
- Neither did the New South Wales regulation alter the limits of New South Wales in constitutional terms.

Finally, although there are a number of other fishing cases that could be mentioned, there is the recent Queensland Court of Appeal decision of *Wren Fishing Pty Ltd v Queensland*[109].

There is an area of the Gulf of Carpentaria designated N12, which is periodically subject to restrictions, and as we understand it particularly as to the use of certain types of equipment.

A diagram in the decision illustrates the area, but broadly it is "all title waters in the Gulf of Carpentaria between the line which is seven nautical miles from the low water mark of Queensland coastline and a particularised line which extends 25 nautical miles seaward into the Gulf. It covers waters which are beyond the outer limits of what are regarded as the coastal water of the State".[110]

How then does Queensland have power to make valid legislation about this?

First Queensland has power to make laws "for the peace welfare and good government" of the State in terms of the *Constitution Act 1867 (Qd)*.

Secondly, Queensland has power under the 1980 offshore constitutional settlement and the legislation which followed upon that settlement.[111]

The court set out its reasoning on the first of those points but essentially:[112]

> "As to the former source of power, a State legislature may give valid extra-territorial operation to a State law, so long as there is a sufficient connection with the peace, order and good government of the State … It was common ground before this Court that, save for the suggested inconsistency with valid Commonwealth legislation, the catching of fish within the N12 area would be regarded as an activity which is so connected with Queensland that appropriate extra-territorial laws could validly be made."

As to the constitutional settlement, the Commonwealth *Fisheries Management Act 1991* expressly allowed for the operation of certain State and Territory laws.[113]

From this we might conclude as follows. If a State was minded to pass legislation for the peace, welfare and good government of that State, and that State's law extended beyond the coastal waters of that State, on the face of it, either the interpretation legislation of the State, or sometimes specific extraterritorial legislation for the waters off of the State, can give that legislation extra territorial effect.

There is specific application of State laws in certain cases, such as for specific purposes of offshore mining and offshore oil and gas. These are but two examples.

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[109] (2022) 408 ALR 584
[110] (2022) 403 ALR 584, [8].
[111] Ibid [10].
[112] Ibid [11].
[113] Ibid [118].

The way in which the Commonwealth legislation applies State law, for particular purposes only, and then with exceptions (for example in relation to taxes) is likely to be criticised as too complex and leading to uncertainty at the margins.

But the States and Territories do not wholly rely on application of their laws as laws of the Commonwealth, in making extra territorial laws. The main feature of a tax law about dealings with property will usually, however, be identified as being a dealing with property in the given State or Territory. That in itself identifies that limited extra-territoriality is implied, perhaps extending to the limits of the coastal waters depending on the way in which the State has designed its rules about interpretation of its legislation.

Gone are the days when it had to be seriously said that it was unlikely that a general expression about taxing a transfer of property should not extend to a transfer of property between two foreigners in a foreign country. Nevertheless, there are still areas for argument at the margins here.

For example, where there is cable or pipelines connecting an offshore installation to the shore, there is a question about how far it can be said that the property is not within the given State or Territory.

5. The seabed

5.1 Characteristics of the seabed

The "seabed", also known as the seafloor or ocean floor, is a generally understood term that refers to the top-surface of earth in seas and oceans, which can change over time:[114]

> "This surface has a topography, which is directly related to the nature of its subsurface geology, in places modified by ocean currents and sedimentary processes. Both the topography and the subsurface are important factors in the use of the seabed by humankind."

The oceanic crust in the deep ocean floor is much thinner (approximately 5–15 km) and denser than the continental crust, which is approximately 20–40 km and relatively light. The general topography of Earth's seabed comprises the continental shelf, the continental slope, the continental rise, the continental margin, and the deep ocean floor.[115]

In this paper, we will focus on the part of the seabed that is located within the Coastal Waters of the Northern Territory and the States.[116] This is the part of the seabed that can come within these Territory and State jurisdictions for the reasons we will discuss shortly. For reasons that should be self-evident (being that it is land-bound), the Australian Capital Territory has no need to contemplate jurisdictional issues in relation to "big things in the sea".

It will be important for us to understand whether the seabed itself constitutes land and, if so, whether under common law such structures as groynes[117] and piers that are built to the seabed could also constitute land by virtue of being annexed or "fixed" to the seabed. A further question arises as to whether these are treated the same or differently to a jetty which, although it extends out to sea, is attached to *terra firma* (ie, firm land that adjoins the seabed rather than the seabed itself). It is also interesting to note whether differences might arise between the various States and between the different taxes.

5.2 Relations between Commonwealth and States

Before we delve into the depths of whether the seabed constitutes land, we will further consider legislative powers over the seabed in light of the relationship between the Commonwealth and the States. As will be evident in subsequent parts of this paper, the relationship between the Commonwealth and the States is integral to considering:

- which laws can apply to the seabed more generally; and
- the legal characterisation of the seabed vis-à-vis whether it is "land".

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[114] Alvar Braathen and Harald Brekke (authors of Chapter 1), *The Law of the Seabed: Access, Uses, and Protection of Seabed Resources*, E-book (also available in hardback) edited by Catherine Banet and published by Brill.
[115] Paraphrased from ibid.
[116] For the balance of this paper, except where expressly stated otherwise, references to the States should be read to include the Northern Territory.
[117] A groyne is a wall or breakwater that is built out from a shore to control erosion.

The complexity of the interaction of our laws, and the application of a variety of laws is widely acknowledged. For example, *Legal Briefing No. 116* issued by the Australian Government Solicitor recognises:[118]

> "The Commonwealth and the states have many important interests in the waters that surround Australia, also known as 'offshore' areas. A variety of laws can apply in different offshore areas, including Commonwealth, state and territory legislation, the common law, the international law of the sea, and specific treaty regimes on particular subject matters, such as the regulation of fishing."

The *United Nations Convention on the Law of the Sea* (**UNCLOS**)[119] relevantly provides that coastal nations (such as Australia): [120]

- can claim a territorial sea of up to 12 nautical miles measured seaward from the baseline; and
- have a sovereign entitlement that extends to the territorial sea, the airspace above it and its bed and subsoil. Such sovereignty is subject to the right of innocent passage by foreign-flagged vessels and to the immunity of warships and other government ships.

As we have noted:

- the Commonwealth laid claim to the territorial sea by section 6 of the *Seas and Submerged Lands Act 1973*, with certain reservations to the States, and
- the States were given legislative powers (non-exclusive jurisdiction) over (amongst other things) "coastal waters" (limited to three miles) in accordance with the *Offshore Constitutional Settlement 1979* (Cth) (**OCS**).[121]

Each of the States passed their respective legislation to give effect to the OCS.[122]

For maritime law purposes, laws of a "coastal State" (such as Australia) only need to expressly specify that they operate in relation to the territorial sea where they are "peculiar to the territorial sea". This is by virtue of coastal State "sovereignty" over the territorial sea (mentioned above), under which a coastal State does not need to expressly specify that its laws apply to the territorial sea. Coastal States must, as noted above, observe their duties and balance their rights within the territorial sea with the rights and duties of other nation States and the international community. [123] An argument might therefore be run that State tax laws need not specify that their application extends to their

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[118] https://www.ags.gov.au/legal-briefing-no-116

[119] Montego Bay, 10 December 1982, [1994] ATS 31

[120] UNCLOS, Articles 2 and 3.

[121] *Coastal Waters (State Powers) Act 1980* (Cth) s 5; *Coastal Waters (Northern Territory Powers) Act 1980* (Cth); *Coastal Waters (State Title) Act 1980* (Cth); *Coastal Waters (Northern Territory Title) Act 1980* (Cth); *Seas and Submerged Lands Amendment Act 1980* (Cth); *Petroleum (Submerged Lands) (Royalty) Amendment Act 1980* (Cth); *Petroleum (Submerged Lands) (Exploration Permit Fees) Amendment Act 1980* (Cth); *Petroleum (Submerged Lands) (Pipeline Licence Fees) Act 1967* (Cth); *Crimes at Sea Act 1979* (Cth).

[122] *Constitutional Powers (Coastal Waters) Act 1979* (NSW); *Constitutional Powers (Coastal Waters) Act 1980* (Qld); *Constitutional Powers (Coastal Waters) Act 1979* (SA); *Constitutional Powers (Coastal Waters) Act 1979* (Tas); *Constitutional Powers (Coastal Waters) Act 1980* (Vic); *Constitutional Powers (Coastal Waters) Act 1979* (WA). The following other Acts also give effect to State laws offshore: *Application of Laws (Coastal Sea) Act 1980* (NSW); *Off-shore Waters (Application of Laws) Act 1976* (SA) (amended post-OCS); *Offshore Waters Jurisdiction Act 1976* (Tas); *Offshore (Application of Laws) Act 1982* (Vic); *Off-shore (Application of Laws) Act 1982* (WA); *Off-shore Waters (Application of Territory Laws) Act* (NT); and the *Acts Interpretation Act 1954* (Qld) relevantly defines "coastal waters of the state".

[123] Paraphrasing Rothwell, Oude Elferink, Scott and Stephens, *The Oxford Handbook of The Law of the Sea* (4th Edition) pages 96-97.

coastal waters. Such an argument would suggest that the application of State tax laws operates to apply to the relevant coastal waters because the States and Territories derive their legislative power (in this regard) through Australia's Commonwealth sovereignty and legislative power as a coastal State. In our view, however, it is far preferable for the States to clarify the matter within their legislation in order to avoid doubt. Indeed, this is the approach that we have generally seen adopted by the States (which we discuss from part 6 of this paper).

5.3 Whether the seabed constitutes "land"

It tends to be generally accepted that the seabed might constitute land and, in simple terms, would essentially be submerged land. However, this becomes more nuanced when we delve into the legal treatment of the seabed.

There is a vast body of case law (including a substantial number of decisions handed down by the High Court) that contemplates the characteristics of the seabed, particularly in the context of whether it constitutes "land" for legal purposes. The decisions mostly fall into four areas of law: native title, taxes (including municipal council rates), fisheries (some of which we have already discussed) and fishing licences (though these cases tend to be more focused on the exercise of legislative power by particular State government), and negligence (generally negligence cases for which a local council is the defendant).

In essence, the seabed can, but need not always, fall within a definition of land. The legislation being interpreted and applied in a particular matter is relevant to the determination of the question of whether the seabed will be "land".

We were interested to note that the judgements in some native title cases referred interchangeably to:

- "land including the seabed" (often with other inclusions listed); and
- land and the seabed separately listed (also with other items in the list).

5.3.1 *Risk v Northern Territory of* Australia[124]

As the focus of this paper is primarily to ascertain the treatment of the seabed for tax purposes, we will centre our attention on the decisions that have most relevance in a tax law context (albeit different types of taxes). However, we will initially draw from some observations of the High Court majority in the native title case of *Risk v Northern Territory of Australia*[125] because this decision is often cited, relates to land (or "not land" as was held) in the Northern Territory, and it acknowledges that the pendulum can swing either way when interpreting whether the seabed is "land".

Their Honours held that there were strong indications in the text of the relevant provisions and in extrinsic materials that indicated "land in the Northern Territory"[126] did not include the seabed below

[124] [2002] HCA 23
[125] per Gleeson CJ, Gaudron, Kirby and Hayne JJ.
[126] As defined in section 3(1) of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

the low water marks of bays and gulfs within the Northern Territory's jurisdictional limits. They did, however, reflect as follows (underlining added):

> "No doubt "land" is a word that can be used in a way that would encompass the seabed. It may be doubted, however, that the word would ordinarily be understood as encompassing the seabed. The distinction between "land" and "sea" is often made. It is only when particular attention must be paid to distinguishing between the two that the distinction can be seen to be attended by the same kind of difficulty as arises in distinguishing between "night" and "day". In each case, the legal geometer who seeks to define the line may find it blurred and indistinct. But that is not to deny either that there is a distinction, or that "land" is ordinarily used in a way that would not include the seabed."

> "In its ordinary meaning, "land" means the "solid portion of the earth's surface, as opposed to sea, water". In certain statutory contexts, however, "land" is capable of referring to the sea-bed. In *Goldsworthy Mining Ltd v Federal Commissioner of Taxation*, Mason J held that, for the purpose of s 88 of the *Income Tax Assessment Act* 1936 (Cth), a lease for dredging purposes of the sea-bed was a lease of land. Hence, whether or not land in the Land Rights Act includes the sea-bed depends on the history, context and purpose of the Land Rights Act."

5.3.2 *Goldsworthy Mining Ltd v Federal Commissioner of Taxation*[127]

In this High Court case (which was earlier than, and cited in, *Risk*), the taxpayer had incurred expenditure in dredging the seabed under a dredging lease of the seabed in (and near) the harbour of Port Hedland. The taxpayer did not have a lease of the water and air above the seabed. The question before the court related to whether the taxpayer was entitled to deductions for the expenditure. To be so entitled, the taxpayer needed to prove that:

- the expenses were incurred to effect improvements on land subject to the lease, and
- the improved land was used for purpose of producing assessable income.

The taxpayer's appeal was dismissed on the basis that the taxpayer had failed to establish that the leased land was "used by the taxpayer" in any sense. In the earlier judgement that was the subject of the (ultimately unsuccessful) appeal, Mason J had observed that:[128]

- the long history of leases for mining purposes of strata of land under the sea supported the view that a lease of a portion of the seabed is ordinarily regarded as a lease of "land" as that expression is generally accepted;
- the relevant definition of "land" was sufficiently wide and general to enable it to comprehend part of the seabed; and
- in general, "land" in its legal signification includes "any ground, soil or earth".

This valuable High Court authority was one of the earlier significant decisions that reflected that a seabed can, and often will (in the appropriate context), legally constitute land.

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[127] [1975] HCA 3; (1975)132 CLR 463
[128] Cited in *Coverdale v West Coast Council* [2016] HCA 15

5.3.3 *Sanctus Nominees Pty Ltd v Valuer-General*[129]

More recently (four years ago), the State Administrative Tribunal (Western Australia) affirmed previous decisions that "pontoon jetties" that were the subject of the dispute did constitute improvements to land and, as such, were to be included in the valuation for the relevant land for council rates purposes. The Tribunal was of the view that once the pontoon modules were secured to pylons (which were embedded in the seabed), they became an integral part of the composite structure. Though they rose and fell with the waves, the pontoon modules could not become separate from the piles because they were kept permanently in place by metal collars and were, therefore, unable to move laterally. The pontoon jetties were held to comprise:

> "a composite structure that are actually affixed to the land as was found in *Auckland City Council v Ports of Auckland* and in *National Dairies*."

Member Petrucci also held:

> "Finally, the pontoon jetties are a 'tenant's fixture' following *TEC Desert* and *Vopac* and supported by the terms of the lease and licence meaning that the pontoon jetties are part of the subject land until they are severed. The result of this is that, in the Tribunal's view, the pontoon jetties are 'improvements' for the purposes of s 4 of the [*Valuation of Land Act*]."

As can be seen from the quotes above, the Tribunal drew from significant cases that all Australian duties practitioners should know. This accentuates that once we have ascertained whether the seabed is "land" for the purpose of the legislation being considered, we turn to common law principles to determine whether assets are affixed to or improve the seabed, such that those assets are also land for the relevant purpose.

5.3.4 Coverdale v West Coast Council[130]

The High Court was unanimous in its decision on the appeal from a judgment of the Full Court of the Supreme Court of Tasmania in the Coverdale case. Their Honours' decision sets out a concise and clear summary of the relevant law in this area. At a mere 13 pages, it makes for light but worthwhile reading.

The question that arose in this appeal was whether the seabed and waters of Macquarie Harbour were lands or Crown lands within the meaning of a particular provision of the *Valuation of Land Act 2001* (Tas) (**VLA**). The Honours held that the answer was affirmative. Presumably due to the importance of this decision, the Tasmanian Attorney-General appeared by Senior Counsel as contradictor.[131]

It was accepted by the parties to the appeal that Macquarie Harbour is vested in the Crown in the right of the State of Tasmania and that it is "Crown land" within the meaning of the *Crown Land Act 1976* (Tas) (**CLA**). "Land" was expressly defined in the CLA to include "land covered by the sea or other waters, and the part of the sea or those waters covering that land". In contrast, although the VLA was less explicit as to whether it included such land, s 11(1) of the VLA required the Valuer-General to make valuations of (amongst other things) the "land values, capital values and assessed annual values of all lands within each valuation district, including any Crown lands that are liable to be

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[129] [2019] WASAT 63
[130] [2016] HCA 15
[131] The West Coast Council did not appear at the special leave application or on the hearing of the appeal.

rated…". This proved somewhat circular, as the definition of "land" in the *Local Government Act 1993* (Tas) (**LGA**) "means a parcel of land which is shown as being separately valued in the valuation list prepared under the [VLA]".

Section 16(3) of the *Local Government Act 1993* (Tas) provided that:

> "A municipal area includes—
>
> (a) any accretion from the sea adjoining it; and
>
> (b) any part of the sea-shore to the low-water mark adjoining it."

Relevantly, Macquarie Harbour is almost completely inland and the municipal boundaries are drawn so that the harbour, including the narrow opening to the sea, is within the Council municipal area. This contrasts with the boundaries for most municipal areas in Tasmania, which are drawn to exclude the sea.

In the judgment, their Honours differentiated between the possible constructional choices available to the Court (underlining added):

> "**Constructional choice**
>
> By and large, Tasmanian Acts define "Crown land" in one of three ways. Some refer to Crown land without defining it but implying that it has the same meaning as in the CLA. A second group expressly provide that "Crown land" has the same meaning as in the CLA. The third group expressly define "Crown land" for the purposes of the particular legislation.
>
> In this case, the text of the VLA yields a constructional choice between a meaning of s 11(1) which embraces the definition of "Crown land" in the CLA, and so includes the seabed and waters above it, and a meaning which excludes them. Specifically, the word "including" in s 11(1) of the VLA is ambiguous. It is not clear from the text whether it is used in the phrase "all lands ... including any Crown lands" in a sense which restricts the definition of "Crown lands" to mean only those that fall within the ordinary signification of "land" or in a sense which extends the definition of "land" to Crown lands that fall outside of the ordinary signification of "land". Viewed, however, against the background of the VLA's legislative history and antecedent circumstances, the scope and purpose of the VLA dictate a constructional choice in favour of the adoption of the definition of "Crown land" in the CLA, which includes the seabed and waters above it."

Ultimately, their Honours held:

> "Absent any compelling contrary indication, it is to be inferred that reference to "Crown lands" in s 11(1) of the VLA is a reference to "Crown land" within the meaning of the CLA, and so includes Crown land under the sea and so much of the sea as lies above it as defined in the CLA."
>
> "In the result, it is to be concluded that "Crown lands" in s 11(1) of the VLA means "Crown land" within the meaning of the CLA and so includes the seabed and so much of the sea as lies above it."

The appeal was dismissed, having the effect that the Valuer-General was required to value the Crown land that formed part of the seabed, as this would ultimately be subject to municipal rates.

6. Transfer duty and landholder duty

As noted at 5.3.3 above, once we have ascertained whether the seabed is "land" for the purpose of the legislation being considered, we turn to common law principles to determine whether assets are affixed to or improve the seabed, such that those assets are also land for the relevant purpose. There is a vast body of law relevant to these considerations.[132] As this body of law has been covered at length elsewhere,[133] we do not propose to address these cases in detail in this paper. Rather, we will proceed on the basis that these crucial principles are assumed knowledge and draw from them as required.

Also, as this is already a relatively lengthy paper, we do not propose to discuss trust acquisition duty, partnership acquisition duty, and similar heads of duty (though the same concepts and method for analysis should apply in those circumstances), nor any potential insurance duty implications.

Our analysis proceeds based on our understanding that the seabed within the coastal waters of a State constitutes Crown land of that State, such that an interest held by a potential taxpayer would be by way of a Crown leasehold interest, a Crown licence, or other (lesser) interest, rather than a fee simple interest in land. However, we have included some comments regarding the possible treatment of the seabed for State tax purposes if the seabed were able to be held as an estate in fee simple.

Common law and customary statutory interpretation principles (including those specified in the interpretation legislation for each relevant jurisdictions) are relevant to the analysis outlined below. These principles include, for example, that all legislation is interpreted to operate to the full extent permitted (but not beyond that), and the construction of a provision that would promote its purpose or object is preferred to a construction that does not. We have not made specific reference to these principles and the legislative provisions in which they are embodied.

6.1 Northern Territory

Section 17 of the *Interpretation Act 1978* (NT) defines land as follows:

> *land* includes all messuages, tenements and hereditaments, corporeal and incorporeal, of any tenure or description and whatever may be the estate or interest in the land

Section 4 of the *Stamp Duty Act 1978* (NT) provides the following additional definitions:[134]

> **land** means land in the Territory and includes:
>
> (a) an estate or interest in land; and
>
> (b) a lease of land or an interest in a lease of land; and
>
> (ba) a resource interest or an interest in a resource interest; and

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[132] Relevant authorities include *TEC Desert Pty Ltd & Anor v Commissioner of State Revenue* [2010] HCA 49; *Living and Leisure Australia Ltd v Commissioner of State Revenue* [2017] VSC 675; *National Dairies WA Ltd v Commissioner of State Revenue* [2001] WASCA 112

[133] Bevan, Chris (2022) 'The law of fixtures and chattels: recalibration, rationalisation and reform.', Legal Studies, 42(2). pp. 358-375.

[134] Underlining added

(c) a fixture to land (including a tenant's fixture or a fixture associated with operations conducted, or formerly conducted, on the land in relation to a resource interest).

dutiable property means:

(a) land; and

…

(h) an option to purchase dutiable property or an interest in dutiable property; and

(j) chattels, if part of a transaction in which other dutiable property is conveyed, acquired or created or the beneficial ownership is changed, other than [certain excluded goods]

…

and includes an estate or interest (which may be a partnership interest) in dutiable property.

convertible Crown lease means a lease granted by or in the name of the Territory under the terms of which the lessee has the right to surrender the lease in exchange for the grant of an estate in fee simple in the land or part of the land held under the lease.

conveyance includes the following:

(a) the grant of property, but not the grant of a lease other than a convertible Crown lease;

(b) the transfer or assignment of property;

(c) the vesting of property in, or the accrual of property to, a person;

(d) the foreclosure of a mortgagor's equity of redemption in mortgaged property;

(e) a transaction that is taken to be, or treated as, a conveyance under this Act;

(f) an agreement to make a conveyance;

(g) an instrument effecting or evidencing a conveyance (including a decree, judgment or order of a court);

(h) an instrument, agreement, transaction or arrangement that would operate as a conveyance but for a statutory condition requiring Ministerial approval or registration.

Accordingly, if the seabed were able to be held as an estate in fee simple, dealing with an interest in an estate in fee simple or the grant (for monetary consideration) of a convertible Crown lease should give rise to duty.[135] Otherwise, only the resource interests or tenant's fixtures that come within the definition of 'land' should be likely to give rise to a duty liability (in which case, chattels dealt with in the same transaction or an associated transaction may also be brought to duty).

[135] See also s 5, Schedule 1 (particularly clause 1(9)), and Schedule 2 (particularly clause 10)) of the *Stamp Duty Act 1978* (NT).

6.2 Victoria

Section 57 of the *Interpretation of Legislation Act* 1984 (Vic) relevantly provides:

> **Application of laws of Victoria in certain off-shore areas**
>
> (1) Subject to this section, the provisions of the laws in force in Victoria whether written or unwritten and as in force from time to time and the provisions of any instrument made under any of those laws apply in the offshore area.
>
> (2) The provisions referred to in subsection (1) apply to and in relation to—
>
> (a) any act done or omitted to be done at a place in the offshore area which is within the outer limits of the coastal waters of Victoria;
>
> (b) any act done or omitted to be done in the offshore area by a person connected with Victoria; and
>
> (c) any matter, thing or circumstance existing or arising in the offshore area which involves or relates to persons connected with Victoria—
>
> as if the offshore area were part of Victoria.
>
> …

Section 38 defines 'land' as follows:

> **Land** includes buildings and other structures permanently affixed to land, covered with water, and any estate, interest, easement, servitude, privilege or right in or over land.

Accordingly, unless the *Duties Act 2000* (Vic) (**Vic DA**) contained provisions to the contrary, the Vic DA could operate in relation to the offshore area which is within the outer limits of the coastal waters of Victoria, and land that is covered with water (such as the seabed) is still considered to be land. No provisions in the Vic DA appear to limit this definition of land or restrict the operation of the Vic DA from applying with respect to the coastal waters and the seabed.

On this basis, dutiable transactions could include transfers (and other relevant dealings) with interests in the seabed to the extent that the interest is (relevantly) a Crown leasehold estate (which we expect is likely to be the case), or an interest in fixtures (as defined) that is created, dealt with or held separately from an estate or interest in the land on which the fixtures are located.[136]

If the interest that is acquired (or otherwise dealt with) constitutes a licence rather than a lease, then the relevant dealings should not be subject to duty.

Where such a dutiable transaction (involving a Crown leasehold estate and / or dutiable fixtures) is subject to duty, the characterisation and distinction between fixtures and goods becomes somewhat academic because duty will also be payable in respect of dutiable goods (ie goods other than excluded goods). If the transaction is instead undertaken in a company or unit trust that holds the relevant interest in the seabed, these characteristics remain important because the duty liability will be

[136] Vic DA, ss 10(1)(a)(i), 10(1)(a)(ii), 10(1)(ad). A lease within the definition of s 10(1)(ab) would also be dutiable, but we anticipate that Crown leaseholds are the most likely interest to be held and transacted between taxpayers. An estate in fee simple is also dutiable property, but we do not consider the seabed in the coastal waters would be granted as a fee simple interest.

calculated by reference to the 'landholdings' but not the goods held by the landholder. 'Land holding' is defined as follows:

> **72 What are land holdings?**
>
> (1) For the purposes of this Part, a **land holding** is—
>
> (a) an interest in land other than the estate or interest of a mortgagee, chargee, or other secured creditor or a profit à prendre; or
>
> (b) dutiable property referred to in section 10(1)(ad); or
>
> (c) an interest in relevant land taken to be beneficially owned under section 32XD.
>
> **73 What does land include?**
>
> (1) For the purposes of this Part, **land** includes anything fixed to the land, whether or not the item—
>
> (a) constitutes a fixture at law; or
>
> (b) is owned separately from the land; or
>
> (c) is notionally severed or considered to be legally separate to the land as a result of the operation of any other Act or law.
>
> (2) For the purposes of subsection (1), a thing can be fixed to land by a physical connection to the land.
>
> …

Accordingly, this expanded concept of anything fixed to the land (rather than the common law definition of fixtures) is relevant in determining which assets apply in the calculation of landholder duty. As already noted, many of the 'big things' we have discussed above are likely to be fixed for landholder duty purposes.

6.3 New South Wales

Section 59 of the *Interpretation of Legislation Act* 1987 (NSW) relevantly provides:

> **Application of laws of the State to coastal waters**
>
> The laws of the State apply in and in relation to—
>
> (a) the coastal waters of the State, and
>
> (b) the sea-bed and subsoil beneath, and the airspace above, the coastal waters of the State,
>
> as if the coastal waters of the State, as extending from time to time, were within the limits of the State.

Section 21(1) provides the following definition for land:

> **land** includes messuages, tenements and hereditaments, corporeal and incorporeal, of any tenure or description, and whatever may be the estate or interest therein.

Accordingly, as with Victoria, unless the *Duties Act 1997* (NSW) (**NSW DA**) contained provisions to the contrary, the NSW DA can operate in relation to the offshore area which is within the outer limits of the coastal waters of New South Wales, and the seabed can potentially be land (due to its characteristics and a lack of any limiting words in the definition). No provisions in the NSW DA appear to limit this definition of land or restrict the operation of the NSW DA from applying with respect to the coastal waters and the seabed.

Dutiable transactions could include transfers (and other relevant dealings) with interests in the seabed to the extent that the interest is (relevantly) land or an interest in New South Wales.[137]

'Land' is defined in clause 4 of the Dictionary to the NSW DA as follows:

> **4 Interests in land**
>
> (1) For the purposes of this Act, a mining lease or mineral claim granted under the Mining Act 1992 is taken to give the holder an interest in the land to which it relates.
>
> (1A) To avoid doubt, the land includes anything that, under the authority of the mining lease or mineral claim (whether direct or indirect), is fixed to the land the subject of the lease or claim and that would be a part of the land (as a fixture) if the lease or claim were an estate in fee simple in the land.
>
> (2) For the purposes of this Act, the following do not give rise to an interest in land—
>
> (a) an assessment lease, exploration licence or opal prospecting licence under the Mining Act 1992,
>
> (b) a carbon sequestration right within the meaning of Division 4 of Part 6 of the Conveyancing Act 1919,
>
> (c) a petroleum title within the meaning of the Petroleum (Onshore) Act 1991,
>
> (d) a licence, permit, lease, access authority or special prospecting authority under the Petroleum (Offshore) Act 1982.

This definition further extends the definition of land rather than restricting it.

Where such a dutiable transaction is subject to duty, duty will also be payable in respect of dutiable goods (ie goods other than excluded goods), except where the Chief Commissioner disregards the value of the goods in accordance with section 26 of the NSW DA on the basis that the dutiable value of the other property does not exceed 10% of the dutiable value of all of the dutiable property in the transaction. The distinction between fixtures and goods may, therefore, become relevant if assets that are potentially goods have a high value in comparison to the land and fixtures.

For landholder duty purposes, 'land' is defined as follows:

> **147A What does "land" include?**
>
> (1) For the purposes of this Chapter, land includes anything fixed to the land, whether or not the thing—

[137] NSW DA, ss 11(1). 'Interest' is defined in the Dictionary to the NSW DA to include an estate or proprietary right.

(a) constitutes a fixture at law, or

(b) is owned separately from the land, or

(c) is notionally severed or considered to be legally separate from the land as a result of the operation of any other Act or law.

(2) Land does not include anything excluded under section 163K from the definition of goods in this Chapter.

(3) The Chief Commissioner may determine that land does not include a thing fixed to land if—

(a) the thing is owned by a person who is not the person who owns the land or an associated person of the person who owns the land, and

(b) the thing is not used in connection with the use of the land.

(4) For the removal of doubt, anything that is land because of this section is not goods for the purposes of section 163G (Significant holdings in goods).

The landholder duty treatment should, therefore, align with the transfer duty treatment.

As with Victoria, if the interest that is acquired (or otherwise dealt with) constitutes a licence rather than a lease, then the relevant dealings should not be subject to duty.

6.4 Western Australia

The State Administrative Tribunal decision in the council rates case of *Sanctus Nominees Pty Ltd v Valuer-General* (discussed above) confirms that the seabed of Western Australia can, indeed constitute land.

In Western Australia, the *Interpretation Act 1984* (WA) defines land in section 5 as follows:

Land includes buildings and other structures, land covered with water, and any estate, interest, easement, servitude or right in or over land

This definition specifically provides that land includes land covered with water. The *Duties Act 2008* (WA) (**WA DA**) further defines land with an inclusive definition (without replacing the definition in the Interpretation Act) in section 3A as follows:

3A. Term used: land

(1) In this Act, land includes the following —

(a) an estate or interest in land;

(b) a mining tenement;

(c) an estate or interest in a mining tenement;

…

(f) anything fixed to land (including land the subject of a mining tenement or pastoral lease), whether or not the thing —

(i) constitutes a fixture at law; or

(ii) is owned separately from the land; or

(iii) is notionally severed or considered to be legally separate from the land as a result of the operation of any law of the State or the Commonwealth;

(g) an estate or interest in a thing to which subsection (1)(f) applies.

…

(3) Without limiting subsection (1)(f), a thing is taken to be fixed to land if it has a physical connection to the land or is buried or partly buried under the surface of the land.

(4) Subsection (1)(f) does not apply to the following —

(a) a thing that is fixed to land on a temporary basis and only for the purpose of being used in construction works;

(b) a thing that does not constitute a fixture at law and that is held or used in connection with the business of primary production;

…

(5) A paragraph of subsection (1) is not to be taken into account in determining the meaning of land when used in another paragraph of subsection (1).

Transfers (and other relevant dealings) with interests in the seabed of Western Australia can be treated as dutiable transactions, as can rights to exploit the seabed, rights to income from the seabed, fixed infrastructure control rights, fixed infrastructure access rights, and fixed infrastructure statutory licences.[138] Chattels will also be subject to duty except if those chattels are the only dutiable property the subject of the transaction; so a dutiable transaction dealing with a proprietary interest in the seabed will bring chattels (except excluded chattels) into the duty net.[139] The same treatment would apply for certain business assets (such as intellectual property) that are only dutiable when the transaction also involves other dutiable property or when aggregation applies.

The following definitions in section 148 of the WA DA are relevant for landholder duty purposes:

148. Terms used

(1) In this Chapter, unless the contrary intention appears —

…

land does not include a security interest in land;

land asset means any of the following —

(a) land;

(b) a fixed infrastructure control right;

[138] WA DA, s 15 and 16
[139] WA DA, s 14

(c) a derivative mining right;

(d) subject to section 204A, a fixed infrastructure access right;

…

(2) For the purposes of this Chapter, a land asset referred to in paragraph (b), (c) or (d) of the definition of land asset in subsection (1) is taken to be a land asset in Western Australia.

As with New South Wales, landholder duty is also calculated with reference to the dutiable chattels (though without the ability for the value of the chattels to be disregarded as is possible in New South Wales).

6.5 South Australia

Section 4 of the *Legislation Interpretation Act 2021* (SA) relevantly provides:

In every Act and legislative instrument—

estate, in relation to land, includes any estate or interest, easement, right, title, claim, demand, charge, lien or encumbrance in, over, to, or in respect of, the land;

land includes—

(a) a building or structure affixed to land; and

(b) waters and airspace over land; and

(c) the bed of any body of waters; and

(d) subsoil and subterranean waters;

However, as the seabed is unlikely to be 'qualifying land', no duty liability will arise (except for land that is not 'qualifying land', or for transactions in respect of which duty should already have been paid). Section 105A of the *Stamp Duties Act 1923* (SA) relevantly provides:

Abolition of duty on designated real property transfers

(1) In this section—

qualifying land means land that is being used for any purpose other than—

(a) land that is taken to be used for residential purposes in accordance with subsection (2)(a), other than land of a classification excluded by the regulations; or

(b) land that is taken to be used for primary production in accordance with subsection (2)(b), other than land of a classification excluded by the regulations.

…

(5) No liability to duty arises in relation to a conveyance or transfer of property to which this section applies (to the extent to which it provides for the conveyance or transfer of an interest in qualifying land).

6.6 Queensland

As already discussed, pursuant to section 47A of the *Acts Interpretation Act 1954* (Qld), Queensland's laws apply to Queensland's coastal waters and seabed and subsoil beneath as if the coastal waters were within the limits of Queensland. Section 36 of this Act defines 'land' to include 'messuages, tenements and hereditaments, corporeal or incorporeal, of any tenure or description, and whatever may be the interest in the land'.

Section 3 of the Dictionary in Schedule 6 to the *Duties Act 2001* (Qld) (**Qld DA**) further defines land as follows:

> **land**—
>
> (a) includes—
>
> (i) airspace above land and the coastal waters of the State; and
>
> (ii) a resource authority; but
>
> (b) does not include an exploration permit under the *Petroleum (Submerged Lands) Act 1982*.

Accordingly, an interest in the seabed (which constitutes land) can also give rise to duty in Queensland.

Chattels will also be subject to duty except if those chattels are the only dutiable property the subject of the transaction; so a dutiable transaction dealing with a proprietary interest in the seabed will bring chattels (except excluded chattels) into the duty net.[140] The same treatment would apply for certain business assets (such as intellectual property) that are only dutiable when the transaction also involves other dutiable property or when aggregation applies.[141]

As with Victoria, if the transaction is instead undertaken in a company or unit trust that holds the relevant interest in the seabed, these characteristics remain important because the duty liability will be calculated by reference to the 'landholdings' but not the goods held by the landholder. 'Land holding' is defined in section 167 of the QLD DA as follows:

> **What are an entity's land-holdings**
>
> An entity's land-holdings means the following—
>
> (a) the entity's interest in land, and anything fixed to the land that may be separately owned from the land (whether or not the entity has an interest in the thing fixed to the land), other than—
>
> (i) a security interest; or
>
> (ii) an interest in a trust;
>
> Note— See the Acts Interpretation Act 1954, schedule 1, definition interest.
>
> (b) rights held by the entity that—
>
> (i) relate to, or affect, the use of the entity's land and other land; and

[140] QLD DA, ss 10(1)(e) and 29
[141] QLD DA, s 37

(ii) enhance the value of the entity's land;

(c) an interest in land, and anything fixed to the land, that is the subject of a purchase agreement or sale agreement made by the entity.

…

Accordingly, this expanded concept of anything fixed to the land (rather than the common law definition of fixtures) is relevant in determining which assets apply in the calculation of landholder duty.

6.7 Tasmania

Section 43 of the *Acts Interpretation Act 1932* (Tas) defines coastal waters as follows:

> **coastal waters**, when used in relation to Tasmania, has the same meaning as the expression "coastal waters of the State" has in relation to Tasmania under the *Coastal Waters (State Powers) Act 1980* of the Commonwealth.

Section 46 of that Act provides the following definitions:

> **estate**, used in reference to land, shall include any estate or interest, easement, right, title, claim, demand, charge, lien, or encumbrance in, over, to, or in respect of such land;
>
> **land** shall include messuages, tenements, and hereditaments, houses, and buildings of any tenure and any estate or interest therein.

The definition of "land" in section 3 of the *Duties Act 2001* (Tas) unhelpfully (for our purposes) simply provides "**land** includes a stratum". No other provision clarifies the matter either way to confirm whether seabeds are or are not "land" for duty purposes. However, we are of the view that we can draw from the High Court decision in *Coverdale v West Coast Council*, discussed earlier in this paper. You will recall that case dealt with similar interpretation issues in the Tasmanian *Valuation of Land Act* and *Local Government Act*.

The High Court held that:

> "Absent any compelling contrary indication, it is to be inferred that reference to "Crown lands" in s 11(1) of the VLA is a reference to "Crown land" within the meaning of the CLA, and so includes Crown land under the sea and so much of the sea as lies above it as defined in the CLA."
>
> "In the result, it is to be concluded that "Crown lands" in s 11(1) of the VLA means "Crown land" within the meaning of the CLA and so includes the seabed and so much of the sea as lies above it."

The same would apply for duty purposes, such that the seabed forms part of the land upon which duty is assessed for dutiable transactions. Fixtures to land or a mineral tenement are specifically defined as a dutiable asset.[142] As with other jurisdictions, goods are only subject to duty when they the subject of an arrangement that includes a dutiable transaction over other dutiable property.[143]

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[142] Tas DA s 9(1)(c)
[143] Tas DA s 9(1)(j)

For landholder duty purposes, the definition of land holdings is expanded to generally include things fixed to the land rather than just fixtures that form part of the land under common law.[144] Accordingly, the distinction between goods that are fixed to the land and goods that are not fixed may be important for threshold issues, in determining whether the relevant company or unit trust scheme is a landholder. However, once the threshold is breached, this distinction becomes academic because goods are included in the calculation of landholder duty for Tasmania.[145]

[144] Tas DA s 62(6)
[145] Tas DA s 71

7. Land tax

As each of the land tax regimes assess land tax by reference to the unimproved value of the land, any distinction between fixtures and chattels is unlikely to have relevance for our purposes.

The relevant considerations upon which we focus this part of the paper relate to ownership and deemed ownership concepts for land tax purposes, and the nature of land interests upon which land is levied. For example, in some jurisdictions, the tenant under a Crown lease is deemed to be the owner for land tax purposes and Crown land (that is not exempt from land tax by virtue of being used for government purposes) is assessed for land tax on that basis.

7.1 Northern Territory and the Australian Capital Territory

The Northern Territory does not have a land tax regime and the ACT does not have coastal waters.

7.2 Victoria

For the reasons outlined in relation to duty, the *Land Tax Act 2005* (Vic) (**Vic LTA**) can also apply in respect of the seabed within the coastal waters of Victoria. As the definition of land in section 3(1) of the Vic LTA is inclusive, there is nothing to suggest that this definition removes the aspect of the Interpretation Act definition that brings 'land under water' within the definition. The Vic TLA definition is as follows:

> ***land*** includes—
>
> (a) all land and tenements;
>
> (b) all interests in land

The concept of 'rateable land' (by reference to the *Local Government Act 1989* (Vic) and the valuation aspects in the Vic LTA (per the *Valuation of Land Act 1968* (Vic)) are in similar terms to those that applied in respect of the issues raised before the court in *Coverdale v West Coast Council*. Consequently, in our view, the seabed can be 'land' for these purposes and therefore subject to land tax.

A person entitled to land under a lease of Crown land will be the owner that is assessed for land tax.[146]

As land tax is calculated upon the 'site value' of the land (as defined in the *Valuation of Land Act 1968* (Vic)), the value of any fixtures or any other improvements to the land are disregarded. Accordingly, only the unimproved land will be subject to land tax.

[146] A person entitled to land for a freehold estate in possession would also be the owner for land tax purposes. As previously noted, we consider this is unlikely to be applicable for land that within the coastal waters.

7.3 New South Wales

For the reasons outlined in relation to duty, the *Land Tax Management Act 1956* (NSW) can also apply in respect of the seabed within the coastal waters of New South Wales. Although the provisions in New South Wales differ slightly in structure, they achieve the same purpose as the provisions discussed for Victoria, such that land tax could also potentially be payable upon freehold or (more likely) Crown leasehold interests in the seabed in New South Wales.

A lessee (other than a sub-lessee) of land or part of land owned by the Crown is taken be the owner and assessed for land tax.[147]

As land tax is essentially calculated upon the unimproved value of the land (averaged in accordance with the legislative provisions), the value of any fixtures or any other improvements to the land are disregarded.

7.4 Western Australia

For the reasons outlined in relation to duty, the *Land Tax Assessment Act 2002* (WA) (**WA LTA**) can also apply in respect of the seabed within the coastal waters of Western Australia. As the definition of land in the glossary to the WA LTA[148] is inclusive, there is nothing to suggest that this definition removes the aspect of the Interpretation Act definition that brings 'land under water' within the definition.

A person entitled to land under a lease or licence of Crown land, or a person entitled to use the land for certain purposes is deemed to be the owner (by section 8 of the WA LTA) and is assessed for land tax:

> **8. Certain persons and bodies taken to be owners of land**
>
> (1) A person is taken to be the owner of land for the purposes of section 7 if the person —
>
> (a) is entitled to the land under any lease or licence from the Crown with or without the right of acquiring the fee simple; or
>
> (b) is entitled to use the land for business, commercial, professional or trade purposes under an agreement or arrangement with the Crown, with an agency or instrumentality of the Crown or with a local government or public statutory authority.

As land tax is assessable in the 'unimproved value' of the land (as defined in section 4 of the *Valuation of Land Act 1978* (WA)[149]), the value of any fixtures or any other improvements to the land are disregarded. Accordingly, only the unimproved land will be subject to land tax.

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[147] *Land Tax Management Act 1956* (NSW), s 21(2)
[148] WA LTA, s 4 and glossary clause 1
[149] This definition is adopted by WA LTA, s 4 and glossary clause 1.

7.5 South Australia

Section 4 of the *Legislation Interpretation Act 2021* (SA) relevantly provides:

> In every Act and legislative instrument—
>
> **estate**, in relation to land, includes any estate or interest, easement, right, title, claim, demand, charge, lien or encumbrance in, over, to, or in respect of, the land;
>
> **land** includes—
>
> (a) a building or structure affixed to land; and
>
> (b) waters and airspace over land; and
>
> (c) the bed of any body of waters; and
>
> (d) subsoil and subterranean waters;

Section 4 of the *Land Tax Act 1936* (SA) (**SA LTA**) relevantly provides:

> **Imposition of land tax**
>
> (1) Taxes are imposed on all land in the State, with the following exceptions:
>
> (a) land of the Crown that is not subject to—
>
> (i) a perpetual lease; or
>
> (ii) an agreement for sale or right of purchase;
>
> …

The taxpayer is the 'owner', as relevantly defined in section 2(1) of the SA LTA as follows:

> **owner**—
>
> (a) in relation to land alienated from the Crown by grant in fee simple means any person (other than a mortgagee of the land)—
>
> (i) who holds; or
>
> (ii) who is entitled to; or
>
> (iii) who is entitled to purchase or acquire,
>
> a legal or equitable estate of fee simple in the land or any other estate or interest (other than an estate or interest of leasehold) in the land conferring a right to possession of the land; and
>
> (b) in relation to land of the Crown subject to any agreement for sale, or right of purchase, means the person entitled to the benefit of that agreement or right of purchase; and
>
> (c) in relation to land held under perpetual lease, means the holder of that lease; and
>
> (d) in relation to land held under a shack site lease, means the holder of that lease; and
>
> (e) in relation to land in a defined shack-site area, means the occupier of the land; and

(f) in any case, includes a person who is deemed by this Act to be an owner;

As with other jurisdictions, land tax in South Australia is calculated by reference to the site value of the land. The following definition of 'site value' in section 5 of the *Valuation of Land Act 1971* (SA) (as well as the associated definitions in that provision) is incorporated into the SA LTA by the definition of 'site value' in section 2 of the SA LTA:

site value of land means the capital amount that an unencumbered estate in fee simple in the land might reasonably be expected to realise upon sale assuming that any improvements on the land, the benefit of which is unexhausted at the time of valuation, had not been made; for the purposes of this definition—

(a) improvements means—

(i) buildings and structures (but not including structures in the nature of site works); and

(ii) wells, dams and reservoirs; and

(iii) the planting of trees for commercial purposes;

unimproved value of land means the capital amount that an unencumbered estate of fee simple in the land might reasonably be expected to realise upon sale assuming that any improvements on the land (except, in the case of land not used for primary production, any site improvements), the benefit of which is unexhausted at the time of valuation, had not been made; for the purposes of this definition—

improvements means houses and buildings, fixtures and other building improvements of any kind whatsoever, fences, bridges, roads, tanks, wells, dams, fruit trees, bushes, shrubs and other plants planted or sown, whether for trade or other purposes, draining of land, ringbarking, clearing of timber or scrub and any other actual improvements;

site improvements means reclamation of land by draining or filling, and any retaining walls or other structures or works ancillary to that reclamation, the excavation, grading or levelling of land, the removal of rocks, stone, sand or soil, and the clearing of timber, scrub or other vegetation;

value in relation to land means the annual value, the capital value, the site value and the unimproved value of the land or any one or more of those values; to value means to determine or assess those values or any one or more of them; and **determination of value** or **valuation** means a determination or assessment of those values or any one or more of them.

7.6 Queensland

The land tax position in Queensland is somewhat unique. Taxable land is defined in section 9 of the *Land Tax Act 2000* (**Qld LTA**) as follows:

Meaning of taxable land

Taxable land is land in Queensland that—

(a) has been alienated from the State for an estate in fee simple; and

(b) is not exempt land.

Editor's note—

Acts Interpretation Act 1954, schedule 1— land includes messuages, tenements and hereditaments, corporeal or incorporeal, of any tenure or description, and whatever may be the interest in the land.

Accordingly, the seabed would only be taxable land if it is alienated from the Crown (such that Crown leases are not subject to land tax).

The Qld LTA also has a unique definition for 'owner' in section 10:

Meaning of owner

(1) The **owner** of land includes the following—

(a) a person jointly or severally entitled to a freehold estate in the land who is in possession;

(b) a person jointly or severally entitled to receive rents and profits from the land;

(c) a person taken to be the owner of the land under this Act.

(2) The fact that a person is the owner of land under a provision of this Act does not prevent another person also being the owner of the land.

(3) This section is subject to sections 12 to 14, 22 and 23.

As with other jurisdictions, the site value is used to calculate land tax (with averaging and capping potentially also applying). However, as the seabed within the coastal waters is unlikely to be alienated from the Crown, land tax is unlikely to be payable in Queensland.

7.7 Tasmania

As with the Tas DA, the definition of "land" in section 3 of the *Land Tax Act 2000* (Tas) (**Tas LTA**) unhelpfully (for our purposes) simply provides "**land** includes a stratum".

Crown land is specifically exempted from land tax in Tasmania[150] and "owner" (being the relevant taxpayer liable for land tax) is generally defined as "the person in whom the estate in fee simple is vested".[151] Accordingly, the seabed could only be subject to land tax in Tasmania if a taxpayer held a freehold interest (ie estate in fee simple) in the land.

[150] Tas LTA s 17(1)(a)
[151] Tas LTA s 3A

8. PRT on sailors' wages[152]

The pattern legislation on the eastern seaboard dealing with nexus of payroll tax is exemplified by sections 9-9C of the *Payroll Tax Act 1971 (Qd)*. In the simple case, wages are subject to payroll tax if they are paid for work entirely performed in Queensland. Where this is not the case, other connections to Queensland are identified as sufficient.

Referring to Public Ruling PTA 039.1, the nexus tests are as follows:

- test 1: employee's principal place of residence – if all the other workers were engaged overseas, it is unlikely any would have a principal place of residence in Australia;
- test 2: employer's ABN address or principal place of business – a foreign company dealing with the offshore workers would not need to be registered for an Australian business number and would have no Australian principal place of business;
- test 3: where the wages are paid or payable – foreign workers are unlikely to have opened Australian bank accounts to receive wages; and
- test 4: services performed mainly in Queensland: since the services are being provided on ships, on the sea floor and from laboratories overseas (where remote workers are manipulating robotic controls), this is unlikely to resolve in favour of Queensland. However, this is where there is room for error, and care is needed.

If works are performed within a bay or port in Queensland, there is real concern that those works are within Queensland. The Commonwealth gives up on parts of its ambit claim by s 10 of the *Seas and Submerged Lands Act 1973*, by the exclusions in s 14 of that Act.

This is consistent with the approach to payroll tax that has been adopted by other Australian jurisdictions. For example, the *Payroll Tax Act 2007* (Vic) provides that "this jurisdiction" "means Victoria and the Coastal Waters of Victoria".[153] The definition for "Coastal Waters" for payroll tax purposes adopts the definition set out in the Commonwealth *Coastal Waters (State Powers) Act 1980*.[154]

As is to be expected, the payroll tax legislation in the "harmonised" jurisdictions (namely, Northern Territory, New South Wales, South Australia and Tasmania) align with Victoria and similarly extend their jurisdiction to include their respective coastal waters.[155]

A less explicit approach is adopted in the *Pay-Roll Tax Assessment Act 2002* (WA), which simply provides that "Australian jurisdiction means a State or Territory". Although the *Interpretation Act 1984* (WA) appears to be silent on the matter, the *Constitutional Powers (Coastal Waters) Act 1979* (WA) provides for the making of laws that extend to the coastal waters of Western Australia.

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[152] This part of the paper is reproduced from Marks, "Jurisdictional boundaries – come and get me", (2023) 26(4) *The Tax Specialist* 207 at 212.

[153] *Payroll Tax Act 2007* (Vic) s 3(1).

[154] The extension of Victoria's jurisdiction to Victoria's coastal waters for payroll tax purposes appears to have been introduced by the amendment of the former *Pay-roll Tax Act 1971* (Vic) by the *State Taxation (Amendment) Act 1998* (Vic).

[155] *Payroll Tax Act 2009* (NT) s 3 and *Coastal Waters (Northern Territory Powers) Act 1980* (Cth); *Payroll Tax Act 2007* (NSW) s 3(1) and *Coastal Waters (State Powers) Act 1980* (Cth); *Payroll Tax Act 2009* (SA) s 3(1) and *Coastal Waters (State Powers) Act 1980* (Cth); *Payroll Tax Act 2008* (Tas) s 3(1) and *Coastal and Other Waters (Application of State Laws) Act 1982*.

Based on the approach outlined above (particularly with respect to the harmonised jurisdictions), it appears self-evident that payroll tax liabilities can arise upon wages that have the relevant payroll tax nexus with a particular jurisdiction's coastal waters. Accordingly, payroll tax liabilities should be factored in by employers of personnel located on "big things" within the coastal States or the Northern Territory.

As noted above, the Australian Capital Territory has no need to contemplate jurisdictional issues in relation to big things in the sea in this regard, though the nexus tests still warrant due consideration.

9. Conclusion

The legislative powers of the States and Northern Territory are exercised within the coastal sea, and beyond. The States and the NT are conscious of their powers under the Offshore Coastal Settlement. The States are also conscious of their ability to legislate with extra-territorial effect.

The complexity of the constitutional settlement between the Commonwealth, the States and the NT, is daunting. Responses by the States and the Northern Territory have lacked uniformity, but resemble an attempt to reassert rights. Examples include fishing laws, such as the imposition of restrictions expressly beyond the 3 nm coastal sea in *Wren Fishing*.

We then turn to the tax bases. First we deal with duty and land tax:

There is no reason why a general term, “land”, ought not to include seabed. But this is just the beginning, since existing tax bases refer to particular interests in land, or are overlayed by rules about what forms part of the land. Some rules also take into account things that are not part of the land. An already complex constitutional and international position is thus further complicated.

The payroll tax base seems more readily expressed, with more easily measured forms of connexion to the jurisdiction imposing tax. But there remains a tangle of laws, where for example the Commonwealth excludes State and NT revenue laws from a co-operative scheme under which State and NT laws are, generally, applied to some mining, oil and gas works. That apparently does not preclude direct application of the State or NT tax laws, where there is *nexus*, to wages paid to workers on, say, a gas platform.

The legal, engineering, and scientific concepts with which we have dealt in this paper are challenging. The ocean remains largely an unexplored wilderness. Developments, including the tortuous proceedings of the International Seabed Authority, show that this is a frontier with which humans are now grappling. The economic significance of this will increase. Tax authorities will naturally be more curious about whether there is value that should be captured by the state.