

Jurisdictional boundaries and immunities - Come and get me

Energy and Resources Law Association

David Marks KC and Rachel O'Donnell - 12 October 2023

Zones of the sea

From Churchill, Lowe & Sander, *The Law of the Sea* (4ed), p49, plus our notes in red

Note this addition for Australia -
States limited to 3 nm

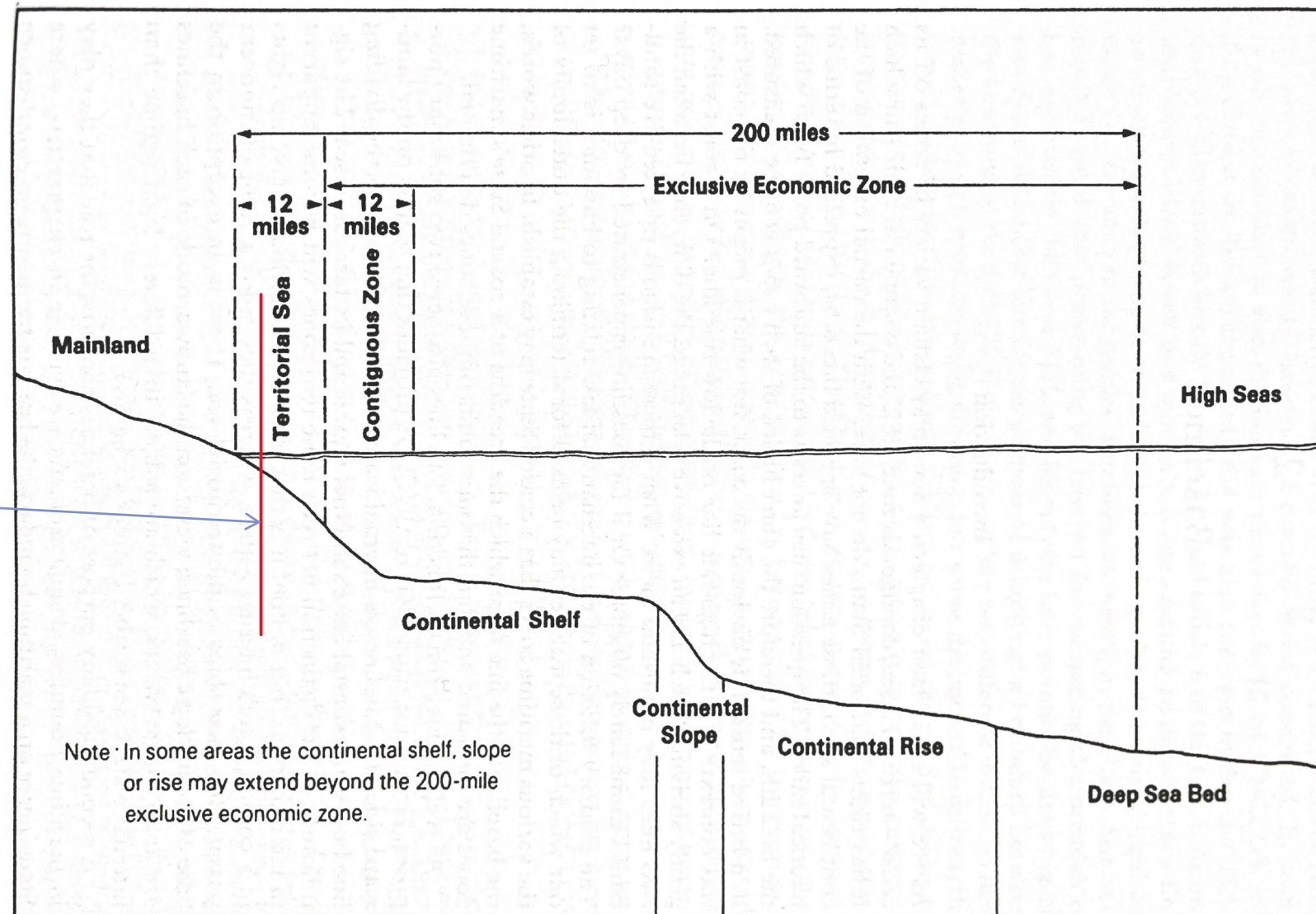


Figure 1 Maritime zones.

Zones of the sea

- ▶ Base lines:
 - ▶ fundamental concept
 - ▶ Territorial sea, contiguous zone and EEZ run off base lines, in one way or another
 - ▶ Not easy to summarise, but base line can be mean low tide or some other line out to sea



Zones of the sea

- ▶ Drawing base lines depends on natural and constructed features of coast and islands
- ▶ Eg - decide whether a bay:
 - ▶ is closed by a base line (if it is larger than a semicircle drawn on a putative “bay closing base line” over its mouth), or
 - ▶ is an indentation, where the base line is the mean low water mark
- ▶ Fringing islands can extend the base line to sea, and an island can generate its own territorial sea
- ▶ Harbour works can generate a base line
- ▶ Once you have the base line, you can work out matters that depend on base lines



With apologies to Churchill, Lowe & Sander's *The Law of the Sea* (4ed), p55, which I have (inaccurately) adapted.

Ships

- ▶ Usually chattels
 - ▶ Interaction with transfer & landholder?
 - ▶ Anchored as a storage unit?
- ▶ *Situs* -
 - ▶ High seas/territorial waters
 - ▶ Flags - Panama, Liberia, Marshall Iss
- ▶ Crewing -
 - ▶ likely crewed for time being
- ▶ “Seawise Giant”



Oil & gas platforms

- ▶ Floating platforms vs fixed
- ▶ Drilling ships
 - ▶ Anchored say 6 ways; or
 - ▶ Dynamic thrust / positioning
- ▶ Technology depends on depth. Most platforms anchored to sea floor somehow:
 - ▶ So is the seabed “land”
 - ▶ If so - whose, and within what limits
- ▶ Crewed



Undersea cables

- ▶ Communication or power
- ▶ Sun Cable -
 - ▶ original budget \$35B
 - ▶ Blew out to \$65B
- ▶ Lots of work on routes - eg sediment hardness, to enable burial



Undersea pipelines

- ▶ Going by the Nord Stream 2:
 - ▶ Buried as comes into shallow water
 - ▶ Otherwise unburied but weighted (if necessary supported) for stability on seabed
 - ▶ 1230km route; 200,000 12m pipes; €9.5B
 - ▶ Significant crew on land and at sea, to build



Undersea mining

- ▶ Traditional mining methods, following a seam out to sea
- ▶ Innovative mining methods of deep seabed -
 - ▶ ISA
 - ▶ Nauru / The Metals Company
 - ▶ Clarion Clipperton Zone - nodules
 - ▶ Outside EEZs most likely ATM
- ▶ Crewed at surface & processing plants



Wind, waves & tides - electricity generation

- ▶ Waves remain experimental
- ▶ Wind is well-developed
- ▶ Innovations in combining wind/tide
- ▶ Wind - fixed/floating - always at least tethered
- ▶ Tidal - logically requires mechanical advantage of attachment to seabed
- ▶ Substations, cables &c
- ▶ Crewing - yes there seems to be a workforce



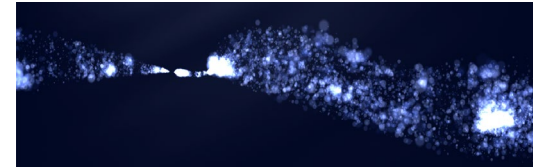
Harbour works

- ▶ Jetties, wharves and groynes
- ▶ Really engages 2 things -
 - ▶ Whether seabed is land
 - ▶ Whether dominion over that seabed, water column, airspace
- ▶ And this is what it comes back to ...



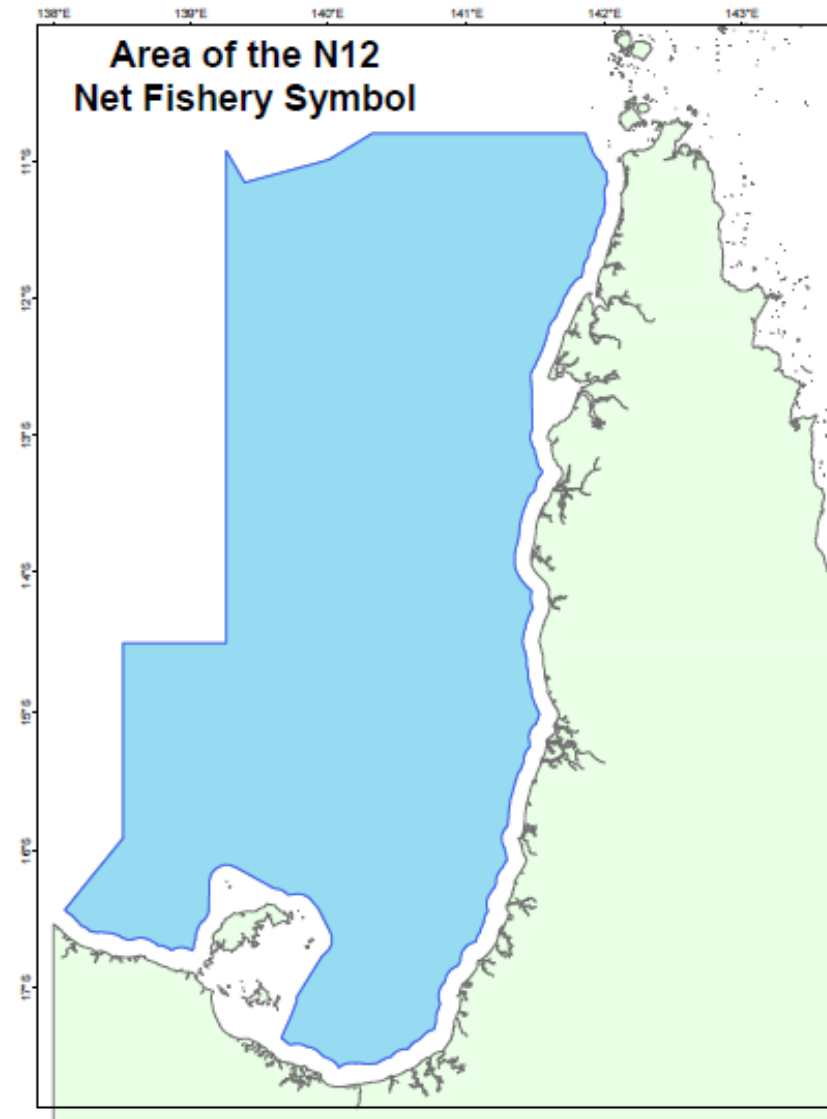
Sovereign immunity

- ▶ Apparently foreclosed for most State taxes by the Foreign State Immunities Act 1985 and regulations.
- ▶ Section 20 of the FSI Act only removes immunity from adjudication & execution for such a tax. It does not remove immunity from such a tax, as such.
- ▶ Regulations do not mention - *Building and Construction Industry (Portable Long Service Leave) Act 1991 (Qd)*
 - ▶ Do sovereign wealth funds act as States, or as essentially in trade?
 - ▶ But what of the ROC sovereign wealth fund? (No answer will be attempted.)
 - ▶ How far do the State statutes accommodate any such claim? Construction issue?
 - ▶ What of counterparties?



What the fishing cases teach

- ▶ Mapa Pearls (2023, VSCA)
- ▶ Lavender (2018, NSWCA)
- ▶ Wren Fishing (2022, QCA)
 - ▶ The States have real power
 - ▶ Within and beyond the coastal waters
 - ▶ And the laws are being read that way
 - ▶ And seabed is readily treated as land

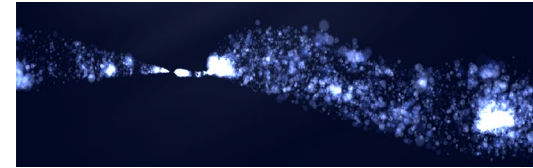


Is the seabed “land”?

- ▶ Characteristics of the seabed
- ▶ Relevance of sovereignty in the context of Commonwealth and State / Territory relationship
- ▶ “land including the seabed, x, and y”
c/f “land, the seabed, x, and y”.



Is the seabed “land”?



- ▶ *Risk v Northern Territory of Australia*
- ▶ Often cited
- ▶ relates to land (or “not land” as was held) in NT, and
- ▶ acknowledges that the pendulum can swing either way when interpreting whether the seabed is “land”
- ▶ No doubt “land” is a word that can be used in a way that would encompass the seabed
- ▶ 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”.

Is the seabed “land”?

- ▶ *Goldsworthy Mining Ltd v Federal Commissioner of Taxation*
- ▶ Harbour of Port Hedland
- ▶ Lease of a portion of the seabed is ordinarily regarded as a lease of “land” as that expression is generally accepted
- ▶ in general “land” in its legal signification includes “any ground, soil or earth”



Is the seabed “land”?

- ▶ *Sanctus Nominees Pty Ltd v Valuer-General*
- ▶ WA (Valuation of Land Act)
- ▶ Pontoon jetties - integral part of the composite structure that are actually affixed to the land
- ▶ ‘Tenant’s fixture’
- ▶ Improvements that are part of the land



Is the seabed “land”?

- ▶ *Coverdale v West Coast Council*
- ▶ Macquarie Harbour
- ▶ *Valuation of Land Act and Local Government Act*
- ▶ *Crown Land Act*

- *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”



Transfer duty and landholder duty

- ▶ "Land"
- ▶ Lease / licence distinction
- ▶ Fixtures v "fixed" v chattels / goods
- ▶ Business assets



Land tax

- ▶ "Land"
- ▶ Owner
- ▶ Exemption
- ▶ Values
- ▶ Fixtures / Improvements / chattels (less important)

Payroll tax

- ▶ Jurisdiction - Coastal waters?



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