

PARLIAMENTARY COUNSEL

Drafting Direction No. 3.3 Application of legislation in relation to various maritime and external areas

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Part 1—Preliminary

1 This Drafting Direction deals with the application of Commonwealth Acts to the territorial sea of Australia, the internal waters of Australia, the contiguous zone of Australia, the exclusive economic zone of Australia and the continental shelf of Australia. It also deals with the application of Commonwealth Acts in relation to the offshore areas in respect of the States and Territories and in relation to the Australian Antarctic Territory.

2 If a provision of an Act has a particular geographical operation, a legislative instrument made for that provision will have the same operation.

3 The Attorney General’s Department has advised that, when the expressions “continental shelf”, “territorial sea”, “exclusive economic zone” and “contiguous zone” are used in legislation, it would be useful to define them by reference to the *Seas and Submerged Lands Act 1973* (the *SSL Act*). The *Acts Interpretation Act 1901* contains the following definitions:

contiguous zone has the same meaning as in the *Seas and Submerged Lands Act 1973*.

continental shelf has the same meaning as in the *Seas and Submerged Lands Act 1973*.

exclusive economic zone has the same meaning as in the *Seas and Submerged Lands Act 1973*.

territorial sea has the same meaning as in the *Seas and Submerged Lands Act 1973*.

Part 2—Scope of application provisions

Territorial sea

4 Subsection 15B(1) of the *Acts Interpretation Act 1901* provides that provisions of Acts automatically extend to the coastal sea of Australia (which is defined, among other things, to include the territorial sea of Australia and the airspace over, and the seabed and subsoil beneath, that sea). If no contrary intention appears, you do not need to draft express provisions to apply Acts or provisions of Acts to the things covered by that subsection.

5 Subsection 15B(3) of the *Acts Interpretation Act 1901* provides that provisions of Acts in force in an external Territory extend to the coastal sea of the Territory (which is defined, among other things, to include the territorial sea adjacent to the Territory and the airspace over, and the seabed and subsoil beneath, that sea). If no contrary intention appears, you do not need to draft express provisions to apply Acts to the things covered by that subsection.

6 In relation to the meaning of “territorial sea” in section 15B of the *Acts Interpretation Act 1901*, the Office of International Law (*OIL*) has advised (opinion 95/082912 dated 26 October 1995) that:

The outer limit of the territorial sea was extended to 12 nautical miles from the territorial sea baselines in November 1990 by a Proclamation made under s.7 of the *SSL Act*. This means that the coastal sea at the present time for the purposes of s.15B of the *Acts Interpretation Act* is the area of waters between the 12 nautical mile limit

and the limits of the States (generally the coastline at mean low water with bay and river closing lines).

Internal waters

7 Sections 10 and 14 of the SSL Act provide that the internal waters of Australia are the waters on the landward side of the territorial sea of Australia. The internal waters of Australia can be divided between:

- (a) the internal waters of the States, i.e. waters of or within any bay, gulf, estuary, river, creek, inlet, port or harbour that:
 - were, on 1 January 1901, within the limits of a State; and
 - remain within the limits of the State; and
- (b) the internal waters of the Commonwealth, i.e. Australia's internal waters other than those mentioned in paragraph (a).

8 Section 15B of the *Acts Interpretation 1901* has the effect that provisions of Acts automatically extend to the internal waters of the Commonwealth (see subparagraphs 15B(4)(a)(ii) and (4)(b)(ii)). If no contrary intention appears, you do not need to draft express provisions to apply Acts or provisions of Acts to the internal waters of the Commonwealth.

9 OIL has advised that provisions of Acts automatically extend to the internal waters of the States and Territories because those internal waters form part of the territory of the State or Territory concerned. You do not need to draft express provisions to apply Acts or provisions of Acts to the internal waters of the States and Territories.

Contiguous zone

10 OIL has advised (opinion 04/9495 dated 24 August 2004) that in its contiguous zone, Australia may exercise the control necessary to prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea and may punish infringement of the above laws and regulations committed within its territory or territorial sea (see Article 33 of the United Nations Convention on the Law of the Sea (*UNCLOS*), which is set out in the Schedule to the SSL Act).

11 The rights mentioned in paragraph 10 are rights under international law. There is no equivalent provision to section 15B of the *Acts Interpretation Act 1901* in relation to the contiguous zone. If your instructors wish to have provisions apply in that zone, you should make it clear that the provisions do so apply (which may take the form of giving the provisions a general extra-territorial operation). You should refer the provisions to OIL for comment, who will consider whether they are consistent with those rights.

12 Some examples of provisions that have a limited operation are:

- (a) subsection 184A(4) of the *Customs Act 1901* (about foreign ships in the contiguous zone of Australia); and
- (b) subsection 245B(4) of the *Migration Act 1958* (about foreign ships in the contiguous zone of Australia).

Exclusive economic zone

13 OIL also advised in the opinion mentioned in paragraph 10 that, in its exclusive economic zone, Australia only has limited sovereign rights, essentially for the purpose of exploring and exploiting or conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil (see Article 56 of UNCLOS, which is set out in the Schedule to the SSL Act). That Article also provides that Australia has sovereign rights with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds. That Article also provides that Australia has other rights in relation to the establishment and use of artificial islands, installations and structures, marine scientific research and the protection and preservation of the marine environment.

14 The rights mentioned in paragraph 13 are rights under international law. There is no equivalent provision to section 15B of the *Acts Interpretation Act 1901* in relation to the exclusive economic zone. If your instructors wish to have provisions apply in that zone, you should make it clear that the provisions do so apply (which may take the form of giving the provisions a general extra-territorial operation). You should refer the provisions to OIL for comment, who will consider whether they are consistent with those rights.

15 Some examples of provisions that have a limited operation are:

- (a) subsection 184A(6) of the *Customs Act 1901* (about foreign ships in the exclusive economic zone of Australia); and
- (b) subsection 22(2) of the *Protection of the Sea (Civil Liability) Act 1981* (about foreign ships in the exclusive economic zone of Australia).

Continental shelf

16 OIL also advised in the opinion mentioned in paragraph 10 that Australia has limited sovereign rights over its continental shelf for the purpose of exploring it and exploiting the mineral and other non-living resources of the sea-bed and subsoil together with living organisms belonging to sedentary species (see Article 77 of UNCLOS, which is set out in the Schedule to the SSL Act). OIL also advised that Australia's rights over the continental shelf do not affect the legal status of the superjacent waters or of the airspace above those waters (see Article 78 of UNCLOS, which is set out in the Schedule to the SSL Act).

17 The rights mentioned in paragraph 16 are rights under international law. There is no equivalent provision to section 15B of the *Acts Interpretation Act 1901* in relation to the continental shelf.

18 The effect of Articles 77 and 78 of UNCLOS is that, as a matter of international law, Australia does not have general jurisdiction over the continental shelf and does not necessarily have jurisdiction in respect of the waters and airspace above the continental shelf.

19 There are provisions in Commonwealth legislation that apply Acts or provisions of Acts to the continental shelf of Australia, the waters above the continental shelf of Australia or the airspace above the continental shelf of Australia. In commenting on a recent Bill, OIL expressed concerns about the width of such provisions and how they interact with Articles 77 and 78 of UNCLOS.

20 If your instructors wish to have provisions apply in relation to the continental shelf, you should make it clear that the provisions do so apply (which may take the form of giving the provisions a general extra-territorial operation). You should refer the provisions to OIL for comment, who will consider whether they are consistent with the rights mentioned in paragraph 16.

Offshore areas in respect of the States and Territories

21 There are provisions in Commonwealth legislation that apply Acts or provisions of Acts in relation to the offshore areas in respect of the States and Territories. A definition of “offshore area” along the following lines is also usually included:

offshore area, in relation to a State or Territory, has the same meaning as in the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*.

22 You should refer provisions applying Acts or provisions of Acts in relation to the offshore areas in respect of the States and Territories to OIL for comment.

Australian Antarctic Territory

23 Section 8 of the *Australian Antarctic Territory Act 1954* provides that a Commonwealth Act will not apply to the Australian Antarctic Territory (**AAT**) unless it is expressly stated to apply to the AAT. The Attorney-General’s Department has advised (opinion A/82/3722 dated 27 June 1984) that a provision along the lines “This Act extends to every external Territory” is sufficient for the Act to apply to the AAT.

24 OIL has advised (opinion #VOL. 100 #P. 933 dated 4 February 1998):

However, our international obligations will prevent the application of our laws to certain persons and to certain types of activities. For example, under the Antarctic Treaty we cannot apply any of our laws to certain foreign observers and scientific personnel within the AAT. (This particular qualification on the application of Australian law is given effect in section 4 of the *Antarctic Treaty Act 1960*). Furthermore, there are a number of international obligations which Australia has undertaken in relation to Antarctica which should prevent the application of particular Australian laws to foreigners in the AAT and adjacent maritime areas. These obligations include those under the Antarctic Treaty, conservation measures adopted under that Treaty, the Environment Protocol to the Antarctic Treaty, the Convention on the Conservation of Antarctic Marine Living Resources and the Antarctic Seals Convention. Many of these obligations are given effect under Australian legislation, including the *Antarctic Marine Living Resources Conservation Act*, the *Antarctic Treaty Act*, the *Antarctic Treaty (Environment Protection) Act* and the *Australian Antarctic Territory Act*.

25 If you are asked to draft a provision applying legislation or provisions of legislation to foreign citizens or nationals in the AAT or the adjacent maritime areas, you should refer the issue to OIL for advice.

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Note: Before the issue of the current series of Drafting Directions, this Drafting Direction was known as Drafting Direction No. 15 of 2005.