

PARLIAMENTARY COUNSEL

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

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Contents

Part 1—Preliminary	2
Part 2—Scope of application provisions	2
Territorial sea	2
Internal waters	3
Contiguous zone	3
Exclusive economic zone	4
Continental shelf	4
Offshore areas in respect of the States and Territories	5
Australian Antarctic Territory	5

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* (the **AI Act**) 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 AI Act has the effect 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 AI Act has the effect 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 subsection 15B(4) of the AI Act, 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 section 7 of the SSL Act. This means that the coastal sea at the present time, for the purposes of section 15B of the AI 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 AI Act 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 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 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 Schedule 1 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 AI Act 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 the Office of International Law (*OIL*) for comment, who will consider whether they are consistent with those rights.

12 Some examples of provisions that rely on Australia's rights in the contiguous zone mentioned in paragraph 10 are:

- (a) paragraph 41(1)(c) of the *Maritime Powers Act 2013*; and
- (b) subsections 42(4), 43A(5), 43C(5) and 43E(4) of the *Surveillance Devices Act 2004*; and

- (c) former subsections 184A(4) of the *Customs Act 1901* and 245B(4) of the *Migration Act 1958*, as in force prior to their repeal by the *Maritime Powers (Consequential Amendments) Act 2013*.

Exclusive economic zone

13 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 Schedule 1 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 AI Act 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 rely on Australia's rights in the exclusive economic zone mentioned in paragraph 13 are:

- (a) subsection 22(2) of the *Protection of the Sea (Civil Liability) Act 1981*; and
- (b) former subsection 184A(6) of the *Customs Act 1901*, as in force prior to its repeal by the *Maritime Powers (Consequential Amendments) Act 2013*.

Continental shelf

16 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 Schedule 1 to the SSL Act). 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 Schedule 1 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 AI Act 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. OIL has previously 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* has the effect that legislation does not apply to the Australian Antarctic Territory (*AAT*) unless it is expressly stated to apply to the AAT. If legislation is expressed to extend to the external Territories (see Part 3 of Drafting Direction No. 3.10 for the drafting precedent), then this is sufficient for the legislation to apply to the AAT.

24 The AAT is a sovereign part of Australia. However, Australia’s sovereignty over the AAT is not recognised by all countries. Australia is a party to the Antarctic Treaty ([1961] ATS 12), which sets aside the issue of sovereignty by effectively ‘freezing’ all territorial claims. Australia is also a party to a number of other related international agreements which, together with the Antarctic Treaty, make up what is known as the Antarctic Treaty system.

25 There is an established practice among Antarctic Treaty parties of enforcing their domestic law in Antarctica only against their own citizens and nationals. Consistent with this practice, Australia refrains from actively enforcing its laws against foreign citizens and nationals in the AAT. Furthermore, in certain cases Australia’s international obligations impose a positive requirement not to apply its laws. For instance, the Antarctic Treaty system includes international obligations which prevent Australia applying its laws to certain classes of persons and to certain types of activities. Many of these obligations are given effect to under Australian legislation, including the *Antarctic Treaty Act 1960*, the *Australian Antarctic Territory Act 1954*, the *Antarctic Marine Living Resources Conservation Act 1981* and the *Antarctic Treaty (Environment Protection) Act 1980*.

26 The following principles are relevant in considering whether legislation should apply to the AAT:

- (a) the starting point is that if legislation will extend to the Coral Sea Islands Territory or the Territory of Heard Island and McDonald Islands, the AAT

should not be treated differently and the legislation should extend to the AAT, unless there is a particular reason not to;

- (b) Australia's practice of not enforcing laws against foreign citizens and nationals in the AAT is not, in itself, a reason to not extend legislation to the AAT;
- (c) significant policy or legal issues related to the Antarctic Treaty system, including Australia's international obligations, may make it inappropriate for particular legislation to extend to the AAT;
- (d) the remoteness and physical environment of the AAT, or other like constraints, may make it impractical or inappropriate for particular legislation to extend to the AAT (for example, because it will not be possible to comply with, enforce or administer the legislation).

27 The question whether or not to apply legislation to the AAT (including by extending the legislation to all the external Territories) may require consultation with the Australian Antarctic Division of the department responsible for the environment (the *Environment Department*) in accordance with the Legislation Handbook. The Environment Department may involve OIL and the Department of Foreign Affairs and Trade in considering the question of the application of the legislation to the AAT. OPC may also be required to refer the draft to the Environment Department or OIL under Drafting Direction No. 4.2.

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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.