

Jurisdiction at sea: international law and domestic law

- 3.1 The dramatic growth in cruising in Australia and around the world makes regulation of the industry more important than ever. The inquiry is particularly focussed on the ability of the Australian Government to improve crime prevention and investigation on cruise vessels. This ability depends on both the extent of Australia's jurisdiction and the vigour of its international cooperation.
- 3.2 Questions of jurisdiction at sea – under the system established by the *United Nations Convention on the Law of the Sea 1982 (UNCLOS)* – are notoriously complex and often misunderstood. A key purpose of this inquiry is to ascertain the scope of Australian jurisdiction and whether Australia is currently exercising the full extent of this jurisdiction.
- 3.3 Where Australia is not able to exercise jurisdiction, the inquiry has investigated the extent to which Australia is actively participating in international fora and leading international efforts to ensure the safety of passengers and the full prosecution of crimes committed at sea.
- 3.4 This Chapter will consider the following questions of jurisdiction and international cooperation:
 - Understanding jurisdiction.
 - Enforcement jurisdiction under international law:
 - ⇒ The *United Nations Convention on the Law of the Sea 1982 (UNCLOS)* ;
 - ⇒ Territorial jurisdiction;
 - ⇒ Extra-territorial jurisdiction;
 - ⇒ Flag-state jurisdiction; and
 - ⇒ Legal Advice.
 - Domestic Australian jurisdiction:

- ⇒ *Crimes At Sea Act*; and
- ⇒ *Criminal Code Act*.
- Intergovernmental cooperation through the International Maritime Organisation.

Understanding Jurisdiction

- 3.5 Crimes committed at sea present a 'dynamic legal scenario'¹ where international law recognises a multitude of domestic jurisdictions existing concurrently. At all times, a ship is subject to the domestic laws of the country in which it is registered, but it can also be within the territorial jurisdiction of another country whilst transiting its waters and in its ports, and thereby subject to that second country's laws.
- 3.6 Further, where a citizen is involved in a criminal offence, either as an alleged perpetrator or as a victim, their country of citizenship is recognised under international law as also having jurisdiction to investigate and prosecute the crime. A criminal act committed on board will therefore often lead to potentially competing jurisdictional claims.²
- 3.7 Jurisdiction refers to the ability of a country both to make and to enforce its laws. It is generally considered that there are two basic types of jurisdiction: prescriptive jurisdiction and enforcement jurisdiction. Prescriptive jurisdiction is the power to regulate people and situations regardless of their location. Enforcement jurisdiction on the other hand is the ability of a country to legally arrest, try, convict and gaol an individual for a breach of its laws.³
- 3.8 It is important to note that the ability to legislate in relation to particular conduct may not necessarily give rise to a corresponding power of enforcement with respect to that same conduct.⁴ The subject of this inquiry has raised questions of both prescriptive jurisdiction and enforcement jurisdiction.
- 3.9 Many of the victims' groups that participated in the inquiry campaign to prevent accidents and crime as a primary focus. Preventative measures – through better regulation, consumer information and vessel equipment

1 Dr Kate Lewins, *Submission 1*, p. 3.

2 Dr Kate Lewins, *Submission 1*, p. 3.

3 D Rothwell, et al (eds), *International Law: Cases and Materials with Australian Perspectives*, 2011, p. 294.

4 Legal Advice, Appendix D, p. 3.

- rely on prescriptive jurisdiction. The investigation and prosecution of crimes, through enforcement jurisdiction, is usually a secondary aim.
- 3.10 However, in the context of crimes at sea, international law limits Australia’s prescriptive jurisdiction to pass laws and regulations about the design, construction, manning and equipment of foreign ships unless those laws give effect to generally accepted international standards or rules.⁵ Similarly, international law places limitations upon Australia’s law enforcement authorities (both federal and state or territory) to investigate alleged criminal conduct.
- 3.11 Clearly establishing the circumstances in which Australia may claim jurisdiction is important for ascertaining the duties of domestic law enforcement agencies and the challenges they encounter. It is also important to guide this Committee about the kinds of recommendations it may make to the Australian Government.
- 3.12 The Committee obtained legal advice from the Australian Government Solicitor on a number of issues, including the impact of jurisdictional limitations on Australia’s legislative options in this area. As noted in Chapter 1, the Legal Advice is included at Appendix D.
- 3.13 Given the severe limitations on both enforcement and prescriptive jurisdiction, there is a pressing need for the Australian Government to ensure it utilises the full extent of its jurisdiction to address both prevention and justice for crimes at sea. Where the limits of jurisdiction bar Australia from taking action, the Australian Government must lead international efforts to improve safety and justice for cruising passengers.

Enforcement jurisdiction under international law

- 3.14 A country will only be entitled to prosecute a crime (exercising enforcement jurisdiction) if it has recognised grounds to claim jurisdiction over the event in international law, and its domestic law expressly asserts that jurisdiction.⁶
- 3.15 As a matter of general international law, a country may invoke jurisdiction – and apply its domestic laws and enforce sanctions for criminal conduct – in a variety of circumstances, including:
- Where criminal conduct occurs within their territory (*territorial principle*);

5 Legal Advice, Appendix D.

6 Dr Kate Lewins, *Submission 1*, p. 2.

- Where one of their citizens is involved (for example, as either a victim or perpetrator) in the crime (*nationality principle and the passive personality principle*);
- Where the conduct is so heinous and so widely condemned that all nations proscribe and punish its occurrence (for example, piracy, genocide and hostage taking) (*universal principle*); and
- Where the criminal conduct has a significantly adverse impact on its national security or governmental process (*protective principle*).⁷

3.16 Importantly, general international law recognises a multiplicity of jurisdictions existing concurrently. Dr Kate Lewins, a specialist in international maritime law at Murdoch University, submitted:

The result, more often than not, is that there might be multiple [countries] entitled to claim jurisdiction over a particular criminal act, based on the flag and location of the ship and the nationalities of the people involved. [Which country will take the lead] may well end up being one negotiated through diplomatic channels, largely based on pragmatism.⁸

United Nations Convention on the Law of the Sea 1982 (UNCLOS)

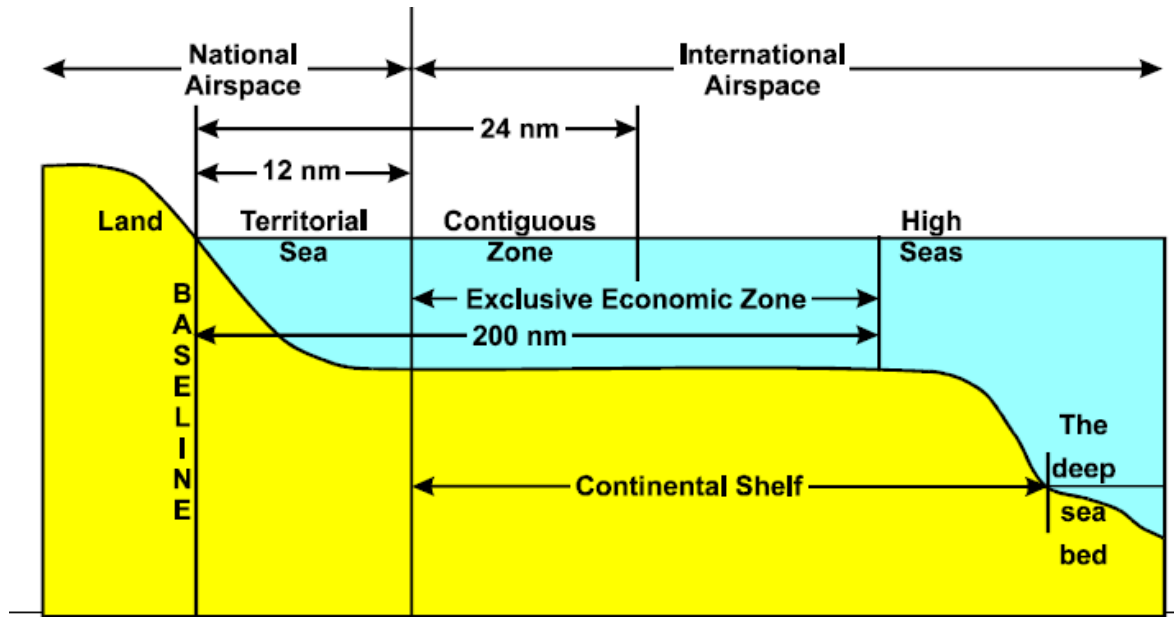
3.17 The international rules and principles governing the regulation of ocean space are captured by UNCLOS. Participating in all three negotiating conferences on the Law of the Sea (1958, 1960 and 1973-1982), Australia became a party to UNCLOS in 1994, the year that UNCLOS came into force.

3.18 UNCLOS accords countries with specific jurisdictional zones and corresponding rights in ocean space adjacent to their territory. Territorial jurisdiction operates like concentric circles, ranging from full territorial sovereignty within internal waters, to almost no sovereign rights on the high seas. As demonstrated in Figure 1, these maritime zones are measured from the Territorial Sea Baseline (TSB), the low-water line along the coast.

⁷ See: Dr Kate Lewins, *Submission 1*; Legal Advice, Appendix D.

⁸ Dr Kate Lewins, *Submission 1*, p. 2.

Figure 1 Maritime zones



Source C Schofield, 'Maritime Zones and Jurisdictions', p. 18, www.gmat.unsw.edu.au/ablos/ABLOS03Folder/SESSION3.PDF

3.19 Under UNCLOS, the zones in which Australia can exercise its territorial jurisdiction can be classified in the following order (with diminishing capacity to enforce domestic law the further out from the TSB):

- Internal waters (all waters landward of the TSB);
- Territorial sea (12 nautical miles (nm) from the TSB)
- Contiguous zone (from 12nm to 24nm from the TSB);
- Exclusive economic zone (no further than 200nm from the TSB);
- Continental shelf; and
- High seas.

3.20 High seas, or 'international waters', are 'open to all States, whether coastal or land-locked'.⁹ International waters are considered to be outside the *territorial* jurisdiction of any country. However, in limited circumstances, Australia may exercise *extra-territorial* jurisdiction.

3.21 Both territorial jurisdiction and extra-territorial jurisdiction are discussed below.

Territorial jurisdiction

3.22 There are two categories of territorial jurisdiction that would allow Australia to enforce its criminal laws against an alleged criminal act committed whilst at sea: *Port State jurisdiction* and *Coastal State*

9 UNCLOS, Article 87(1).

jurisdiction.¹⁰ Jurisdiction beyond these two categories – in the ‘contiguous zone’ and the ‘exclusive economic zone’ – is severely limited, and will be discussed briefly below.

Port state jurisdiction

- 3.23 If a criminal act occurred when the ship is in internal waters (all waters landward of the TSB) having visited a port or about to visit a port, or when the ship has departed the port and is now in the territorial sea of Australia (12nm from the TSB), then Australia can claim jurisdiction over the alleged criminal offence, provided that the relevant criminal legislation expresses its extra-territorial application.¹¹
- 3.24 However, minor matters, such a petty theft, are often left to the Master of the Ship. Dr Lewins explains:
- ... it is commonplace for the port State to leave the minor matters on board to the so called ‘internal economy’ of the ship. The ship is not, after all, a lawless place; as the laws of the flag State apply to it.¹²
- 3.25 The concept of a ‘flag State’ and its jurisdiction are described later in this Chapter.
- 3.26 More significant crimes, such as assault, manslaughter or murder, are said to engage the ‘interests’ of the port State. Consequently, the laws of the port State can and will apply as their enforcement is an exercise of sovereignty and relate to the ‘peace, good order and government’ of the State.¹³

Coastal state jurisdiction

- 3.27 Under limited circumstances, a coastal State may exercise its territorial jurisdiction if the ship is not visiting a port of that State but is travelling through its territorial sea (out to 12 nm from the TSB).
- 3.28 UNCLOS provides that a State may only exercise this type of jurisdiction where:
- The ‘consequences’ of the crime extends to the coastal State;
 - Is of a kind to disturb the peace of the State or the good order of the State’s territorial sea;
 - If the assistance of the State is requested by the Master of the Ship; or

10 Dr Kate Lewins, *Submission 1*, p. 5.

11 UNCLOS, Articles 25- 27.

12 Dr Kate Lewins, *Submission 1*, p. 5.

13 *CSL Pacific* [2003] CLR 397.

- The matter involves the specific case of the illicit traffic of narcotic drugs.¹⁴
- 3.29 Commenting on the connection between enforcement jurisdiction and prescriptive jurisdiction, Dr Lewins disputes the position set out in the Government Response. She considers that coastal State authority enables Australia to make entry to Australian ports or internal waters conditional upon compliance with certain regulations:

I do believe that Australia is entitled to impose certain regulations on ships that visit its ports, and to this extent I respectfully disagree with the government response to [the Milledge recommendations]. I view the ability to regulate as stemming from the fact that we are allowing these vessels into our ports and we have an entitlement then – a sovereign entitlement – to dictate the terms of that entry. ... I do not believe that measured regulations would interfere with our obligation to allow innocent passage through territorial waters, which I think is a slightly different point.¹⁵

Jurisdiction in the Contiguous and Exclusive Economic Zones

- 3.30 Australia may only exercise control in the contiguous zone that is necessary to prevent or punish infringement of customs, fiscal, immigration or sanitary laws and regulations.
- 3.31 Similarly, Australia may only exercise jurisdiction over its exclusive economic zone and continental shelf for purposes relating to economic exploitation and environmental protection. This does not extend to criminal matters.
- 3.32 Should Australia wish to exercise jurisdiction over an alleged crime occurring within its contiguous zone, exclusive economic zone, continental shelf or on the high seas, it can only do so under certain circumstances. Such an exercise of jurisdiction is called extra-territorial jurisdiction. Extra-territorial jurisdiction is provided in general international law and is beyond the scope of UNCLOS.

Extra-territorial jurisdiction

- 3.33 Countries can claim extra-territorial jurisdiction, concurrent with flag state jurisdiction, over crimes committed on foreign-flagged ships that occur beyond its territory based on a number of principles.

14 UNCLOS, Article 27.

15 Dr Kate Lewins, *Committee Hansard*, 1 November 2012, p. 2.

Next port jurisdiction

- 3.34 Australia may validly exercise jurisdiction over an alleged crime on board a ship beyond the territorial sea if that ship next docks in an Australian port.¹⁶
- 3.35 In such circumstances, it is common for the Master of the ship to report the incident to the authorities of the next-port State. In practice, Dr Lewins explains, this means that Australian authorities would lead subsequent investigations and the collection of evidence. Depending on the nature of the alleged crime, it may also mean that Australian authorities detain the accused.¹⁷
- 3.36 This claim for extra-territorial jurisdiction is provided under the *Crimes at Sea Act 2000* (Cth) which is discussed further below.¹⁸
- 3.37 Even where criminal proceedings are commenced in an alternative jurisdiction, such as that of the flag-state, the investigative work of the next-port jurisdiction may be strongly relied upon in those proceedings.

Jurisdiction based on the nationality of the accused or victim

- 3.38 As noted above, Australia may claim jurisdiction under general international law where an Australian citizen is either an accused or a victim of the alleged crime. These are understood as the nationality principle and the passive personality principle respectively.
- 3.39 International law provides that when a criminal act is committed by an Australian citizen, Australia has the power to prosecute that citizen according to its domestic laws no matter where the crime took place.¹⁹
- 3.40 The *Crimes at Sea Act 2000* (Cth) applies Australian criminal law extraterritorially using the above two principles. Beyond 200 nm from the TSB, or the outer limit of the Continental Shelf (the high seas), the criminal law of the Jervis Bay Territory applies to a criminal act on an Australian ship, by an Australian citizen (other than a crew member) on a foreign-flagged ship, or by any person on a foreign-flagged ship whose next port of call is Australia.²⁰ This is further explained in the next section, regarding Australian domestic jurisdiction.
- 3.41 The passive personality principle provides for Australia to prosecute crimes committed against its own citizens outside its territory under

16 Dr Kate Lewins, *Submission 1*, p. 7.

17 Dr Kate Lewins, *Submission 1*, p. 7.

18 *Crimes at Sea Act*, Section 6(3).

19 *Nottebohm Case (Liechtenstein v. Guatemala)*; *Second Phase*, ICJ Decision, 6 April 1955.

20 *Crimes at Sea Act*, Sections 6(2), 6(3).

certain circumstances.²¹ Following the 2002 terrorist bombings in Bali, Australia relied on this principle to pass legislation to this effect.²²

- 3.42 Dr Lewins suggested that this might enable Australia to prosecute crimes committed against Australians on board a ship at sea:

Where a crime occurs on a cruise ship, legislation that relies on passive personality principles to ground an assertion of jurisdiction over a particular crime might well be justified in circumstances where the flag State does not intend to prosecute. [This] is a realistic scenario given that most cruise ships are flagged in open registries. Therefore this head of jurisdiction may be useful for a State looking to ensure that the accused is required to face due process in their courts if the alternative is that the accused will not face justice at all.²³

- 3.43 Dr Lewins told the Committee that Australia should apply the passive personality principle to crimes committed at sea:

If there are other reasons we could claim jurisdiction over things that happen on that outward voyage then I believe we should do so. We already claim it on the whether the accused is Australian – I say we should also claim it if the victim is Australian. This notion that we can claim jurisdiction over criminal acts where an Australian is the victim anywhere in the world has been controversial in the past, but we are suitably deferential to the overriding right of the flag state to deal with things. It is a useful second stage. In fact, it becomes the de facto first stage because so often the flag state is not in a position to deal with criminal acts on board its many ships.²⁴

- 3.44 Currently the United States is the only country to apply the passive personality principle specifically to crimes committed at sea, claiming jurisdiction in relation to a crime committed by or against an American national on the high seas or on any voyage that departed from or arrived in the United States.²⁵

Flag state jurisdiction

- 3.45 As indicated above, under UNCLOS the flag state (the country in which the ship is registered) has primary responsibility over its ship, including

21 Dr Kate Lewins, *Submission 1*, p. 7.

22 Dr Kate Lewins, *Submission 1*, p. 8.

23 Dr Kate Lewins, *Submission 1*, p. 8.

24 Dr Kate Lewins, *Committee Hansard*, 1 November 2012, p. 5.

25 Dr Kate Lewins, *Submission 1*, p. 8.

criminal jurisdiction, even when the ship is outside the flag state's territorial waters.²⁶

- 3.46 However, given that vessels are generally flagged in distant states, flag states' ability to play an active role in investigations and/or prosecutions can be extremely limited.
- 3.47 This head of jurisdiction is unlikely to be invoked by Australian law enforcement as few ships are registered in Australia, other than passenger ships such as *Spirit of Tasmania* and merchant ships. Of particular relevance to this inquiry, no cruise ships are registered in Australia.²⁷
- 3.48 Ms Camille Goodman, from the Attorney General's Department, explained how the laws of the flag-state are 'carried' by the vessel:
- A general principle is that ... the internal operation of a ship which is regulated by the laws of a foreign state on an ongoing basis, as ships move around the world and the general law that the flag state has primacy of jurisdiction on the high seas.²⁸
- 3.49 Evidence received during the inquiry indicated that in many cases, the flag state is simply a flag of convenience and does not have the interest, will or resources to deal with a crime.²⁹ In such cases, other states with concurrent jurisdiction may be able to come to an agreement with the flag state to investigate and prosecute the alleged crime.

Legal Advice

- 3.50 The preceding paragraphs of this Chapter amply demonstrate the complexity of international law as it applies to vessels that travel internationally. Various sources of evidence to the inquiry have pointed out that this is a notoriously complex area of law that does not readily provide rules for straightforward application. For example, the Attorney-General's Department submitted that:
- In practice, the application of these principles [of international law] requires a balancing of the rights and obligations of flag States and coastal States, as well as a consideration of both Australia's international legal obligations and matters of international practice and comity.³⁰

26 UNCLOS, Article 27.

27 Government Response, Appendix F.

28 Ms Camille Jean Goodman, Attorney General's Department, *Committee Hansard*, 14 March 2013, p. 2.

29 See: Dr Kate Lewins, *Submission 1*, p. 4; Holiday Travel Watch, *Submission 3*, pp. 10-11; Commissioner for Victims' Rights South Australia, *Supplementary Submission 7.1*, p. 2.

30 Attorney-General's Department, *Supplementary Submission 22.1*, p. 2.

3.51 The Milledge Recommendations suggested Australia consider passing legislation that would be similar in effect to the *Kerry Act*. Evidence to the inquiry supported such a step.³¹ However, the Government Response indicated that it does not support the adoption of legislation similar to the *Kerry Act* in Australia, saying:

The Government considers that the current arrangements already cover the areas raised in the *Kerry Act* to the extent possible under Australia's obligations pursuant to international law.³²

3.52 This question of whether Australia has the jurisdiction to enact legislation similar to the *Kerry Act* was a contentious issue during the inquiry. The Attorney-General's Department reiterated the position put forward in the Government Response:

In particular, under article 21 of [UNCLOS] we cannot pass laws and regulations about the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international standards or rules. That makes it very difficult for Australia to pass something analogous to the *Kerry act*.³³

3.53 However, Dr Kate Lewins, for example, submitted that:

While Australia might consider it unpalatable to demand ship design or infrastructure changes such as heightened ship rails, it could nonetheless introduce a version of [the *Kerry Act*] dealing with, for example, on board CCTV monitoring, formal reporting standards for criminal acts aboard, and requiring evidence of training in medical treatment for sexual assault, and crime scene management.³⁴

3.54 The Committee sought to establish definitively whether Australia would be able to enact legislation similar to the *Kerry Act*. To this end, it decided to obtain legal advice, which is referred to in various parts of this report. Whilst the Legal Advice gave the opinion that certain measures covered by the *Kerry Act* could be regulated under Australian law, it did not support a general adoption of similar legislation in Australia.

31 See: Dr Kate Lewins, *Committee Hansard*, 1 November 2012, p. 2; Commissioner for Victims' Rights South Australia, *Submission 7*, p. 10; Mr Mark Brimble, *Committee Hansard*, 1 February 2013, p. 7.

32 Government Response, Appendix F, p. 7.

33 Mr Iain Anderson, Attorney-General's Department, *Committee Hansard*, 14 March 2013, p. 2.

34 Dr Kate Lewins, *Submission 1*, p. 19.

Jurisdiction under domestic Australian maritime law

- 3.55 If it can be established that Australia has jurisdiction relating to a matter under international law, the next step is to consider how the matter is dealt with under domestic law. As a federation, there are divisions of jurisdiction depending on where crimes occur in Australia.
- 3.56 To resolve complexities presented by Australia's federal system, the Australian Government, the States and the Northern Territory agreed in November 2000 to a cooperative scheme that provides clarity to the overlapping jurisdictions at the different levels of government. This scheme is referred to as the *Intergovernmental Agreement – Crimes at Sea 2000* (the Intergovernmental Agreement).³⁵
- 3.57 The Intergovernmental Agreement provides for the extraterritorial application of the criminal law of the States in the waters adjacent to the coast of Australia. It also provides for the division of responsibility for administering and enforcing the law relating to crimes at sea.
- 3.58 The cooperative scheme is given the force of law by the following:
- *Crimes at Sea Act 2000* (Commonwealth);
 - *Crimes at Sea Act 1998* (New South Wales);
 - *Crimes at Sea Act 1999* (Victoria);
 - *Crimes at Sea Act 2001* (Queensland);
 - *Crimes at Sea Act 2000* (Western Australia);
 - *Crimes at Sea Act 1998* (South Australia);
 - *Crimes at Sea Act 1999* (Tasmania); and
 - *Crimes at Sea Act 2000* (Northern Territory).
- 3.59 The application of Australian criminal law to matters beyond 200nm can only be applied to an act committed on an Australian ship, an act committed by or against an Australian citizen, or to instances on board a non-Australian ship not involving an Australian citizen but where the next port of call is an Australian port or an external territory of Australia.³⁶ This reflects the international jurisdictional rules as explained above, particularly those under UNCLOS.
- 3.60 Whenever a Federal, state or territory prosecutor seeks to commence criminal proceedings for an alleged criminal act on board a foreign-registered ship, the Federal Attorney-General must give consent before the

35 Intergovernmental Agreement – Crimes at Sea, Appendix H.

36 Mr Iain Anderson, Attorney-General's Department, *Committee Hansard*, 14 March 2013, p. 1.

matter proceeds to a hearing or determination.³⁷ The purpose of the Attorney-General's consent is to ensure consultation with foreign governments who hold concurrent jurisdiction, particularly the flag State.

- 3.61 The Intergovernmental Agreement states that, while the Australian Government, the States and the Northern Territory are empowered under the cooperative scheme to investigate and prosecute crimes that fall within their relevant jurisdictions, the applicable international legal obligations must be observed:

In exercising or performing powers, duties and functions under the cooperative scheme, the parties and their agencies must act so as to avoid any breach by Australia of its international obligations, in particular under the United Nations Convention on the Law of the Sea, having regard especially to the responsibilities of Australia with respect to ships of the Australian flag, and to the rights of other countries in the maritime areas to which the arrangements in this Agreement apply.³⁸

- 3.62 As previously indicated, the Intergovernmental Agreement is given legal force at the federal level by the *Crimes at Sea Act 2000* (Cth) (the *Crimes at Sea Act*). The *Crimes at Sea Act*, and the cooperative jurisdictional arrangement are further discussed below.

Crimes at Sea Act

- 3.63 The *Crimes at Sea Act* provides for the application of Australian criminal law on a territorial basis. The *Crimes at Sea Act* is the primary act that seeks to claim jurisdiction over crimes at sea.
- 3.64 As explained above, it also gives legislative effect to the cooperative approach set out in the Intergovernmental Agreement. The agreement provides for a system to clearly identify the appropriate domestic jurisdiction in Australia's federal system when a crime has occurred.

Establishing the relevant domestic jurisdiction in a federal system

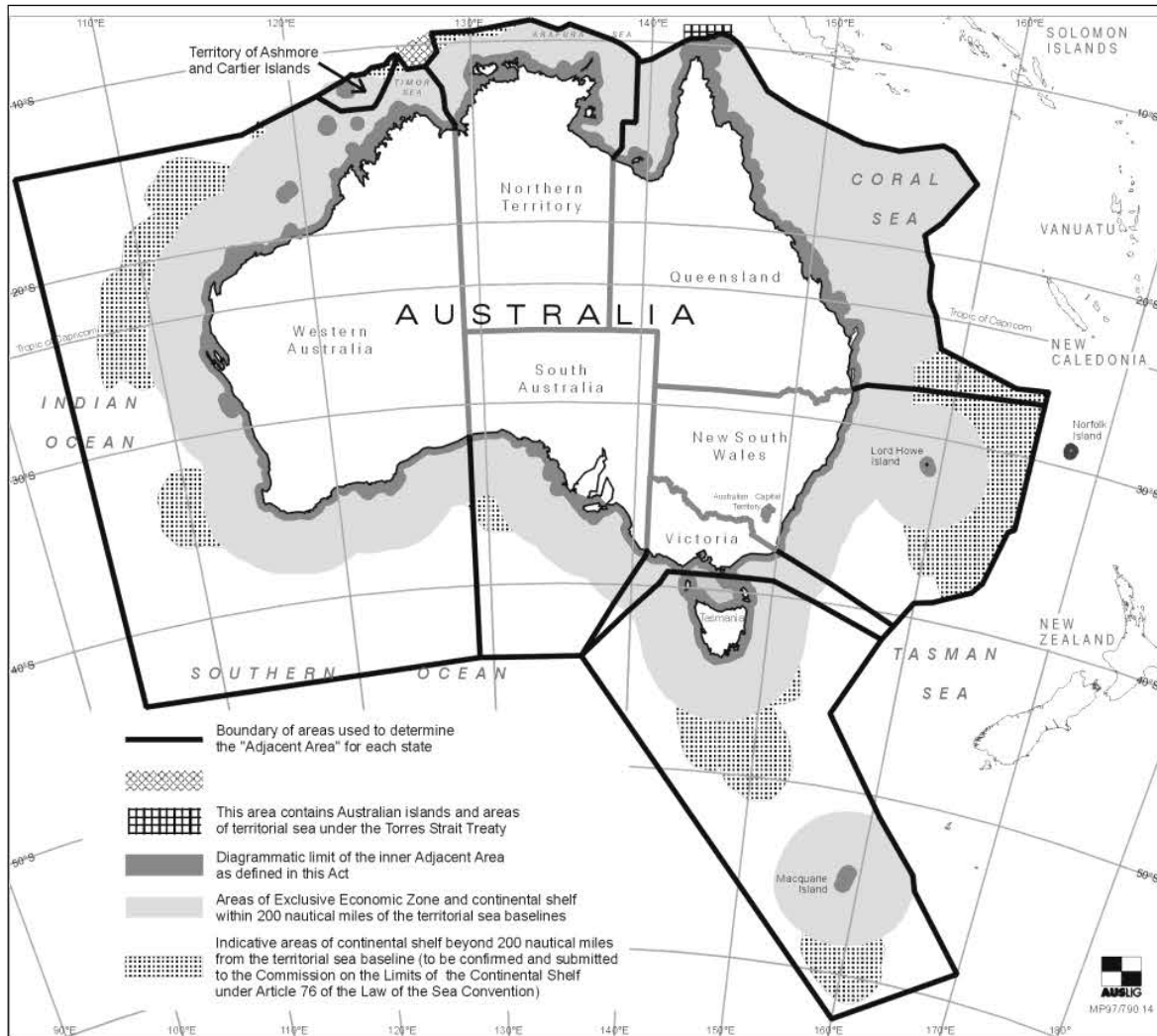
- 3.65 The *Crimes at Sea Act* establishes three 'zones' – the inner adjacent area, the outer adjacent area and the area outside the adjacent area. These areas are illustrated in the figure on the following page. Mirroring UNCLOS maritime boundaries, the 'inner adjacent area' is that area within a 12nm belt of sea as measured from the baseline of the State (its internal waters). The outer adjacent areas is that area beyond 12nm up to a distance of

37 Mr Iain Anderson, Attorney-General's Department, *Committee Hansard*, 14 March 2013, p. 1, 8.

38 Intergovernmental Agreement – Crimes at Sea, Appendix H, p. 2.

200nm from the baseline for the State or the limit of the continental shelf (whichever is the greater distance).³⁹

Figure 2 Indicative Map of Intergovernmental Agreement jurisdictions



Source Schedule 1, Crimes At Sea Act 2000

3.66 For criminal acts alleged to have been committed within the adjacent area (both outer and inner), the cooperative scheme established by the Intergovernmental Agreement, applies the substantive criminal law of the adjacent state or territory.⁴⁰

3.67 The cooperative scheme provides that the substantive criminal law of the state applies to alleged criminal conduct within the *inner adjacent area* of a state. The responsibility for commencing prosecutions of such offences generally rests with the adjacent state's relevant prosecuting authorities.

³⁹ Commonwealth Director of Public Prosecutions, *Submission 6*, p. 2.

⁴⁰ *Crimes at Sea Act 2000*, Schedule 1, Part 2.

However, it is possible for the Commonwealth Director of Public Prosecutions (CDPP) to conduct such prosecutions in accordance with existing joint trial arrangements with the states.⁴¹

- 3.68 Similarly, the cooperative scheme outlined that in the case of the *outer adjacent area* of a State, 'the provisions of the substantive criminal law of that State apply by force of the law of the Commonwealth. Accordingly, offences under the applied State law in the outer adjacent area are technically Commonwealth offences'.⁴² The responsibility to prosecute alleged offences within this area may rest with the adjacent State, another State or the Commonwealth. The Intergovernmental Agreement provides some guidance on this matter and outlines some indicative circumstances to determine the relevant jurisdiction.⁴³ Where the authority to commence a prosecution is contested by multiple jurisdictions, the Intergovernmental Agreement requires a consultative process to determine how the matter should proceed.⁴⁴
- 3.69 For criminal acts alleged to have been committed *outside the adjacent area*, the jurisdiction which carries responsibility to investigate and prosecute is determined in accordance with section 6 of the *Crimes at Sea Act*. Commonwealth law, by way of the Jervis Bay territory, applies to alleged criminal conduct within this area, and consequently, the responsibility for prosecuting alleged offences rests with the CDPP.

Criminal Code Act

- 3.70 The *Criminal Code Act 1995* (Cth) asserts Australia's jurisdiction to alleged criminal conduct where an Australian citizen or resident of Australia is seriously harmed even where that conduct occurs outside of Australia's territory where it can claim jurisdiction. This reflects the 'nationality principle' under international law as explained earlier in this Chapter.
- 3.71 Mr Iain Anderson, First Assistant Secretary, Criminal Justice Division, from the Attorney-General's Department commented that the *Criminal Code Act*:

... does not in itself empower the AFP to go offshore and carry out investigations. Realistically it is always going to be a question of negotiations with the jurisdiction where such an offence occurs as to whether they are going to prosecute and whether we might

41 Commonwealth Director of Public Prosecutions, *Submission 6*, p. 2.

42 Commonwealth Director of Public Prosecutions, *Submission 6*, p. 2.

43 Intergovernmental Agreement – Crimes at Sea, Appendix H, Clause 4; Commonwealth Director of Public Prosecutions, *Submission 6*, p. 2.

44 Intergovernmental Agreement – Crimes at Sea, Appendix H, Clause 6; Commonwealth Director of Public Prosecutions, *Submission 6*, p. 2.

carry out investigations. That is just a limitation on the practical utility of those offences.⁴⁵

- 3.72 The process and challenges of conducting investigations will be discussed in greater detail in Chapter 5 of this Report.
- 3.73 As stated earlier, Dr Lewins expressed concern that Australia does not assert its internationally accepted jurisdiction where an Australian falls victim to a crime as frequently as when it does where an Australian is the alleged perpetrator of a crime.⁴⁶ Section 115 of the *Criminal Code Act* asserts Australia's jurisdiction over events where an Australian is a victim of a crime outside of its territory.
- 3.74 However, Dr Lewins expressed concern that it is not clear how the assertion of Australian jurisdiction where an Australian is a victim (in line with the national personality principle) interacts with the *Crimes at Sea Act*,⁴⁷ where the national personality principle is not included.

Improvements through international bodies

- 3.75 Although there are considerable limits on Australia's ability to pass legislation about matters in the *Kerry Act*, Australia has considerable opportunities to improve cruise passenger safety through multilateral bodies such as the International Maritime Organisation (IMO).
- 3.76 The development of consistent international maritime rules is particularly important for an island nation like Australia, and Australia has a proud history of involvement in developing international law and regulation including UNCLOS.
- 3.77 The Office of International Law at the Attorney Generals' Department is currently involved in discussions of this kind within the auspices of the IMO. Mr Anderson stated:

Australia is also actively involved in seeking to develop or help negotiate new standards to the extent that that is possible. These things take a while; UNCLOS itself was negotiated over 200 years. That is a side process because it is a multilateral process, but the Office of International Law is involved in discussions with other countries under the umbrella of the International Maritime Organisation. We are trying to look at the new standards.⁴⁸

45 Mr Iain Anderson, Attorney-General's Department, *Committee Hansard*, 14 March 2013, p. 2.

46 Dr Kate Lewins, *Committee Hansard*, 1 November 2012, pp. 1-2.

47 Dr Kate Lewins, *Committee Hansard*, 1 November 2012, p. 2.

48 Mr Iain Anderson, Attorney-General's Department, *Committee Hansard*, 14 March 2013, p. 3.

3.78 Australia has been involved in IMO work to develop guidelines for dealing with crimes on vessels:

Australia actively participates in the IMO Legal Committee and Australia's engagement is led by our [the Office of International Law, Attorney-General's Department]. At the last meeting, in April 2012, Australia was supportive of the guidelines being included on the committee's work program.⁴⁹

3.79 Those guidelines are titled *Guidelines on the preservation and collection of evidence following an allegation of a serious crime having taken place on board a ship or following a report of a missing person from a ship, and pastoral and medical care of persons affected*. The guidelines were adopted by the IMO Legal Committee in early 2013, and it is widely anticipated that they will be adopted when they are put to the full IMO Assembly in November 2013. The guidelines are discussed in greater detail in Chapters 4 and 5.

3.80 This is a good example of the productive work that can be done in international fora. However, the extent of the Australian Government's involvement in this matter is not immediately clear from the records of the IMO Legal Committee. Although Australia participated in the Committee's meetings, other delegations (such as from the Philippines and the United Kingdom) took leading roles.⁵⁰

3.81 In addition, the matters covered by the guidelines do not exhaust the avenues for further passenger safety on cruising vessels. Recent tragedies discussed in Chapter 2 highlight the continuing need for improved vessel safety. Areas that need urgent international cooperation include:

- The installation of security cameras with a closed-circuit television monitoring system (CCTV), including real-time monitoring by security;
- The installation of 'man-overboard' alarm systems to alert on-board security to passengers going overboard;
- The adoption of mandatory crime reporting protocols analogous to those in the *Kerry Act* (see Chapter 5); and
- The implementation of *Responsible Service of Alcohol* (RSA) protocols (including training) for bar and security staff.

3.82 Despite the fact that some cruise operators have implemented some of these measures on certain vessels, there remains no mandatory standard applied across the industry. These safety measures are discussed further in the following Chapter.

49 Ms Camille Goodman, Attorney-General's Department, *Committee Hansard*, 14 March 2013, p. 6.

50 International Cruise Council Australasia, *Submission 11*, Attachment A.

- 3.83 It is clear that there is both the need and the opportunity for Australia to make a much greater contribution to the development of international standards to improve cruising passengers' safety.

Committee Comment

- 3.84 It comes as no comfort to a victim of crime at sea, or to someone who suffered an accident at sea, or their families, that international law does not allow for greater Australian regulation of the cruising industry. It is wholly irrelevant to their needs as victims. The complexity and vagueness of maritime law and regulation may be an inherent feature of international law today, but it cannot be an excuse for inaction.
- 3.85 Australia's capacity to legislate for particular vessel requirements is limited, under international law, to matters about which Australia can exercise prescriptive jurisdiction. The following Chapter outlines actions that the Australian Government make take in regard to this. UNCLOS provides that states may not make laws pertaining to the design, construction, manning or equipment of foreign ships unless according to accepted international standards.⁵¹
- 3.86 The Legal Advice confirms the limits of Australia's capacity for unilateral regulation of the cruising industry, but this does not preclude active and creative work to improve safety and justice for cruising passengers through cooperative international work.
- 3.87 Pursuing negotiated changes to passenger protection strategies within the IMO will require long-term commitment. As is often the case with multilateral organisations, change takes a significant and continued commitment. Yet, protracted negotiations and debate should not be a deterrent to pursuing valuable endeavours to prevent crimes at sea.
- 3.88 Indeed, whilst the collaborative nature of international maritime law is a barrier to Australia unilaterally imposing better regulation of the cruise industry, the cooperative nature of the international maritime legal system is also a strength as the reach of its standards and protocols is expansive. Widespread and pervasive elements of treaty law can with time become customary law, binding on all states, regardless of whether or not they are party to the treaty in question.
- 3.89 The Australian Government should, as an urgent priority, pursue the development of international agreements to standardise cruising vessel safety equipment and procedures, and in particular:
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51 UNCLOS, Article 21.

- The installation and real-time monitoring of CCTV;
- The installation of 'man-overboard' alarm systems to alert on-board security to passengers going overboard;
- The adoption of reporting protocols analogous to those in the *Kerry Act* (see Chapter 5); and
- A Responsible Service of Alcohol code.

Recommendation 2

3.90 **The Committee recommends that the Australian Government dramatically increase its efforts to achieve greater cruise passenger safety and crime prevention strategies within the International Maritime Organisation and other organisations as appropriate, including pursuing cooperative agreement for the following urgent priorities:**

- **The installation and real-time monitoring of CCTV;**
- **The installation of 'man-overboard' alarm systems to alert on-board security to passengers going overboard;**
- **The adoption of reporting protocols analogous to those in the Kerry Act; and**
- **A Responsible Service of Alcohol code.**

3.91 In order to promote the adoption of the most recent IMO guidelines, the Australian Government must continue to strongly voice its support for them, and vote in their favour at the IMO Assembly in 2013.

Recommendation 3

3.92 **The Committee recommends that the Australian Government vote in favour of the *Guidelines on the preservation and collection of evidence following an allegation of a serious crime having taken place on board a ship or following a report of a missing person from a ship, and pastoral and medical care of persons affected*, at the upcoming International Maritime Organisation Assembly in November 2013.**