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Regulating fishing in Australia: from mullet size limits to international hot pursuits

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Regulating fishing in Australia: from mullet size limits to international hot pursuits

Abstract

Fisheries laws simply regulate human interactions with fish. Yet it is an enormous challenge to get them right. The central problem with which fishing laws need to deal is that technological advancements continually enable people (especially commercial fishers) to increase their ability to catch fish. This may be coupled with an increasing number of people fishing, or perhaps a relatively stable number of people fishing but changing their practice such as intensively fishing in one location. Human activities affecting fish are ever changing and, as a result, so too are fisheries laws. Past fishery collapses (such as cod stocks off the east coast of Canada in the early 1990s and orange roughy off the south-east coast of Australia in the mid-1980s) stand as a warning for what can happen if fishing is not properly regulated.

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Regulating Fishing in Australia: From mullet size limits to international hot pursuits

Warwick Gullett

Introduction

Fisheries laws simply regulate human interactions with fish. Yet it is an enormous challenge to get them right. The central problem with which fishing laws need to deal is that technological advancements continually enable people (especially commercial fishers) to increase their ability to catch fish. This may be coupled with an increasing number of people fishing, or perhaps a relatively stable number of people fishing but changing their practice such as intensively fishing in one location. Human activities affecting fish are ever changing and, as a result, so too are fisheries laws. Past fishery collapses (such as cod stocks off the east coast of Canada in the early 1990s and orange roughy off the south-east coast of Australia in the mid-1980s) stand as a warning for what can happen if fishing is not properly regulated.

However, avoiding the collapse of stocks of target species is not the only objective for fisheries management. Although fisheries collapses do need to be avoided, if fisheries laws are too heavily skewed towards conservation, then fishing for a variety of purposes – commercial, leisure or cultural – may be severely curtailed or even stopped. Fisheries laws therefore need to strike a delicate balance between conservation and exploitation.

Since colonial times, the regulation of fishing in Australia has been achieved by developing rules in stand-alone fisheries legislation. While this remains the case, with the current principal federal fisheries legislation running close to 100 pages¹ (excluding all the detailed regulations issued under it), and state fisheries legislation sometimes even longer,² the shift to ecosystem-based fisheries management (discussed by Haward in this volume) has resulted in the emergence of environmental legislation as another body of regulation affecting fishing. This is most obviously evident in the requirements in the federal *Environment Protection and Biodiversity Conservation Act 1999* (Cth) for environmental assessments of fisheries management arrangements, as well as in the rules to protect threatened species and habitats and in the ability to declare marine parks. Other fields of law – from constitutional to criminal – also have relevance for fishing. Fisheries law is actually a complex of inter-related regimes.

Determining an appropriate level of fishing for a target species is a difficult enough task for fisheries managers, but the difficulty of devising rules for fishing is compounded when the focus is not just on the resilience of target species to a certain amount of fishing, but also on wider impacts of such fishing. For example, even if quotas are determined and strictly adhered to for a high value species that is easily caught in isolation from other fish, such as Southern bluefin tuna, questions arise as to the effect of this catch on other species which either prey on them or are preyed upon by them. No definitive answers can ever be determined for these questions, and it makes sense that a margin of precaution is used when setting catch limits. Wider issues that also need to be considered are the effects of particular fishing gear on marine habitats, such as trawl gear on benthic communities.

What this means is that, in addition to the difficulty of striking a balance between conservation and exploitation, numerous factors are at play which affect conservation values and exploitation needs, including the vocalised interests of different groups of fishers and other users of aquatic environments. This means that the creation of particular fisheries laws, be it a reduction in quota for commercial scallop fishers,

allowing dugong to be hunted by Indigenous people, or the introduction of licence fees for recreational saltwater fishing, can seriously upset people, and also result in litigation.

One of the more difficult challenges is to reduce conflict between the three categories of fishers (commercial, recreational and Indigenous). This conflict is sourced in different beliefs about their entitlements to fish in circumstances where there is increasing competition for fish.³

Some people perceive a palpable policy shift to support recreational fishing at the expense of commercial fishing.⁴ In comparison with commercial fishing, recreational fishing supports more economic activity per fish caught – indeed, there can be great expenditure of time and effort for few or no fish! But this is not to deny that recreational fishing results in substantial amounts of catch (although catch amounts are more difficult to verify than for commercial fishing) and there is a demonstrated need for recreational fishing to be regulated. Recreational fishing is an increasingly popular pastime in Australia, particularly in coastal areas but also in lakes and rivers.

Recreational fishing has become a significant income earner for many coastal towns, especially on the populated east coast, through visitor accommodation, gear and bait supplies, and fishing charters and tours. The growth in recreational fishing stands in contrast to the general decline in the last decade in the commercial fishing sector. Many commercial fishers have been encouraged to leave the industry through licence buy out processes and many others have found that they are no longer allowed to fish in some of their traditional fishing spots near their home ports.

The recognition and support for traditional Indigenous fishing is another controversial issue. The identification of Indigenous fishing rights within native title determinations, and the separate creation of traditional fishing rights within fishing or environmental legislation, or even under land rights legislation, has emerged as one of the most challenging areas for fisheries regulation, especially in cases where otherwise protected species such as turtles and dugong are permitted to be taken (see Morphy and Morphy in this volume).

The way in which fishing is regulated is that access to fisheries resources is controlled and only specified methods of fishing are permitted. Fisheries law has traditionally focused on 'input' controls which regulate the amount of fishing effort (eg, issuing a limited number of commercial fishing boat licences). There is now a shift to 'output' controls which, for example, place a limit on the number of fish that may be caught. Fisheries laws are numerous and varied, ranging from the setting of a minimum size limit for Yellow-eye mullet in Tasmania to complex law enforcement rights and procedures under international law which enable the chasing down and apprehension in international waters of foreign fishers suspected of unlawful fishing in Australian waters.

This article overviews the diverse nature of Australian fishing laws by focusing on two key facets of it: where they operate, and the challenges of guarding Australian fish from foreign poachers.

Which laws are where? Jurisdictional complexities and doubts about location

Fisheries laws extend from remote inland waters, including those which flow over private land, to 200 nautical miles (nm) from the coast.⁵ In some more limited respects, Australian fishing laws also apply to Australians and Australian boats even beyond 200 nm on the high seas and even in waters of foreign countries, such as the prohibition on driftnet fishing.⁶ A challenge for Australian fishers is to know which laws apply where.

This is because Australia comprises multiple fisheries jurisdictions and there is also uncertainty about the exact geographic reach of some laws.

Complicated constitutional arrangements

A federation requires a sharing of legislative responsibilities between the federal parliament and the parliaments of the sub-national jurisdictions. One of the important issues the drafters of the Australian constitution needed to decide in the 1890s was that of whether the Commonwealth or the states should have responsibility to regulate marine fishing, or whether there should be shared responsibility.

In 1890, Sir Henry Parkes (Premier of New South Wales and strident federalist) argued that a single federal jurisdiction would best. He said that 'the splendid sea-fisheries which Australia possesses' could

under one law, one system of regulation and management, be developed to an extent which is never likely to be ascertained otherwise.

Such an arrangement would be quite different from the extant situation. The colonies had regulated marine fishing from their earliest days of self-government.⁷ By the 1880s, most colonies had comprehensive fisheries laws.⁸ These laws extended to a distance of three miles offshore. This three mile-wide area was assumed to be the 'territorial waters' of the colonies. It was also assumed that the colonies were not able to regulate activities outside their territory. Both of these assumptions would prove to be wrong.

The idea of having a single national jurisdiction was also advocated by our soon-to-be first Prime Minister, Edmund Barton, due to its practical simplicity. During the final constitution convention debates in Melbourne in 1898, he argued that a single jurisdiction would avoid the problem of fishing laws changing at three miles offshore. If this were to happen, he said,

the unlucky fisherman who does not always know whether he is 2½ or 3 miles away will get into the pickle instead of his fish.

Unfortunately for Barton (as well as for generations of fishers), none of the other constitution convention delegates supported his proposal for a single marine fisheries jurisdiction. It was unthinkable that the colonies, upon becoming states, would be denied the ability to regulate fishing in the three mile area because they had enjoyed, and had exercised, this legislative jurisdiction for generations. Further, it was not envisaged that there would be any inconsistencies between Commonwealth and state laws because it was assumed that the Commonwealth laws commencing at three miles offshore would simply harmonise with the adjacent state's laws within three miles.⁹

The final result was that the Australian constitution, in the curiously-worded s 51(x), authorises the Australian parliament to legislate with respect to 'Fisheries in Australian waters beyond territorial limits'.

Federal fisheries legislation, enacted from the 1950s, actually proceeded to differ from state laws operating inside three miles, with the result that many fishers have indeed found themselves 'in the pickle'. However, some constitutional lawyers have dined rather well off this particular pickle due to the emergence of further problems. There was growing doubt about the true operation of s 51(x), especially about where the 'territorial limits' lay. Was it three miles offshore, or was it at the low water mark?¹⁰ The issue was brought to a head following the Whitlam Labor Government's enactment of the *Seas and Submerged Lands Act 1973* (Cth) which boldly asserted Commonwealth sovereignty in waters and the seabed beyond the low water mark. All states

immediately launched a legal challenge, arguing that the Commonwealth had no power to do what it had done.

The High Court reached its decision in the *Seas and Submerged Lands* case in 1975.¹¹ A majority of the court determined that the states' limit was at the low water mark. This was a landmark ruling. If the limit of the states was at the low water mark, rather than three miles offshore, then more than a century of combined colonial and state law expressed to operate in this area might be invalid, potentially leaving the area almost lawless. To counter this concern, the High Court also expressed its view that the states did in fact possess the ability to regulate matters outside their territory, thereby negating the long-held view that the states lacked extraterritorial legislative competence. In a fuller judgment in 1976, when this issue was squarely before it, the High Court formulated its nexus test.¹² Provided there is a 'sufficient connection' between the subject matter being regulated and the state in question, a state could regulate matters outside of its territory. This legislative competence would later be found to enable South Australia to regulate lobster fishing to a distance of 200 nm¹³ but was insufficient to enable Western Australia to enact law concerning an historic shipwreck lying a little more than two miles offshore.¹⁴

The significance of the High Court's decisions is that, rather than having a situation intended by the drafters of the constitution whereby there would be two *separate* fisheries jurisdictions (the states having power only to three miles, whereupon the federal parliament has power) we now have a situation where we have two *overlapping* jurisdictions whereby the federal parliament has power to regulate fishing vast distances beyond the low water mark and the states can regulate fishing possibly beyond 200 nm offshore, provided there is a sufficient connection between the type of fishing and the state concerned. However, state fishing laws will be invalid if they are inconsistent with Commonwealth laws operating in the same area.¹⁵

Yet this is not the end of the matter. The decision in the *Seas and Submerged Lands* case was delivered just four days after the Fraser Coalition Government came to power. It immediately commenced an ambitious and untested process to 'sidestep' the High Court's decision.¹⁶

Utilising the previously unused s 51 (xxxviii) reference power in the constitution, in 1980 the Fraser Government ushered in a remarkable package of legislation (with mirror legislation enacted by the states) which essentially gave back to the states the three mile area that had been 'lost' to them. This was known as the Offshore Constitutional Settlement (OCS), although it did not actually change the constitutional position identified by the High Court.¹⁷

The OCS, which covered a number of fields including offshore petroleum, crimes at sea and shipping and navigation, enabled the states and the Northern Territory to exercise the power they traditionally enjoyed over the sea and seabed from the low water mark to three miles offshore. The OCS regime for fisheries took a more pragmatic approach. It enabled the creation of single fisheries jurisdictions depending on the nature of a particular fishery. For example, if a fishery was adjacent to one state, it could be managed by that state even if the fishery extended beyond three miles. However, a fishery which was adjacent to two or more states would be managed by the Commonwealth. The states have also maintained jurisdiction over recreational fishing, to a distance of 200 nm or possibly beyond.¹⁸

The OCS anticipated that regimes for particular fisheries would be determined in agreements between states and the Commonwealth – cooperative federalism at its finest. The status quo would continue for fisheries not brought under a specific

agreement. This would mean that some fisheries would be managed by states within three miles but by the Commonwealth beyond this point. Surprisingly, some agreements appear to undermine the one-jurisdiction ideal behind the OCS. For example, in 1986 an agreement was reached between the Commonwealth, Victoria and Tasmania concerning the Bass Strait Scallop Fishery. The result was that the Commonwealth maintained responsibility for the central portion of Bass Strait, with both Victoria and Tasmania having responsibility within 20 miles of their shores. An even more complex arrangement was reached between the Commonwealth and New South Wales in 1991. In areas north of Sydney, New South Wales retained control over most of the commercial fisheries beyond three miles to a new distance determined by the 4,000 metre depth contour (a very squiggly line located between 50 and 80 miles offshore). Thus the geographic extent of certain fisheries laws depend not upon a specified distance from shore but upon the depth of the water.

The overlapping nature of the law means that, for example, at one point 20 miles offshore of New South Wales, recreational fishing and commercial fishing for species such as Australian salmon are governed by New South Wales law, yet commercial tuna fishing is regulated by the Commonwealth.

As a final note on the fisheries power in the constitution, it appears that it is now redundant. This is because the expansive 'geographic externality' view of the s 51(xxix) external affairs power in the constitution currently favoured by the High Court means that this power can be used to support almost any Commonwealth law that operates in areas outside Australia. This means that the Commonwealth has almost unfettered ability to regulate fishing below the low water mark. The reach of the Commonwealth's power is not limited by the vague expression 'Australian waters' found in the fisheries power. Sufficient authority for the Commonwealth to regulate any marine fishing, no matter what distance from Australia, is found in the external affairs power.

Location

All laws need to be enforceable for them to be effective. A complication for many fisheries laws is that they need to be enforceable at remote locations where surveillance of fishing is difficult, be it ensuring that freshwater anglers in remote lakes do not use undersized fish as bait, or that recreational fishing is not conducted from any foreign ship (including commercial vessels such as bulk carriers) whenever they are transiting, or at an anchor, in Australian waters. Two issues arise here: how do the regulations specify the geographic range of particular laws, and how can fishers (or enforcement officers) know exactly where they are?

How are geographic boundaries of fisheries laws defined?

All laws regulating fishing need to operate in defined geographic areas. For commercial fishing, for example, the outer limit of the laws may be specified by coordinates (to the nearest second of latitude and longitude¹⁹) or by a certain distance from a permanent feature – such as the coast. These coordinates can be placed on charts and issued to fishers who, if in possession of GPS (global positioning system) technology, can fairly accurately determine where they are.²⁰ However, determining the exact location of the reference point from which the laws extend may be difficult, such as the exact location of the high water mark.

Fisheries laws operating in estuaries may have their outer limit defined as imaginary lines drawn between coastal features, such as headlands. This is the case, for example, in New South Wales, where an imaginary line is drawn across a coastal indentation between the 'extremity' of two features. In some cases, the legal definition

of a boundary may not equate with common understandings. For example, in 2004 in the Northern Territory, three barramundi fishers were convicted of fishing in an area not authorised by their licences, namely at a location landwards of a 'river mouth'.²¹ The prosecution established that they were fishing more than 500 metres landwards of this point. Although dictionaries typically define rivers to be natural streams of water flowing in a definite course or channel (and thus exclude tidal waters), the regulation in question adopted a broader definition of 'river' to include 'tidal arms'. This meant that the river mouth, for the purpose of this regulation, was an imaginary line drawn contiguous with the mean low water mark at both sides of the coastal indentation. Such a line is of course exceedingly difficult to identify at any time of the day other than at the point of the low tide, especially in areas in northern Australia where there are high tidal ranges and gently sloping shores. It may also be kilometres seaward of where the dictionary definition would locate the river mouth.

Definitional problems also occur with respect to inland fishing regulations, such as locating the seaward extremity of freshwater. This is usually expressed to be the extent of tidal influence, but may also be expressed more helpfully as areas downstream of a fixed feature such as a bridge, or between two clearly identifiable points, such as where an imaginary straight line is drawn between white posts located on opposite banks. The exact geographic reach of other laws cannot be known until individual cases are litigated, such as determining at what point a person will have committed the offence of possessing prohibited fishing equipment while 'adjacent' to water.

Guarding against illegal foreign fishing

Australian fisheries laws not only need to regulate fishing by Australians, they also need to ensure that foreigners do not illegally fish in Australian waters.

Prior to the acceptance under customary international law in the late 1970s of the extended fisheries jurisdiction concept (subsequently codified in the United Nations Convention on the Law of the Sea 1982 (LOSC) as the Exclusive Economic Zone (EEZ)), coastal states could only exclude foreign fishers from the (then) three mile wide area of their territorial sea. The territorial sea was extended to 12 miles following the entry into force of LOSC in 1994. Beyond this point, to a maximum distance where this is possible of 200 nm from the coast, coastal states have preferential fishing rights in their EEZ. Since the mid-1990s, no foreign fishing has been permitted in the Australian EEZ, with the limited exception of Indonesian traditional fishing in a designated area near Ashmore Reef in the Timor Sea and some traditional fishing by PNG residents in some areas of the Torres Strait.

Nevertheless, Australia faces the constant threat of illegal fishing by foreign fishers in its waters. These threats have different characteristics depending on the area in which the fishing occurs and the type of fishing concerned, yet they all share similar characteristics in terms of the legal measures Australia can use to deter and apprehend foreign fishers. The main areas where threats exist are in the north and south.²²

Northern waters

By far the most instances of illegal foreign fishing occur in Australia's northern waters. These are almost without exception by Indonesian fishers, often targeting shark (for their fins only). There have been hundreds of incursions in the last decade, although it appears that the bolstering of Australia's surveillance and enforcement operations is at least partially responsible for a decline in incursions since 2004.

A complication in some of Australia's northern waters is that, due to technical boundary issues, the outer limit of Australia's fishing zone does not always coincide with the

outer limit of its jurisdiction over the seabed resources of its continental shelf, which may extend further than its fisheries jurisdiction. This has resulted in a situation where Indonesian fishers are allowed to fish for free-swimming fish above Australia's continental shelf where this is outside Australia's fishing zone, but they are not allowed to take seabed resources, such as trepang (sea cucumber) and trochus (sea snail) shells.²³

Part of Australia's response to the logistical challenges of holding large numbers of arrested persons in remote northern regions has been to amend regulations so that detained foreign fishers can be treated on the same basis and under the same conditions as illegal immigrants. This is despite the fact that most of the 'fisheries' detainees have not actually chosen to enter Australia's immigration zone, but rather were brought within the zone by Australian officers after being arrested.²⁴ It should be borne in mind that, under international law, foreigners (including fishers) enjoy complete freedom of navigation in Australia's EEZ (subject to requirements such as not fishing, and ensuring that fishing equipment is stowed), and also enjoy the right of innocent passage within Australia's territorial sea.

Southern waters

More high-tech illegal fishing has occurred since the mid-1990s in remote Australian waters in the sub-Antarctic, such as around Heard and McDonald Islands (over 4,000 km south west of Perth) and Macquarie Island (over 1,000 km south of Tasmania). The main target species here is the prized Patagonian toothfish. Such fishing tends to be from large commercial vessels registered in 'flag of convenience' countries (eg, Belize, Cambodia and Panama) which exert little or no influence over their operations. The sub-Antarctic waters provide rich pickings. In just a few weeks of fishing, the value of fish caught may exceed the capital value of the vessel from which they were taken.

Australia has arrested a number of vessels in this area. Two arrests followed remarkable 'hot pursuits'. These were the Togo-registered *South Tomi* in 2001 and the Uruguayan-registered *Viarsa 1* in 2003. The *South Tomi* was arrested after the longest hot pursuit in history (14 days, 3,300 nm). This was eclipsed by the arrest of the *Viarsa 1* following a hot pursuit of 21 days covering 3,900 nm.²⁵ The arrest of both vessels was effected only after assistance was rendered by South Africa.²⁶

The Fisheries Minister at the time, Senator Ian Macdonald, proudly declared that these seizures were a warning to the pirates and poachers who invade Australia's waters to fish illegally 'that Australia will pursue them to the end of the earth to stamp out this illegal activity'. However, the fact that the vessels were able to flee and not be brought to heel without the assistance of other countries actually served to highlight the inadequacies of Australia's law enforcement capabilities in the region. This has since been rectified, in part by the use of the ice-strengthened and armed 105 metre *Oceanic Viking* to regularly patrol those waters, as well as massive increases in penalties and the use of satellite surveillance.²⁷

What happens to the boats?

As in many other countries, Australian law stipulates that a foreign vessel used for a fisheries offence in Australia is forfeited to Australia. However, unlike any other country, Australian law provides that the forfeiture takes place at the moment of the commission of the acts constituting the offence, rather than when a conviction is recorded (which is normally many months later).²⁸ The remarkable aspect of this law is that it means that Australia could avoid the obligations it has under international law with respect to the rights of a foreign vessel which it suspects had previously been used to fish illegally in Australian waters, such as not conducting a hot pursuit of it in

accordance with international rules. This is because, by virtue of Australian law, the legal title to the vessel would have passed to Australia some time earlier and thus Australia would simply be seizing its own vessel. This provision, for example, legitimised the seizure in 2005 of a Cambodian vessel on the high seas.²⁹ While this law would not withstand a challenge in a relevant international court (such as the International Tribunal for the Law of the Sea), it has withstood a constitutional challenge³⁰ and is unassailable as a matter of Australian law. Although the operation of this law patently is inconsistent with international law, it also is a reflection of the difficulty of modernising the rules of international law, especially in circumstances such as this where the problem of large scale illegal foreign fishing only emerged after the international rules on enforcement actions against foreign vessels were settled.

The operation of the automatic forfeiture provision means that all vessels seized by Australia on suspicion of being used for illegal foreign fishing are dealt with by Australia as it sees fit. The large vessels apprehended in southern waters may be sold (following a tender process), or sunk as dive wrecks. The much smaller wooden vessels seized in northern waters typically are burned (for safety or quarantine reasons).³¹

Conclusion

Australian fisheries laws will become ever more detailed and complex. The romantic idea of the 'freedom to fish', where fishers can get away from it all, is now just an historic notion. Even recreational fishing in near shore areas is something for which, in Victoria and New South Wales, you must first get a licence.³² In 2008, the High Court even sounded the death knell for the public right to fish, an ancient common law right sourced in the Magna Carta.³³ The ever increasing detail of fisheries laws means that fishers (recreational, Indigenous and especially commercial) should thoroughly acquaint themselves with the relevant rules before venturing out to fish. But simply going to the local office of your fisheries department and asking what laws you need to know will not save you if you are given incomplete information and, as a result of that, you inadvertently commit an offence. This was the case in 2004 for an unlucky Western Australian rock lobster fisherman, who, the High Court confirmed, must be convicted for his offence due to the fundamental rule that ignorance of the law is no excuse.³⁴



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- ¹ Fisheries Management Act 1991 (Cth).
- ² Eg, Fisheries Management Act 1994 (NSW).
- ³ There has been a concerted effort in some jurisdictions to formalise the allocation of fishing entitlements to these sectors in order to reduce conflict. See, eg, Western Australia's 2004 'Integrated Fisheries Management' policy.
- ⁴ The most obvious piece of evidence for this is the recent closure of many near shore areas to commercial fishing. This includes a large area adjacent to Perth and 30 New South Wales estuaries, including Botany Bay, which are now 'recreational fishing havens'. In some other areas, commercial fishing is restricted rather than prohibited. For example, commercial fishing in Port Phillip Bay, Victoria is now limited to eels and bait, and commercial fishing is restricted to particular zones within the three mile wide, 100 km long Batemans Marine Park on the south coast of New South Wales (although all trawling and longline fishing is prohibited throughout the park). Other areas may be closed to commercial fishing but for reasons other than prioritising recreational fishing or conserving biodiversity. For example, the closure in 2006 of Sydney Harbour to commercial fishing was prompted by increased levels of dioxins in fish and crustaceans, especially in areas west of the Sydney Harbour Bridge.
- ⁵ This is the outer limit of Australia's Exclusive Economic Zone.
- ⁶ Fisheries Management Act 1991 (Cth) s 13.
- ⁷ Oyster Fishery Act 1853 (Tas), Oyster Fisheries Act 1853 (SA), An Act for the Protection of the Fisheries of Victoria 1859 (Vic), Fisheries Act 1865 (NSW).
- ⁸ Eg, Fisheries Act 1873 (Vic), Fisheries Act 1881 (NSW).
- ⁹ This was indeed the practice from 1885 when the Imperial Parliament established the quasi-federal organisation called the 'Federal Council of Australasia'. The council enacted two pieces of fisheries legislation in the late 1880s which simply extended the operation of Queensland and Western Australian pearl shell and sea cucumber legislation beyond three miles.
- ¹⁰ Attention was given to the issue following the publication in 1958 of an influential article by DP O'Connell in the *British Year Book of International Law*. He argued that the low water mark was the limit of the states' territory, based on the 1876 case of *R v Keyn*. This view was debated at the time, most notably by Enid Campbell in an article in the *Tasmania Law Review* in 1960.
- ¹¹ *New South Wales v Commonwealth* (1975) 135 CLR 337.
- ¹² *Pearce v Florenca* (1976) 135 CLR 507.
- ¹³ *Port MacDonnell Professional Fishermen's Association Inc v South Australia* (1989) 168 CLR 340.
- ¹⁴ *Robinson v Western Australian Museum* (1977) 138 CLR 283.
- ¹⁵ Section 109 of the Australian Constitution provides that 'When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.' For the application of s 109 to fisheries, see *Raptis and Son v South Australia* (1977) 138 CLR 346 and *Radar Holdings Pty Ltd v State of Western Australia* [2004] WASC 251.
- ¹⁶ Haward, M (1989). 'The Australian Offshore Constitutional Settlement', *Marine Policy*, 13, 4: 334-348.
- ¹⁷ The OCS comprises 14 pieces of legislation. The most important are the *Coastal Waters (State Powers) Act 1980* (Cth) and the *Coastal Waters (State Title) Act 1980* (Cth). The legislation came into effect in 1983.
- ¹⁸ All states other than Queensland declare that their recreational fisheries laws extend to any waters to which their legislative powers extend for those activities. Queensland recreational fishing laws are declared to extend only to 200 nm.
- ¹⁹ A second of latitude is approximately 30 metres. Seconds of longitude vary depending on the distance from the equator. In Tasmania, a second of longitude is approximately 20 metres.
- ²⁰ Note, however, that different jurisdictions use different datum, such as the World Geodetic System, Australian Geodetic Datum or the Australian Map Grid. Persons with GPS

technology may need to convert between the datum used in their GPS to the datum used for the regulation. This is because identical coordinates referenced to different datums will actually be different points on the surface of the earth. Conversely, the exact same location on the surface of the earth will have different coordinates where different datums are used.

²¹ *Perry v Simlesa* (2004) 142 A Crim R 282.

²² A lesser threat exists in Australia's eastern waters. These are home to some high value pelagic fish, including various species of tuna. Waters immediately adjacent to Australia's EEZ off its east coast, including the area around Lord Howe Island, are regularly fished by longline vessels, such as from Japan and Taiwan. There have been relatively few instances of suspected or illegal foreign fishing in this area in the last decade.

²³ Due to complications about these arrangements, in 2008 there were a number of acquittals of Indonesian fishermen prosecuted for illegal fishing in these areas. Eg, *Gap v Hansen; Arifin v Hansen* [2008] NTSC 34.

²⁴ Nevertheless, there have been quite a few cases where such fishers come ashore in Australia, such as in remote areas in the Gulf of Carpentaria, in order to get fresh water and other supplies. Such landings of course raise immigration concerns as well as quarantine issues.

²⁵ It should be noted that in 2005 all of the five *Viarsa 1* crew members charged with fisheries offences were acquitted in a jury trial in the Western Australian District Court.

²⁶ In the case of the *Viarsa 1*, assistance was also rendered by a United Kingdom vessel.

²⁷ See Gullett, W and Schofield, C (2007). 'Pushing the Limits of the Law of the Sea Convention: Australian and French Cooperative Surveillance and Enforcement in the Southern Ocean', *International Journal of Marine and Coastal Law*, 22, 4: 545-583.

²⁸ *Fisheries Management Act 1991* (Cth) s 106A.

²⁹ No hot pursuit was undertaken and the flag state only authorised Australia to board and inspect the vessel, but not to seize it: *R v Amoedo* [2006] NSWDC 187.

³⁰ *Olbers v Commonwealth (No 4)* (2004) 136 FCR 67; *Olbers v Commonwealth* [2005] HCA Trans 228.

³¹ See generally Stacey, N (2007). *Boats to Burn: Bajo Fishing Activity in the Australian Fishing Zone*, ANU EPress.

³² There are some exceptions, such as children and aged persons, although the exemptions in New South Wales and Victoria are not identical. More limited saltwater recreational fishing licences are required in Western Australia and Tasmania.

³³ *Northern Territory of Australia v Arnhem Land Aboriginal Land Trust* (2008) 82 ALJR 1099.

³⁴ *Ostrowski v Palmer* (2004) 218 CLR 493. See Gullett, W (2004) 'Relying on Fishy Advice: The Ostrowski Decision', *Environmental and Planning Law Journal*, 21, 4: 245-248.

