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CENTRE FOR INTERNATIONAL LAW (CIL) RESEARCH PROJECT ON REGIONAL COOPERATION TO COMBAT PIRACY AND OTHER MARITIME CRIMES

Case Study: Australia

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University Research Opportunities Programme (UROP)
Directed Research Dissertation in part fulfillment of the requirements for the LLM (International & Comparative Law)

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PART I

RATIFICATION AND IMPLEMENTATION OF INTERNATIONAL TREATIES

For the purposes of Maritime Security, Australia is a good benchmark for other common law jurisdictions to look to, particularly for its general willingness to enter into several Maritime Security instruments and its refreshingly transparent approach to Treaty Ratification and Implementation. Australia's efforts to criminalise Maritime offences pursuant to its Treaty obligations are commendable, though an examination of such Implementing Legislation reveals that there is some room for improvement.

Context. Australia is a constitutional monarchy with a Federal system of government which functions at Commonwealth and State levels. The distribution of powers under the Commonwealth Constitution ("the Constitution") is two-fold. First, the Constitution divides powers between the Commonwealth of Australia, its 6 States and its 2 Territories. It gives the Commonwealth bicameral Parliament specific powers, while enabling State Parliaments to enjoy residual powers. Section 109 of the Constitution provides that where there is a conflict between Commonwealth and State law, the former will "prevail to the extent of the inconsistency"[1]. Second, the Constitution implicitly provides for a separation of powers between Parliament, the Executive and the Judiciary by its very structure[2].

Since independence from the United Kingdom sometime between World War I and II, the Commonwealth Executive negotiates and signs treaties for Australia pursuant to s 61 of the Constitution[3]. In theory, the Queen enjoys this power, which the Governor-General exercises as her representative. However, by Convention, the Governor-General acts on "ministerial advice"[4]. At common law, the "prerogative power" to sign treaties has been "incorporated" into s 61 of the Constitution[5]. But in practice, the responsible Commonwealth Minister or Government Agency makes decisions or takes action under the same section[6].

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[1] Tony Blackshield & George Williams, Australian Constitutional Law and Theory: Commentary and Materials (4th ed, abridged, 2006) [p. 1433, setting out the Commonwealth Constitution].

[2] Chapters I, II and III of the Constitution confer Legislative, Executive and Judicial powers to Parliament, the Executive and the Judiciary respectively: Ibid.

[3] Ibid; Parliament of Australia, Senate, 'Trick or Treaty? Commonwealth Power to Make and Implement Treaties', Executive Summary: http://www.aph.gov.au/SENATE/committee/legcon_ctte/completed_inquiries/pre1996/treaty/report/b02.htm.

[4] Blackshield & Williams, above n 1, pp. 522 – 526.

[5] Ibid.

[6] Robin Creyke & John McMillan, Control of Government Action: Text, Cases & Commentary (1st ed, 2005).

Separation of powers between the Commonwealth Executive and Parliament in the Treaty-making process. The Commonwealth Executive's power to negotiate and sign treaties must be distinguished from the Commonwealth Parliament's "external affairs" power to "implement treaties under domestic law" pursuant to s 51 (xxix) of the Constitution[7]. In order for a Commonwealth domestic law to be valid, 2 conditions must be satisfied. First, the law must come under a designated Head of Power such as the external affairs power[8]. Second, the law must not violate express or implied limitations on the relevant Head of power[9].

A "Snapshot" of the Treaty-making Process

Commonwealth Executive's power to Negotiate and Sign Treaties. The Commonwealth Executive has the "exclusive power" to take on international obligations, including proposing the way in which such responsibilities should be implemented, whether through Parliament or by its own Regulations. Indeed it supervises the drafting and negotiation of Treaties. The Department of Foreign Affairs and Trade ("DFAT") states that often the Cabinet or Ministers "call the shots" on "negotiating positions" and may set out the ambit of the Delegation's work[10]. Further, the Cabinet or relevant Ministers have the final say on whether or not to ratify a Treaty. The Cabinet usually decides on which Multilateral Treaties should be ratified. The responsible Ministers examine amendments to Bilateral Treaties that have already been approved by Cabinet in the past before handing them over to the Federal Executive Council for its consent to sign the Treaty[11].

If the Commonwealth Executive decides to sign a Treaty "in principle", then DFAT and the Legal Branch of the Commonwealth Attorney-General's Department ("Legal Branch"), advised by Government Agencies responsible, have to determine if further action must be taken. This includes deciding whether Parliament should pass Implementing Legislation at the Commonwealth/State/Territory levels or whether Existing laws suffice[12]. Sometimes "Executive action" through Regulations is deemed enough. At other times new laws are needed, or laws already in place are not enough to cover Treaty obligations[13].

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[7] Parliament of Australia, Senate, 'Trick or Treaty? Commonwealth Power to Make and Implement Treaties', above n 3.

[8] The external affairs power's scope has 4 aspects to it: (i) power in relation to other countries; (ii) geographical externality i.e. matters outside of Australia; (iii) implementation of Treaties and; (iv) implementation of international law, possibly general principles of law or customary international law: Blackshield & Williams, above n 1, 'Chapter 19: International Law and the External Affairs Power'.

[9] Ibid.

[10] Hilary Charlesworth, Madelaine Chiam, Devika Hovell, George Williams, 'Deep Anxieties: Australia and the International Legal Order' [2003] Sydney Law Review 21; [2003] 25 (4) Sydney Law Review 423, pp. 6 – 7: http://www.austlii.edu.au/au/journals/SydLawRw/2003/21.html.

[11] Australian Government, Department of Foreign Affairs and Trade, 'Treaties and Treaty-making: Treaties, the Constitution and National Interest, p. 2: http://www.dfat.gov.au/treaties/making/making2.html.

[12] Ibid, p. 3: http://www.dfat.gov.au/treaties/making/making3.html.

[13] Ibid.

Interplay between the Commonwealth Executive Bodies and Parliament(s). Generally if the Legal Branch and DFAT find that Parliament has to pass new laws to give effect to Australia's treaty obligations, it is advisable for them to await Parliament's Legislation implementing the Treaty first before seeking the Federal Executive Council's consent to sign the Treaty. Otherwise Australia risks "international obligations it could not fulfill"[14]. The ratification of Bilateral and Multilateral Treaties is subject to the Federal Executive Council's review and endorsement. The Ex-Co consists of all Ministers and "Parliamentary Secretaries"[15].

"Records of Treaty Action". The Internet provides monthly synopses updates of Australia's Treaty action" and DFAT documents 3-monthly synopses on the "DFAT Record". The Australian Treaty Series ("ATS") consists of hardcopies of any Treaty taking effect in Australia and yearly synopses on Australian "Treaty Action". The Series is also available in cyberspace. A complete record of all Treaty action is compiled on the "Australian Treaty List" and revised every year. The List is accessible on the internet[16].

DFAT also publishes the Final texts of Multilateral Treaties, including those that Australia is not a party to and those that have not yet taken effect to keep the citizenry informed. It does this annually in the Select Documents on International Affairs series, which is available on the internet and in libraries[17]. Coupled with Parliamentary oversight of the Treaty-making process, such transparency enables the Australian populace – not just "stakeholders", to keep in touch with Australia's Treaty obligations and its place in the International Community.

Procedures for Negotiation & Signing of Treaties

"Mandate to Negotiate". The Minister for Foreign Affairs should give consent before negotiations for a new treaty are underway. Where a Government Agency other than DFAT wishes to start negotiations, the relevant Minister would submit a written request to the Minister for Foreign Affairs[18].

Advance Notice and Consultation. The relevant Commonwealth Government Agency such as the Australian Maritime Safety Authority ("AMSA") seeks the Commonwealth/State Standing Committee on Treaties (SCOT's) aid in advising States/Territories of "new" Treaties being contemplated or alterations being considered to existing ones. The Agency consults delegates representing States/Territories, NGOs and the community. It also organises "briefings" for interest groups.

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[14] Ibid.
[15] Charlesworth, Chiam, Hovell and Williams, above n 10, p. 7.
[16] Ibid.
[17] Department of Foreign Affairs and Trade (DFAT), 'Australia International Treaty Making Information Kit': http://www.austlii.edu.au/au/other/dfat/reports/infokit.html.
[18] Michael Bliss, 'Treaties in the Global Environment: Concluding Treaties – Australian practice': http://www.dfat.gov.au/treaties/workshops/treaties_global/bliss.html.

Further, DFAT compiles a list of Multilateral Treaties along with the relevant Contact Officer's particulars and tables it in both Houses of the Commonwealth Parliament about twice annually. The list is also put up on the internet for public access[19].

"Negotiations and Final text". Negotiations for the Final text of the Treaty follow, with Legal Branch and DFAT getting involved in drafting or revising the Text.

Drafting process

Bilateral Treaties.

Cabinet's "standard model" text informs the drafting process for Bilateral Treaties. DFAT and the Legal Branch revise and approve of the Draft text. The same applies where a foreign contracting party prepares the Draft[20]. Once the Treaty is finalised, both States' representatives sign the Treaty committing to seek their respective Governments' approval. The Treaties Secretariat of DFAT provides the Bilateral Treaty's "Signature text"[21]. DFAT publishes the Finalised text only after the Bilateral Treaty is signed. It may do so even if the Treaty has not yet taken effect. Till then Bilateral Negotiations are to be kept secret until the Final text of the Treaty is signed[22].

Multilateral Treaties. Commonwealth Government representatives participate in negotiations at international conventions and the Multilateral Treaty's text is attached to the Final Act of the "plenipotentiary conference" where it is adopted. However, the signing of the Final Act is only indicative of a commitment to seek Government approval. It does not manifest Australia's intention to be legally bound – not yet. The Legal Branch and DFAT, in consultation with responsible Government Agencies, are responsible for revising and approving the Draft[23].

Accession

By and large where the Commonwealth Government wishes to accede to Multilateral Treaties that have already been concluded by other States, a similar preparatory process to ratification of such Treaties applies. DFAT's Treaties Secretariat is responsible for preparing the Treaty Draft, once briefed by the relevant Government Agency[24].

"RIS". If the Treaty can have an effect on "business regulation" or limit competition, the Commonwealth Government or Parliament may require a Regulation Impact Statement ("RIS")

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[19] Department of Foreign Affairs and Trade (DFAT), 'Australia International Treaty Making Information Kit', above n 17.
[20] Ibid.
[21] Where the Bilateral Treaty's "Signature text" is to be in English and another Language, and a softcopy of the text is unavailable, DFAT will liase with the relevant State party's preparatory body: Ibid.
[22] Ibid.
[23] Ibid.
[24] Ibid.

to be prepared after consulting the Productivity Commission – a Commonwealth Government research centre which looks into policy and regulation[25].

"Implementation". Legislative steps towards implementing the Treaty should then be taken at Commonwealth/State/Territory level, with the Attorneys-General of the Commonwealth, States and Territories advising on their respective laws' consistency with the Treaty obligations[26]. Usually, the Commonwealth Attorney-General's Department works together with the Attorneys-General of States/Territories rather than persuading the Commonwealth Parliament to invoke its "external affairs power" under the Constitution to force their hand[27].

"Government approval". The relevant Government Agency presents the Treaty to all relevant Minister(s) and/or Cabinet for their endorsement. Where it is sufficient to call on the relevant Ministers, the Prime Minister and the Minister for Foreign Affairs must at least be kept informed, so they can advise on which Minister(s) should be responsible for giving written approval.

Federal Executive Council's ("Ex-Co's") authentication. DFAT and the Legal Branch, acting on information from the relevant Government Agency, prepare documents including an "Explanatory Memorandum" summing up the Treaty's effect. They submit it to the Federal Ex-Co for approval. The Signing Ceremony then takes place[28].

Procedures for Evaluation and Ratification of treaties

The Commonwealth Executive would often get a Bill through the House of Representatives (Lower House) as the majority of its Members are from the dominant party. Hence the Senate (Upper House) remains an important checking mechanism for Treaties ratified or acceded to[29].

Tabling. The Treaties' contents are tabled in both Houses of Commonwealth Parliament for Parliamentary analysis before the Commonwealth Executive takes "binding action" by ratification or accession. For "Category 1" Treaties – deemed of great "political, economic or social" importance, Parliament has 20 sitting days to look into the relevant Treaty. DFAT claims that this is generally the case. For "Category 2" Treaties which are "uncontroversial" and "relatively routine", Parliament has 15 "sitting days" to do so[30]. However, Parliamentary sitting

[25] Ibid.
[26] Ibid.
[27] Ibid; Charlesworth, Chiam, Hovell and Williams, above n 10.
[28] Department of Foreign Affairs and Trade (DFAT), 'Australia International Treaty Making Information Kit', above n 17.
[29] Charlesworth, Chiam, Hovell and Williams, above n 10, pp. 3 – 9.
[30] Australian Government, Department of Foreign Affairs and Trade, 'Categories 1 and 2 Treaties': http://www.dfat.gov.au/treaties/making/category.html; Charlesworth, Chiam, Hovell and Williams, above n 10.

periods can take up to 30 – 100 "calendar days"[31]. Hence in "urgent" situations concerning important "commercial, strategic or foreign policy interests", the 15/20-day requirement is lifted. In such cases, the Treaty's contents should be tabled for analysis "as soon as possible"[32].

National Interest Analyses ("NIA"). The responsible Government Agency's NIA is a publicised Report on each Treaty tabled in Parliament. The NIA primarily examines whether Australia's entry into a Treaty conforms to its "national interests", but it has since taken a more holistic approach to withstand Parliamentary scrutiny[33]. The NIA is posted on the internet, and can be accessed by States, Territories and the public[34]. Generally its utility has exceeded expectations, though there is still room for improvement, considering that the "quality" of NIAs vary depending on the Government Agency which prepares them[35].

The Commonwealth Government responded to the 1996 Senate Legal and Constitutional Affairs Committee's call for holistic "treaty impact statements" by stating that the NIA would go beyond assessing the "pros and cons" of entering into a Treaty. It also consults deemed "stakeholders". The NIA includes not only the Treaty's obligations, but its "social, cultural and environment effects", which may be discussed in the context of "reasons" for and against ratification[36]. The NIA also covers the Treaty Implementation's impact on the Federal-State division of powers. Its objectivity can be checked by the Joint Standing Committee on Treaties (JSCOT) and the Commonwealth Parliament, particularly the Senate[37].

Joint Standing Committee on Treaties ("JSCOT"). The Joint Standing Committee on Treaties ("JSCOT"), established on 30 May 1996, is the main body responsible for making recommendations on the signing of treaties for Parliament[38]. In contrast, SCOT can make recommendations on treaties which may affect the delicate Federal-State balance of power[39]. JSCOT consists of 16 Members – 9 of whom are from the House of Representatives (Lower

[31] Department of Foreign Affairs and Trade (DFAT), 'Australia International Treaty Making Information Kit': http://www.austlii.edu.au/au/other/dfat/reports/infokit.html.
[32] Ibid; For more information on the Tabling process, see Ruth Blunden, 'Treaties in the Global Environment: The Tabling Process': http://www.dfat.gov.au/treaties/workshops/treaties_global/blunden.html.
[33] Ibid; Charlesworth, Chiam, Hovell and Williams, above n 10.
[34] Department of Foreign Affairs and Trade (DFAT), 'Australia International Treaty Making Information Kit', above n 17.
[35] Charlesworth, Chiam, Hovell and Williams, above n 10, pp. 12 – 13.
[36] Parliament of Australia, Senate, 'Trick or Treaty? Commonwealth Power to Make and Implement Treaties', above n 3.
[37] Department of Foreign Affairs and Trade (DFAT), 'Australia International Treaty Making Information Kit', above n 17.
[38] Parliament of the Commonwealth of Australia, Joint Standing Committee on Treaties, 'Australia-Indonesia Maritime Delimitation Treaty 12th Report, November 1997': http://www.aph.gov.au/house/committee/jsct/reports/report12/report12.pdf.
[39] The Treaties Council meets only once annually while SCOT meets twice annually. SCOT is more effective than the Treaties Council because it is kept informed of Treaties Schedule developments every 3 months. State and Territory agents may also ask for better particulars, clarify doubts, submit their opinions and "flag" issues for discussion. SCOT is to be distinguished from JSCOT because it is mainly concerned with the Treaty's effect on States and Territories and advising accordingly: Department of Foreign Affairs and Trade (DFAT), 'Australia International Treaty Making Information Kit', above n 17; Charlesworth, Chiam, Hovell and Williams, above n 10.

House) and 7 from the Senate (Upper House). A 9-Member majority of the JSCOT is from the Government party, 6 Members are from the main Opposition party and 1 is from the Australian Greens party[40].

JSCOT was established pursuant to the Senate Legal and Constitutional Affairs Committee's call for greater accountability, transparency, consultation and participation in the treaty-making process[41]. It is tasked with monitoring each Treaty tabled before Parliament and the Commonwealth Government's NIA attached to it[42]. It convenes "public hearings" and invites parties interested to consider their views on the Treaty. Such parties include Government Agencies, NGOs, and the private sector. After receiving submissions from such stakeholders, JSCOT should look into tabled treaties within 15 – 20 sitting days, save for exceptional circumstances warranting more time. JSCOT then submits a report to the Commonwealth Parliament on, inter alia, "whether and in what circumstances" – if at all, the Commonwealth Executive should ratify the treaty[43].

Government's reaction. The Commonwealth Executive then answers to JSCOT's recommendations. It at least does not act inconsistently with them[44]. Nevertheless, the Executive – particularly the Cabinet, has the final say on whether to "sign or ratify" a Treaty[45].

Formalities – Final Treaty Action. Generally Australia's signing an International Treaty is done subject to an "instrument of ratification" or accession, like its approach to the SUA 2005 Protocol. The Treaty, whether Bilateral or Multilateral, has to undergo Parliamentary scrutiny first, save in "urgent" cases where Tabling is postponed[46]. DFAT, having been briefed by the Government Agency concerned, prepares the instrument of ratification or accession for the Federal Executive Council to check and endorse[47]. After its approval, DFAT submits the relevant instrument to the depositary responsible. The instrument is then sent to the Minister for Foreign Affairs for written consent[48].

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[40] Parliament of Australia, Joint Committee: Joint Standing Committee on Treaties, 'Committee Members': http://www.aph.gov.au/house/committee/jsct/members.htm; 'Committee establishment, role and history': http://www.aph.gov.au/house/committee/jsct/ppgrole.htm.

[41] The Committee came about from the Senate Committee's recommendation that a Joint Parliamentary Committee on Treaties should be set up, and is seen as the most successful reform measure Parliament of Australia, Senate, 'Trick or Treaty? Commonwealth Power to Make and Implement Treaties', above n 3.

[42] Department of Foreign Affairs and Trade (DFAT), 'Australia International Treaty Making Information Kit', above n 17.

[43] Charlesworth, Chiam, Hovell and Williams, above n 10.

[44] Ibid.

[45] Ibid; Australian Government, Department of Foreign Affairs and Trade, 'Treaties and Treaty-making: Treaties, above n 11-12.

[46] Department of Foreign Affairs and Trade (DFAT), 'Australia International Treaty Making Information Kit', above n 17.

[47] Bliss, above n 18.

[48] Department of Foreign Affairs and Trade (DFAT), 'Australia International Treaty Making Information Kit', above n 17.

A Multilateral Treaty's Final Text may be adopted by "1-step definitive signature" or in "2-steps". The 1-step procedure may apply where Australia directly becomes a party to an existing Treaty by accession. The 2-step procedure applies where Australia signs such a Treaty subject to ratification.

Summing Up. Treaty-making remains in the Commonwealth Executive's hands, though after the 1996 Senate Committee's recommendations, the process has improved "Parliamentary scrutiny"[49]. The Commonwealth Parliament is, after all, generally the responsible arm of government to implement Treaties ratified by the Executive by passing Laws, save for Delegated/Subsidiary Legislation. Though Parliament does not draw up the Bill, it controls the Bill's provisions by discussing them and proposing modifications[50]. Coupled with Australia's policy of transparency to keep the public informed, Australia's Treaty-making process is a good model.

Procedures undertaken after ratification of treaties

Implementing Legislation. A Treaty only becomes National Law only when Legislation has been passed at Commonwealth and State/Territory Levels implementing the Treaty.

"Registration with the United Nations". DFAT records Treaties in effect for Australia consistent with Art 102 of the UN Charter. The relevant depositary is responsible for providing the Treaty's "Signature text". It gives a "Certified true copy" to DFAT. DFAT turns copies over to relevant Agencies[51].

Procedures for Reservations and Declarations

Signing a Multilateral Treaty does not manifest an intention to be legally bound but rather is conditional upon Government approval. The Agencies concerned, the Attorney-General's Department and DFAT discuss the legal repercussions of ratifying or acceding to the Treaty towards the Final text's adoption, particularly over what, if any, Reservations or Declarations should be made for Australia[52].

Procedures for Amendment and Termination

It should be noted that an NIA is necessary for any modification or withdrawal from a Treaty[53].

[49] Charlesworth, Chiam, Hovell and Williams, above n 10, p. 6.
[50] Ibid, p. 16.
[51] If the depositary provides the "Certified text" directly to the relevant Agency, it is to be copied to the Treaties Secretariat of DFAT: Department of Foreign Affairs and Trade (DFAT), 'Australia International Treaty Making Information Kit', above n 17.
[52] Ibid.
[53] Blunden, above n 32.

Amendment. Broadly, amending a Treaty is treated as being a party to it "in the first place". Hence, some procedures on the negotiating, signing and ratification of Treaties set out above still apply[54].

Termination. DFAT claims that the Government has the "right" to withdraw from treaty responsibilities if it finds that the Treaty stops "serving Australia's international and national interests"[55]. The Termination or Withdrawal procedure turns on the relevant Treaty's provisions. In Australia, the Federal Ex-Co must give its consent to the Termination or Withdrawal[56]. Further, the Commonwealth Parliament's "tabling procedures" still apply[57].

<u>Relationship between International Law and Domestic Law</u>

The Commonwealth Constitution is silent on 3 pertinent issues: (i) the means by which Australia gets into "binding international relationships; (ii) the Legal consequences of International law on the domestic framework; and (iii) "who" implements international responsibilities in the domestic arena. It is up to the Executive, Parliament and the Judiciary to mould Australia's relationship with International Law, and the extent to which it should be imported into the domestic framework[58].

The only relevant provisions that envision interaction with International Law are s 51 (xxix) of the Constitution, which empowers the Commonwealth Parliament to pass laws on "external affairs", and s 75 (i) of the same, which gives the High Court "original jurisdiction" over "matters arising under a treaty". The Commonwealth Parliament's external affairs power to implement laws giving effect to Treaty provisions has been construed broadly, while the High Court's jurisdiction over "matters arising under a treaty" has been interpreted strictly[59].

<u>General principles guiding the Conclusion and Implementation of Treaties</u>

National/International interests. Both the Commonwealth Executive's NIA, followed by Parliament's JSCOT, would set out reasons why Australia's entry into a Treaty or withdrawal from it would or would not be in its National interest. Australia's withdrawal from *UNIDO* was on grounds that "the treaty no longer serves Australia's national and international interests"[60].

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[54] Jonathan Chew, 'Treaties in the Global Environment: Key Provisions in Treaties – Things to Watch Out For': http://www.dfat.gov.au/treaties/workshops/treaties_global/chew.html.

[55] Australia hardly pulls out of a Treaty, but it did remove itself from the UN Industrial Development Organisation ("UNIDO") in 1996 on the basis that UNIDO's practices did not substantially help Australia's "priority development objectives" and, essentially, the funding obligations were not worth it: Charlesworth, Chiam, Hovell and Williams, above n 10, p. 7.

[56] Department of Foreign Affairs and Trade (DFAT), 'Australia International Treaty Making Information Kit', above n 17.

[57] Charlesworth, Chiam, Hovell and Williams, above n 10, p. 10.

[58] Ibid, p. 6.

[59] Ibid, pp. 3 – 5.

[60] Ibid, p. 7.

Non-interference. Perhaps the "anxiety" over International Law's 'invasion' of Australian Law reached its height after the ***Teoh*** decision. To this end, the Coalition and following Governments introduced The *Administrative Decisions (Effect of International Instruments) (Cth)* Bills in 1995, 1997, and 1999 to "correct" the decision, but they had "lapsed" by the time Parliament could pass them. Among State Parliaments, only South Australia succeeded in getting its *Administrative Decisions (Effect of International Instruments)* Bill through in 1996 to curb ***Teoh's*** impact[61].

Conformity with National Law.

Put differently, we could approach the issue as "Conformity with International Law"[62]. This question raises 2 concerns. First, assuming the NIA recommends ratification, and JSCOT's recommendations are heeded by the Commonwealth Executive, should Parliament pass new laws to give effect to the Treaty or are laws already in place sufficient to do so? Second, how will the Treaty affect the Federal-State division of powers? To what extent will the Commonwealth Government through its Executive and Parliament encroach into matters that are traditionally within State/Territory domain, if at all?

Application to National Laws

How particular Treaty obligations are implemented in National Law

Generally, Australia tends to adopt a dualist model of implementing Treaties, so its ratification of a Treaty must be followed by implementing laws and regulation, such as an Act of Parliament. A relevant Treaty provision does not become "part of Australian Law" until a Statute "validly incorporates" it. However, people can "legitimately expect" that Commonwealth authorities will consider Treaties Australia has ratified, but has yet to give effect to via Legislation, particularly where individual rights are at stake. Here, the "monism/dualism" and "incorporation/ transformation" dichotomies are seen as somewhat archaic. Authors think that Australia's relationship with International Law is "more nuanced"[63]. The 3 main ways of implementing Treaty obligations are set out below.

"Specific Legislative Implementation". The most favoured approach for implementing Treaties is to draft the Treaty provisions in specific parliamentary terms. Here, the Act is easier to understand and apply, while still giving effect to most Treaty obligations. The *Space Activities Act 1988* (Cth) is one such example[64].

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[61] Ibid, pp. 11, 20 [Fn 170], 46.
[62] Department of Foreign Affairs and Trade (DFAT), 'Australia International Treaty Making Information Kit', above n 17.
[63] Charlesworth, Chiam, Hovell and Williams, above n 10, pp. 9. 17 – 18.
[64] Ibid, p. 9.

“Existing Commonwealth or State Legislation, including Regulations”. Relevant Commonwealth or State Laws already in place may be enough to implement Treaty obligations, which may involve making Regulations[65].

“Administrative measures” or Delegated/Subsidiary Legislation. The Commonwealth Executive can take “administrative measures” giving effect to Treaty obligations if they are only binding on the Government[66].

Conflict/inconsistency between Treaty and National Law

National laws claimed to give effect to Treaty obligations under the external affairs power must be capable of being “appropriate and adapted” to implementing them. If so, then a slight departure from the Treaty provisions will not be “fatal” to its validity[67]. In the ***Industrial Relations Act Case***, the joint majority held that a “deficient” national statutory provision giving effect to a Treaty does not necessarily render that provision invalid unless the “deficiency” is so significant that, taken in totality with the other statutory provisions it undermines the implementation of the Treaty or the Treaty itself[68]. Where the Commonwealth Government relies solely on Parliament’s external affairs power to sustain a National law passed to give effect to a Treaty, the relevant provision must be of “sufficient specificity” to be upheld as valid. If the provision is just “aspirational” or vague, it may, where possible, be read down in accordance with the Treaty provision or severed so that the other provisions that give effect to the treaty survive[69].

The Commonwealth Government usually relies on alternative Heads of power over and above the external affairs power to ensure that the relevant law is upheld as valid. A National provision that fails the “reasonable proportionality” test pursuant to the external affairs power may be upheld on another Head of Power[70]. Where the National law provision is upheld on another basis, it can trump the Treaty provisions.

Treatment of treaties by National Courts

A High Court joint majority has affirmed the “reasonable proportionality test”, but confined its application to Commonwealth laws implementing Treaties pursuant to the external affairs power. If the relevant law is reasonably capable of being considered appropriate and adapted to implementing the Australia’s Treaty obligations so that it can be characterised as a law with

[65] Ibid.
[66] Ibid.
[67] Blackshield & Williams, above n 1, citing joint majority in the *Industrial Relations Act Case*.
[68] Ibid, pp. 921 – 925.
[69] Ibid.
[70] Ibid.

respect to external affairs, it would be valid[71]. The High Court remains the final arbiter of whether or not the Commonwealth law passes this test, though it is wary of substituting its own opinion for that of Parliament.

In ***Teoh***, the High Court majority gave International Treaty commitments domestic effect in the absence of “Legislative implementation” – much to the Commonwealth Government’s chagrin. The Court found that signed International Treaties ratified by the Commonwealth Executive but not domestically implemented through law nevertheless created a “legitimate expectation” that the Government would make “administrative decisions” conforming to its international responsibilities[72]. But ***Teoh*** did not change the position that Australia’s ratification of International Treaties still had to be domestically implemented. It simply required Government Agencies to consider International Conventions that Australia had entered into when making decisions even if no domestic implementation had taken place[73].

[71] Ibid, citing the joint majority in the *Industrial Relations Act Case*.
[72] Charlesworth, Chiam, Hovell and Williams, above n 10, pp. 10 – 11.
[73] However, in future, considering the judicial and political repercussions, Courts may wind back from relying directly on the relevant Treaty itself in the absence of domestic implementing legislation. Subsequent High Court decisions’ obiter dicta expressed some contempt for the decision, including the need to revisit it. Both Labour and subsequent Coalition Governments sought to undo the “damage” done in *Teoh* by making statements emphasising the necessity for domestic law to give effect to Treaties. But the “legitimate expectation” test is still good administrative law, particularly in ascertaining whether a breach of natural justice has occurred: Ibid, above n 10, pp. 10 – 11, 19.

PART II

IMPLEMENTATION OF SPECIFIC CONVENTIONS WHICH AUSTRALIA HAS ENTERED INTO

Australia has ratified or acceded to United Nations Convention on the Law of the Sea 1982 ("UNCLOS"), the Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation ("SUA 1988 Convention"), the International Convention Against the taking of Hostages ("'The Hostages Convention"), the United Nations Convention against Transnational Organised Crimes 2000 ("UNTOC 2000") and the International Convention for the Suppression of the Financing of Terrorism 1999 ("SOFOT 1999 Convention")[74]. Recently, in a Joint Declaration with ASEAN Defence Ministers, Australia pledged to contribute to "enhancing regional peace and security"[75]. It is one thing for a State to enter into several Maritime Security instruments, but it is quite another to implement Treaty provisions fully and effectively. Australia generally gives effect to its Treaty obligations, but its Implementing Legislation has some issues. Importantly, Australia has to be mindful of its other Treaty obligations, and Implementing Legislation giving effect to them. For example, it faces the daunting task of balancing its National and Maritime Security Interests with its Human Rights Treaty obligations[76].

Implementing/Existing Legislation for Piracy and Other Maritime Crimes

Australia did not pass specific Implementing Legislation implementing UNCLOS as a whole, given that UNCLOS covers a broad range of issues[77]. But the Commonwealth Parliament passed *the Crimes Act 1914* (Cth) (Amended in 1992), *the Crimes (Ships & Fixed Platforms) Act 1992* (Cth), and the *Crimes (Hostages) Act 1989* (Cth) to implement UNCLOS provisions on Piracy, the SUA 1988 Convention and its Protocol on Fixed Platforms and the Hostages Convention respectively[78]. Further, Parliament passed the *Suppression of the Financing of Terrorism Act 2002* (Cth) to implement the SOFOT 1999 Convention[79]. In contrast, the Commonwealth

[74] Robert Beckman, et al, Centre for International Law Research Project on Regional Cooperation to combat Piracy and Other Maritime Crimes [Upcoming], Annex 2, p. 2.
[75] Hetty Musfirah, 'A commitment to enhance regional peace and security', Today, 13 October 2010, p. 3.
[76] For its part, Australia has signed 6 Key UN Human Rights instruments, despite allegations of double standards in implementation: Charlesworth, Chiam, Hovell and Williams, above n 10, p. 9. Maritime Security and Human Rights are not necessarily divorced, given that many Maritime Security Treaties, including the SUA 1988 Convention seeks to ensure Due process rights for the alleged Perpetrator. It is up to the State party concerned to put these mechanisms in place.
[77] It is beyond the scope of this paper to discuss Australia's Maritime boundary delimitation disputes with East Timor: Matthew W Flint, 'The Timor Sea Joint Petroleum Development Area Oil & Gas Resources: The Defence Implications', Working Paper No. 13: http://www.navy.gov.au/w/images/Working_Paper_13.pdf.
[78] Douglas Guilfoyle and J Ashley Roach et al, 'Piracy & Legal Issues: Reconciling Public and Private interests', Africa Programme & International Law Conference Report [Annex 2 on States' Implementing Legislation].
[79] *Suppression of the Financing of Terrorism Act 2002* (Cth) http://www.austlii.edu.au/au/legis/cth/consol_act/sotfota2002443/.

Executive inserted "new regulations" to Existing Legislation to implement Australia's obligations under UNTOC 2000[80].

Piracy under UNCLOS

Piracy remains an old "enemy of mankind"[81]. Art 101 of UNCLOS defines Piracy as any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or passengers of a private ship/aircraft or on the High Seas against another ship, or persons or property on board". Hence Piracy has to further "profit-making". It does not encompass acts for a political purpose[82]. Accordingly, it is not to be conflated with Terrorism[83]. UNCLOS provides for Universal jurisdiction over Ships involved in Piracy on the High Seas or EEZ. Enforcement action against Piracy as defined in UNCLOS is problematic because the vast majority of Attacks take place in a Coastal State's Territorial waters[84]. Further, many State parties to UNCLOS have no Laws criminalising Piracy or enabling their Courts to exercise jurisdiction over Foreign Perpetrators[85].

Interplay with the SUA 1988 Convention, the Hostages Convention and UNTOC 2000

The SUA 1988 Convention complements Piracy as defined in UNCLOS by requiring State parties, inter alia, to proscribe "armed robbery at sea"[86]. Likewise, the Hostages Convention provides for the criminalisation of "holding crew for ransom" – the classic situation off

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[80] Regulations were included in the *Extradition Act 1988* (Cth) and the *Mutual Assistance in Criminal Matters Act 1987* (Cth): UNTOC [2003] ATNIA 33: http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/dfat/nia/2003/33.html?stem=0&synonyms=0&query=transnational%20organised%20crime; JSCOT Report 59, Chapter 5: UNTOC and Protocols on Trafficking in Persons and Smuggling of Migrants: http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/jscot/reports/59/chapter5.html?stem=0&synonyms=0&query=transnational%20organised%20crime.

[81] Donald R Rothwell, 'Maritime Security in the 21st Century: Contemporary Challenges for Australia and New Zealand' in Natalie Klein, Joanna Mossop, and Donald R Rothwell, Maritime Security: International Law and Policy Perspectives from Australia and New Zealand (2010), p. 242.

[82] Stuart Kaye, 'Threats from the Global Commons: Problems of Jurisdiction and Enforcement, 8 Melbourne Journal of International Law [2007] 185, p. 190.

[83] J Ashley Roach, 'Checklist for assessing Implementation of National Legislation for Piracy and Armed Robbery' on Art 101 UNCLOS, 'National Action Required: Other crimes such as Larceny, Assault, Battery, Murder, Extortion, SUA Violations, Hostage-taking, Terrorist-financing, which often occur during or in connection with Piracy, should be addressed in other National Legislation, be applicable in all areas subject to the State's jurisdiction'. Terrorism remains loosely-defined in International Law, but it often includes random violence to intimidate Governments or International organisations "for political ends". Further, despite both the SUA 1988 and the Hostages Conventions being seen as "Counter-terrorism" Treaties, the term "Terrorism" is only expressed in their Preamble. Both Conventions' operative provisions do not require a "Terrorist motive" for the relevant Crimes: Guilfoyle & Roach et al, above n 78, p. 3.

[84] Kaye, above n 82, p. 189.

[85] Robert Beckman and Tara Davenport, 'Enhancing Regional Cooperation on Piracy and Maritime Crimes', International Conference on Cooperation in Dealing with Non-Traditional Security Issues in the South China Sea: Seeking more effective means', 21 – 22 May 2010, Haikou, China.

[86] Guilfoyle & Roach et al, above n 78, p. 3.

Somalia[87]. UNTOC 2000 targets organised criminal syndicates at their source by enabling, inter alia, criminalisation of onshore planning and preparatory activities against "vessels at sea" and related crimes including "money laundering"[88]. Coupled with UNCLOS, these 3 Conventions devised a holistic system to minimise the availability of "safe havens" for Perpetrators of Maritime Crimes by obliging State parties to "extradite or prosecute" them. The best way to maintain Maritime Security is to ensure that such Perpetrators have "nowhere to hide". To the extent that these Conventions enable the prosecution based on mere presence of the alleged Offender on a State party's territory, they provide for "quasi-universal jurisdiction"[89]. A common thread running through these 3 Conventions is that each of them can be used as a legal basis for State parties to commence extradition proceedings, without having to conclude a separate bilateral extradition agreement with each State[90].

Australia's Implementing Legislation for Piracy as defined in UNCLOS

Australia's Definition of Piracy. Australia does have a more coherent legal framework to deal with Piracy than its heydays, having ratified UNCLOS on 5 October 1994[91] and taken legislative steps to implement its Piracy provisions. The *Crimes Act 1914* (Cth) ["Crimes Act"] as amended by Act Number 164 of 1992[92] clarified ambiguities in the Common Law and State/Territory Legislation on Piracy[93]. The 1992 Amendment to the Crimes Act defined Piracy and provided for a Penalty, so it has prima facie complied with Art 100 of UNCLOS[94]. Section 52 of the said Act criminalises "Acts of Piracy", stipulating that it is punishable by a term of Life imprisonment. Section 51 of the Crimes Act defines Piracy as "an act of violence, detention or depredation committed for private ends by crew or passengers of a private ship or aircraft and directed:

(a) if the Act is done on the High Seas or Coastal sea of Australia – against another Ship or Aircraft or against Persons or Property on board another Ship or Aircraft, or;
(b) if the Act is done in a place beyond the jurisdiction of any country – against a Ship, Aircraft, Persons or Property."

The Crimes Act defines Piracy fairly closely to Art 101 (a) of UNCLOS, but extends it to cover Australia's "Coastal sea". Section 51 of the said Act defines the Coastal sea to include the Territorial sea of Australia and the "sea on the landward side" of it that falls outside

[87] Beckman & Davenport, above n 85 [Powerpoint Version, p. 1, Slide 6].
[88] Beckman & Davenport, above n 85, p. 22.
[89] Ibid, pp. 15 – 16, 28.
[90] Beckman & Davenport, above n 85, pp. 17, 21, 26.
[91] Beckman et al, above n 74, Annex 2, p. 2.
[92] Guilfoyle & Roach et al, above n 78, Annex 2 [on States' Implementing Legislation].
[93] *Crimes Act 1914* (Cth): http://www.austlii.edu.au/au/legis/cth/consol_act/ca191482/; Blair Ussher, Office of the Director General Reserves (Navy) Royal Australian Navy Reserve Professional Studies Programme, Goorangai [May 2010] 4 (5): http://www.navy.gov.au/w/images/Goorangai_Vol4_No5.pdf.
[94] Roach, above n 83, on Art 100, 'National Legislation required: Enact Legislation defining and providing for the punishment of the crime of piracy'.

State/Territory limits. But National Laws on Piracy should "not include acts committed in the Territorial sea, in port or internal waters". A State may pass Domestic Laws criminalising such acts under another offence pursuant to the SUA 1988 or the Hostages Conventions, such as the "SUA" Crime of Armed Robbery[95]. In addition, National Laws on Piracy should extend to the EEZ considering that Art 58 (2) UNCLOS contemplates that Arts 88 – 115 of UNCLOS, including Arts 100 and 101 on Piracy, are applicable to the Coastal State's EEZ[96].

Further, the Crimes Act excludes Arts 101 (b) and (c) of UNCLOS from its Definition of Piracy. Instead, it treats "voluntary participation in the operation of a Pirate-controlled Ship or Aircraft" as a separate "less serious offence"[97] – "operating a pirate-controlled Ship or Aircraft", which carries a punishment of 15 years.

In addition, the Crimes Act does not include "any act of inciting or intentionally facilitating an Act" of Piracy in its Definition of Piracy, so the equivalent of Art 101 (c) UNCLOS is missing. It does not appear to criminalise "attempts and conspiracy to commit Piracy", let alone aiding and abetting[98]. It does not cover "Acts of Piracy" by crew who have "mutinied" and taken over a Warship or Government Ship/Aircraft pursuant to Art 102 UNCLOS[99].

To sum up, Piracy under the Crimes Act is not "as defined in UNCLOS"[100]. Perhaps Australia should revisit s 52 of the said Act to bring it in line with Art 101 of UNCLOS[101]. The importance of coherence between National, Regional and International Laws cannot be overstated considering that Piracy is truly a crime that crosses borders of different States. Discrepancies between States' Laws may impede the arrest, extradition or prosecution of Perpetrators[102].

Jurisdiction. Nevertheless, s 51 (b) of the Crimes Act enables Universal jurisdiction over Acts of Piracy "beyond the jurisdiction of any country", which is defined as a "place other than the High Seas that is not within the Territorial jurisdiction of Australia or any other Country". This provision appears to be consistent with Art 101 (a) (ii) of UNCLOS, which contemplates Acts of Piracy "outside the jurisdiction of any State"[103].

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[95] Roach, above n 83, on Art 101 UNCLOS, 'Relevant provisions in National Law: National Law should refrain from applying the National Law on Piracy in the Territorial Sea, Internal waters or Archipelagic waters'.
[96] Ibid, on Art 58 UNCLOS, 'Relevant provisions in National Law: National Legislation should not limit application to the High Seas'.
[97] Beckman & Davenport, above n 85, p. 12.
[98] Roach, above n 83, on Art 101 UNCLOS, 'Relevant provisions in National Law: National Law should include attempts and conspiracy to commit Piracy, Aiding and Abetting Commission of Acts of Piracy, and Accessory after the Fact of Piracy'.
[99] Ibid, on Art 102 UNCLOS, 'Relevant provisions in National Law'.
[100] Beckman and Davenport, above n 85, p. 29.
[101] Ibid.
[102] Ibid, p. 12.
[103] This may be the case despite the suggestion that the phrase "outside the jurisdiction of any State" suggests Antarctica and the surrounding area, given that no other place is "Terra nullius": Roach, above n 83, on Art 101 UNCLOS, 'Relevant provisions in National Law'.

Seizure. Section 54 of the Crimes Act is broadly comparable to Arts 105 and 107 UNCLOS, which taken together, provide for military or government "seizure of Pirate Ship or Aircraft". It empowers a member of the Defence Force or the Australian Federal Police to seize Pirate Ships and Aircraft "in Australia, on the High Seas or in a place beyond the jurisdiction of any country".

SUA 1988 Convention

Generally, the SUA 1988 Convention is at least concerned with Attacks on Ships scheduled to navigate between States' Territorial waters and beyond. It applies so long as the Ship does not navigate or is not scheduled to navigate within just 1 State's Territorial sea[104]. The exception is where the alleged Perpetrator is discovered in another State party's territory[105]. The said Convention intended to protect "the safety of maritime navigation" particularly "hijacking and sabotage". It complemented UNCLOS to some degree by removing its requirements that the relevant Attacks take place on the High Seas or EEZ and requiring Contracting State Parties to "extradite or prosecute" alleged Perpetrators. In doing so, it reinforced the need for inter-State cooperation to fight Maritime Crimes and contributed to Maritime Security[106].

Australia's Implementing Legislation for the SUA 1988 Convention

Like with UNCLOS, which is not "self-executing", State parties to the SUA 1988 Convention should pass laws implementing its provisions to supplement their National Laws on Piracy. State parties should give effect to the said Convention by criminalising (i) attacks on the ship and people and cargo "on board" and (ii) acts endangering or threatening to endanger that ship or a ship's Navigational safety. Further, such Laws should provide for punishment which enables consideration of the "grave nature" of such crimes[107].

Australia's Commonwealth Parliament passed Implementing Legislation in the form of the *Crimes (Ships & Fixed Platforms) Act 1992* (Cth) ["Crimes Act"] before acceding to the SUA 1988 Convention and its Protocol on Fixed Platforms[108]. Parliament was inspired to do so after the *Achille Lauro* Hijacking, when an American was killed. Some Perpetrators escaped because

[104] Roach, above n 83, on Art 4 SUA 1988 Convention, 'Legal Implications'.
[105] Beckman and Davenport, above n 85, on the applicability of Art 4 (1) and Art 4 (2) of the SUA 1988 Convention.
[106] Ibid; Roach, above n 83, on Art 4 SUA 1988 Convention, 'Legal Implications'. Australia acceded to the SUA 1988 Convention on 20 May 1993: Beckman et al, above n 74, Annex 2, p. 2.
[107] Art 5 SUA 1988 Convention; Beckman and Davenport, above n 85, p. 16.
[108] *Crimes (Ships & Fixed Platforms) Act 1992* (Cth); Guilfoyle & Roach et al, above n 78, p. 47, citing the same: http://www.austlii.edu.au/au/legis/cth/consol_act/cafpa1992318/. With regard to the Protocol, the same Principles and Concepts apply, given that "SUA" Crimes may not just take place on Ships, but also on "Fixed platforms" such as "artificial islands, installations or structures permanently attached to the sea-bed". Further, Australia criminalises similar activities in implementing both the SUA 1988 Convention and its SUA 1988 Protocol on Fixed Platforms. Hence, similar concerns arise.

of jurisdictional loopholes between States[109]. Ironically, the word "terrorism" only appears once in the SUA 1988 Convention – in its Preamble[110].

Australia's Implementing Legislation on the said Convention is somewhat complex. The Crimes Act presumes a "fault" element, yet explicitly provides for the mens rea of knowledge in some sections. In comparison, under the Convention, the mens rea for such Crimes is whether the alleged Perpetrator "acts unlawfully and intentionally", without the need to establish "motive". The effect may be one and the same – or it may not. We now turn to compare and contrast the relevant Australian provisions with those of the SUA 1988 Convention[111]. From Hansard Reports, the mens rea was deliberately left out for s 12 of the Act – "destroying or damaging navigational facilities". The Parliamentary Secretary to the Attorney-General called for "a fairly strict regime of protection" arguing that people "ought not to be negligent in their approach" to such facilities[112]. However, it is unlikely that the other "SUA" Crimes without mens rea attract strict liability. Section 5A of the Crimes Act retains Chapter 2 of the *Criminal Code Act 1995* (Cth) ["Criminal Code"], which prescribes "the general principles of criminal responsibility", including "physical and fault elements". In the absence of a specified "fault element", Div 5.6 of the Criminal Code prescribes "intention" for Crimes involving only "conduct" and "recklessness" for Crimes which include circumstances and consequences. But where do we draw the line? We now turn to the operative provisions of the Crimes Act.

<u>Section 8 Crimes Act – "Seizing a Ship"</u>. Section 8 states that "a person must not take possession of, or take or exercise control over, a private ship by the threat or use of force or by any other kind of intimidation" and punishes such conduct with Life imprisonment. Such wording implements Art 3 (1) (a) of the SUA 1988 Convention almost word-for-word. But s 8 of the Crimes Act is silent on the mens rea ("MR") element of "unlawfully and unintentionally". Presumably, s 8 of the Act read together with the Criminal Code assumes the mens rea of intention, since seizing a ship amounts to conduct.

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[109] Parliament of Australia, House of Representatives, *Crimes (Ships and Fixed Platforms) Bill 1992* (Cth), 25 November 1992, Mr Hollis (2nd Reading): http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;orderBy=date-eFirst;page=0;query=(Dataset%3Ahansardr%20SearchCategory_Phrase%3A%22house%20of%20representatives%22)%20Date%3A01%2F01%2F1981%20%3E%3E%2031%2F12%2F2009%20Decade%3A%221990s%22%20Year%3A%221992%22%20Month%3A%2211%22%20Speaker_Phrase%3A%22mr%20hollis%22;querytype=Speaker_Phrase%3Amr%20hollis;rec=0;resCount=Default.

[110] Guilfoyle & Roach et al, above n 78, p. 3.

[111] Roach, above n 83, on Art 3 SUA 1988 Convention, 'Subject Matter on Art 3: Legal Implications'.

[112] Parliament of Australia, House of Representatives, *Crimes (Ships and Fixed Platforms) Bill 1992* (Cth), 25 November 1992, Mr Duncan (2nd Reading): http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=CHAMBER;id=chamber%2Fhansardr%2F1992-11-25%2F0103;orderBy=date-eFirst;page=0;query=(Dataset%3Ahansardr%20SearchCategory_Phrase%3A%22house%20of%20representatives%22)%20Date%3A01%2F01%2F1981%20%3E%3E%2031%2F12%2F2009%20Decade%3A%221990s%22%20Year%3A%221992%22%20Month%3A%2211%22%20Speaker_Phrase%3A%22mr%20hollis%22;querytype=Speaker_Phrase%3Amr%20hollis;rec=0;resCount=Default.

Section 9 Crimes Act – "Acts of Violence". Section 9 states that "a person must not perform an act of violence against a person on board a private ship knowing that the act is likely to endanger the safe navigation of the ship", punishing such conduct with 15 years' imprisonment. Although such wording is similar to Art 3 (1) (b) of the SUA 1988 Convention, the MR requirement of knowledge appears here.

It seems harder to establish that the alleged Perpetrator knew that his/her Act of Violence against a Person on board a Private Ship is likely to endanger that Ship's safe navigation than the requisite MR under SUA 1988 Convention. Art 3 (1) (b) of the said Convention requires proof that the Perpetrator "unlawfully and intentionally" performed such an Act of Violence "if that Act is likely to endanger" that Ship's safe navigation. Under the SUA 1988 Convention, there is no need to prove that the alleged Perpetrator knows that "the act is likely to endanger the safe navigation of that ship". Here it seems that the bar to prove MR has been raised.

Section 10 Crimes Act – "Destroying or Damaging a Ship". Section 10 (1) of the said Act criminalises "conduct that causes the destruction of a private ship". Section 10 (2) prohibits "conduct that causes damage to a private ship or its cargo, knowing that such damage is likely to endanger the safe navigation of the ship". Perpetrators convicted for such destruction or damage face Life imprisonment.

Under s 10 (1), the MR for the "destruction" of a private ship is left absent or assumed. Considering the applicability of the Criminal Code, the requisite MR should be intention rather than recklessness, given that such destruction constitutes conduct.

Under s 10 (2), the requisite MR is knowledge that causing such damage is likely to endanger the Ship's safe navigation. It seems more difficult to prove such knowledge than "unlawfully and intentionally causing damage to a ship or its cargo" pursuant to Art 3 (1) (c) of the SUA 1988 Convention. It must be proven that the alleged Perpetrator knows that his/her conduct causing the damage is likely to endanger the safe navigation of the ship, not just his/her "intentional" damaging of that ship or its cargo. There seems to be a material difference in MR between both sub-sections.

Section 11 Crimes Act – "Placing Destructive devices on a Ship". Similar MR issues persist when reading s 11 of the said Act, which enables punishment for such conduct with 15 years' imprisonment. Section 11 (1) of the said Act prohibits "placing or causing to be placed a device or substance on a private ship that is likely to destroy that ship". In contrast, s 11 (2) of the Act criminalises "placing or causing to be placed a device or substance on a private ship that is likely to cause damage to the ship or its cargo knowing that it is likely to endanger the safe navigation of the ship". Both provisions are meant to give effect to Art 3 (1) (d) of the SUA 1988 Convention.

Section 12 Crimes Act – "Destroying or Damaging Navigational Facilities". Section 12 of the said Act prohibits acts that cause destruction or damage of maritime navigational facilities or

causes serious interference with their operation rendering such conduct punishable by 15 years' imprisonment. In doing so, it seeks to give effect to Art (3) (1) (e) of the SUA 1988 Convention. As explained above, s 12 is deliberately silent on the MR, thereby imposing at least strict liability.

Section 13 Crimes Act – "Giving False Information". Section 13 of the said Act criminalises communication of false information "knowing that the communication will endanger the safe navigation of a private ship" and gives effect to Art 3 (1) (f) of the SUA 1988 Convention almost to the letter. It renders such conduct punishable by 15 years' imprisonment. Interestingly this is the first time the MR requirement of knowledge appears in the SUA 1988 Convention, so that the Act and Convention are more or less synchronised.

Section 14 Crimes Act – Causing death; Section 15 Crimes Act – Causing Grievous Bodily Harm; Section 16 Crimes Act – Causing Injury to a Person. Broadly these 3 Sections of the said Act implement Art 3 (1) (g) of the SUA 1988 Convention, which prohibits the "unlawful and intentional" injury or killing of a person "in connection with the commission or the attempted commission of any of the Crimes set out from Art 3 (1) (a) – (f)" of the said Convention. All 3 Sections of the Act criminalise Attempted commission of Causing death, Grievous Bodily Harm or Injury to a Person, "in connection with ss 8 – 13", rendering such crimes punishable with Life imprisonment, 15 years' imprisonment and 10 years' imprisonment respectively. Here the Crimes Act goes a step further than the SUA 1988 Convention by including "Grievous Bodily Harm" as a Crime, thereby providing for more nuanced degrees of culpability. However, it is troubling that these Sections do not explicitly prescribe an MR, even if s 5A of the Act preserves Chapter 2 of the Criminal Code's operation. These are indeed serious charges, considering that such grave Crimes carry severe penalties. When read together with Div 5.6 of the Criminal Code, causing death, grievous bodily harm or injury amounts to conduct, so the requisite mens rea should be intention rather than recklessness.

Section 17 Crimes Act – "Threatening to endanger a Ship". Broadly s 17 of the Act gives effect to Art 3 (2) (c) of the SUA 1988 Convention. The Offence is punishable by 2 years' imprisonment. Section 17 (1) of the said Act prohibits a person from Threatening to: (i) commit an Act of Violence (ii) Destroy or Damage a Ship and/or its Cargo and (iii) Destroy or Damage Navigational Facilities "with intent to compel an individual, body corporate or a body politic to do or refrain from doing an act" if that threat is likely to endanger the Ship's safe navigation. To determine such intent s 17 (2) of the Crimes Act permits inferences to be drawn from the alleged Perpetrator's statement(s) or conduct.

Attempts and Abetments. The Crimes Act implements Arts 3 (2) (a) and 3 (2) (b) of the SUA 1988 Convention which respectively prohibit all Attempts and Abetments in committing Offences under Art 3 (1) of the Convention. Section 5A of the said Act preserves Attempts and Abetments in all the Offences set out above by maintaining the operation of Sections 11.1, 11.2

and 11.2A of the *Criminal Code Act 1995* (Cth), which criminalises "Attempts, Complicity, Common purpose and Joint Commission"[113].

Summing Up. Broadly, when setting out "SUA" Offences, Australia's Implementing Legislation of the SUA 1988 Convention is fair, save for the lack of specificity over the mens rea elements for several Offences – which is a concern. With the exception of s 12 of the Crimes Act, perhaps the MR of "intentionally" can be used to fill the gaps particularly for serious charges, given that the mens rea of "fault" is presumed but not set out. Further, Schedule 1 of the said Act sets out the SUA 1988 Convention and can be informative. Implementing Legislation should be read in the context of the relevant Treaty unless there is express provision to the contrary.

Jurisdiction. Section 5 Crimes Act – "Extraterritorial jurisdiction".

Section 5 of the said Act gives Australia Extraterritorial jurisdiction by stating that, unless indicated otherwise, "This Act extends to acts, matters and things outside Australia and to all persons, whatever their nationality or citizenship". Hence, it appears to implement Art 6 (4) of the SUA 1988 Convention, which permits jurisdiction based on the alleged Perpetrator's mere presence in any State party's Territory where no extradition proceedings take place. Accordingly, there does not appear to be a need to establish a jurisdictional nexus between the Offence and Australian Territory[114]. For enforcement purposes, s 18 of the Crimes Act on "Commencement of Proceedings" is relevant to jurisdiction because it is framed similarly to Art 6 (1) and 6 (2) of the SUA 1988 Convention.

Section 18 Crimes Act – "Commencement of Proceedings"

Section 18 (1) (a) of the said Act enables proceedings to be initiated against the alleged Perpetrator only when the relevant Crime took place on a Ship: (i) involved or scheduled to be involved in an "international voyage", which, at its minimum should traverse the "territorial sea of more than 1 State", or (ii) on a Foreign State's "territorial sea or internal waters". But s 18 (2) of the said Act waives the application of s 18 (1) (a) if the alleged Perpetrator has only been extradited to Australia for the relevant "SUA" Crime(s). In any event, s 18 (1) (b) of the Act still requires proof of an Australian or a Convention State element.

Territorial & Nationality Jurisdiction based on an Australian element.

Section 18 (3) of the Crimes Act implements Art 6 (1) of the SUA 1988 Convention. The relevant Crime has an "Australian element" if the Ship involved was an Australian-flagged Ship, or the alleged Perpetrator was an Australian National. Further, implicit in s 4 of the Act is that Australia would exercise jurisdiction over nationalised "SUA" Crimes committed on its

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[113] *Criminal Code Act 1995* (Cth): http://www.austlii.edu.au/au/legis/cth/consol_act/cca1995115/sch1.html. The *Crimes (Ships and Fixed Platforms) Act 1992* (Cth) also excludes Attempts and Abetments in Threatening to endanger a Ship, which is also consistent with the SUA 1988 Convention. Criminalising Attempts to Threaten would defy logic.

[114] Section 18 (1) (b) *Crimes (Ships & Fixed Platforms) Act 1992* (Cth).

Territory, "including its territorial sea" given that the section states that the Act "extends to all external Territories" within Australia.

"Universal jurisdiction" between State parties based on Convention State element.

Alternatively, assuming s 18 (1) prerequisites are met, under s 18 (4) of the Act, the relevant Crime has a "Convention State element" enabling Australia to initiate proceedings if 1 of the following conditions is satisfied:

(a) the Ship involved was "flying the flag" of Another State party to the SUA 1988 Convention other than Australia;
(b) the Ship involved was in Another State party's Territorial sea or internal waters;
(c) the alleged Perpetrator was Another State party's National;
(d) the alleged Perpetrator was "stateless" and "habitually resident" in Another State which was also a party to the SUA 1988 Convention and which expanded its jurisdiction pursuant to Art 6 (2) (a) of the said Convention;
(e) a National of Another State party to the SUA 1988 Convention was "seized, threatened, injured or killed" during the offending act and that State party expanded its jurisdiction pursuant to Art 6 (2) (b) of the said Convention [similar to jurisdiction exercised pursuant to the Passive Personality principle]; or
(f) the alleged Crime took place in an effort to coerce Another State party to carry out or refrain from carrying out any act and the State party expanded its jurisdiction pursuant to Art 6 (2) (c) of the SUA 1988 Convention.

Broadly, s 18 (4) of the Crimes Act implements Art 6 (2) of the SUA 1988 Convention. Art 6 (2) of the said Convention is permissive, enabling a State party to exercise jurisdiction over Crimes where: (i) "stateless persons" residing in that State allegedly committed the Crime, (ii) the State party's own Nationals have been "seized, threatened, injured or killed", or (iii) the relevant Crime was carried out in an effort to force that State to carry out or refrain from carrying out an act. These permissive provisions give the discretion to State parties to determine whether or not to exercise jurisdiction. Australia may initiate extradition proceedings when it contemplates Another State party "extending jurisdiction" pursuant to Art 2 (b) and Art (2) (c) of the SUA 1988 Convention.

Apprehension. Sections 19 & 20 Crimes Act – Ship Master's Powers of Arrest and/or Delivery to "Convention State". These Sections of the said Act provide for the Ship Master of an Australian-flagged Ship to "hold in custody" any alleged Perpetrator of the above Offences until "delivery" to another State party to the SUA 1988 Convention or "another appropriate authority", provided that s/he follows "notification" protocol. The Ship Master's failure to do so attracts 2 years' imprisonment, but s/he has a "reasonable excuse" defence available. Broadly, ss 19 and 20 of the said Act implement Art 8 of the SUA 1988 Convention.

Summary of Australia's Implementation of Piracy as defined in UNCLOS and SUA 1988 Convention

Australia may be a good role model when it comes to Ratification of Treaties contributing to Maritime Security. However, considering its Implementing Legislation on Piracy as defined in UNCLOS and the SUA 1988 Convention provisions, more clarity is advised. This is the case given the Implementing Legislation's definitional issues surrounding Piracy and the presumption of a "fault" element for certain "SUA" Crimes, without specifying the requisite mens rea. Broadly, for Australia's Implementing Legislation on Piracy, it is feared that Ratification may not translate to effective Implementation. For Australia's Implementing Legislation on "SUA" Crimes, the broad concern is its "over-effective" implementation without due consideration of the relevant mens rea[115].

SUA 2005 Protocol

The SUA 2005 Protocol supplements the SUA 1988 Convention. The new Art 3bis of the said Protocol creates some new offences to tackle Terrorism and WMD Proliferation, which inter alia, provide for:

(i) using against or on a Ship, or releasing from a Ship, any explosive, radioactive material or BCN which causes or is likely to cause death, serious injury or damage;

(ii) using fixed platforms to further terrorist objectives, such releasing WMDs and/or dangerous substances which causes or is likely to cause death or serious injury;

(iii) criminalising the transport of WMDs, save for instances where the State Party to the Treaty of Non-Proliferation of Nuclear weapons is involved – subject to certain conditions[116].

For enforcement purposes, the Flag State principle that Vessels on the High Seas "cannot be boarded without the Flag State's consent" still stands[117]. It is worth noting that the SUA 2005 Protocol puts procedures in place where a State party wishes to board a Ship "flying the flag" of

[115] This is particularly the case because the *Crimes (Ships & Fixed Platforms) Act 1992* (Cth) does not explicitly require Australia to consider the alleged Perpetrator's rights to consular access or communication, as required by Art 7 (3) of the Convention. Nor does the Act guarantee the alleged Perpetrator's "fair treatment" as required by Art 10 (2) of the SUA 1988 Convention. Section 7 of the said Act prevents double jeopardy by providing that a Perpetrator already convicted in a Foreign State for any conduct will not be re-convicted under the Act for such conduct. Since this "right" has been expressed, the alleged Perpetrator's rights to consular access and "fair treatment" should also be set out: Roach, above n 83, on Arts 7 and 10 SUA 1988 Convention, 'Legal Implications; Relevant Provisions in National Law'.

[116] International Maritime Organisation (IMO) on SUA 2005 Protocol: http://www.imo.org/home.asp?topic_id=910; J Ashley Roach, 'Overview of Actions taken to address Transnational Organised Crime', UNICPOLOS IX Segment 2, 24 June 2008.

[117] Beckman and Davenport, above n 85, p. 29.

another State party when it has "reasonable grounds to suspect" that the Ship or those "on board" was, or is going to be involved in committing a "SUA" Crime. The Protocol requires the State's Vessel to seek the Flag State's consent and assistance before boarding the suspected Vessel[118].

Article 8bis (2) of the SUA 2005 Protocol states that the Requesting State "should, if possible, contain the name of the suspect ship, the IMO ship identification number the port of registry, the ports of origin and destination, and any other relevant information". The Requesting State does not have to give the Flag State intelligence resulting in its "reasonable grounds for suspicion". However, in practice, the Flag State may call for "additional information" before giving consent to board[119].

Article 11 of the SUA 1988 Convention sets out "extradition procedures", but it is now qualified by the new Art 11ter of the SUA 2005 Protocol, which stipulates that State parties' responsibility to extradite or provide "mutual legal assistance" does not have to apply if the extradition claim may have been made to prosecute or punish a person on the basis of "race, nationality, ethnic origin, political opinion or gender", or that compliance would be discriminatory on any of these grounds[120].

Article 12 of the SUA 1988 Convention obliges State parties to assist one another in Criminal proceedings concerning "SUA" Crimes. The new Art 12bis of the SUA 2005 Protocol puts procedures in place for a Perpetrator "doing time" in a State Party's Territory to be "transferred" to another State Party to assist in investigations or prosecutions of such Crimes.

On 7 March 2006, Australia signed the 2005 SUA Protocol "subject to ratification". The Commonwealth Attorney-General's Department, particularly its Security Law Branch, was looking into the Implementing Legislation necessary to give effect to the said Protocol[121]. According to the International Maritime Organisation ("IMO"), as at 30 September 2010, Australia has yet to ratify the SUA 2005 Protocol. The said Protocol has already entered into force alongside the updated SUA 2005 Convention on 28 July 2010[122]. The Commonwealth Parliament will probably pass Implementing Legislation first before ratification, considering past practices.

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[118] International Maritime Organisation on SUA 2005 Protocol, above n 115.
[119] Natalie Klein, 'Intelligence Gathering and Information Sharing for Maritime Security Purposes under International Law, in Klein, Mossop, and Rothwell, above n 81 , pp. 224 – 241, 224 – 229
[120] International Maritime Organisation on SUA 2005 Protocol, above n 115.
[121] Parliament of Australia, 'Comments from the Attorney-General's Department on the Terms of Reference, Coastal Shipping Policy & Regulation Inquiry':
http://www.aph.gov.au/house/committee/itrdlg/coastalshipping/subs/sub54.pdf.
[122] International Maritime Organisation, 'Status of Conventions by Country':
http://www5.imo.org/SharePoint/mainframe.asp?topic_id=248.

Hostages Convention

The Hostages Convention came about to deal with the proliferation of hostage-taking events in the 1970s[123]. It differs from the SUA 1988 Convention in 2 ways. First, the Convention does not only apply to Maritime Crimes[124]. For example, the "kidnapping of crew for ransom" may constitute Hostage-taking regardless of whether it took place on board a ship or aircraft[125]. Second, the Hostages Convention gives State parties the discretion to reject an extradition request where it has "substantial" reason to believe[126] that the request was made "for the purpose of prosecuting or punishing a person on account of his race, religion, nationality, ethnic origin or political opinion" or where the alleged Offender's "position may be prejudiced"[127]. The Convention has no specific "territorial limitations" applying to Hostage-taking at any given place, so long as jurisdictional conditions are satisfied[128]. But Art 13 of the Convention states that it does not apply where the crime is carried out in a particular State, the Victim and alleged Perpetrator are both citizens of that State and the alleged Perpetrator is discovered in that State's territory[129].

Australia's Implementing Legislation for the Hostages Convention

Like its approach to the SUA 1988 Convention, the Commonwealth Parliament adopted Implementing Legislation giving effect to the Hostages Convention by passing the *Crimes (Hostages) Act 1989* (Cth) ["Crimes Act"][130] before acceding to the said Convention on 21 May 1990[131].

Sections 7 and 6A Crimes Act – Relevant Offences. Interestingly, s 7 of the Crimes Act, which defines Hostage-taking, implements Art 1 of the Hostages Convention almost to the letter[132], but expressly contains the mens rea element of intent[133]. Further, where the Hostage-taking is done to compel a State to do or refrain from doing something, the Crimes Act elaborates on the affected State's institutions. Section 7 states that a person commits the crime of Hostage-taking if s/he "seizes or detains and threatens to kill, injure, or to continue to detain a person with the intention of compelling:

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[123] Beckman and Davenport, above n 85, p. 18.
[124] Ibid.
[125] Ibid, p. 19.
[126] Art 9 (1) Hostages Convention [1990] ATS 17: http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/dfat/treaties/1990/17.html?stem=0&synonyms=0&query=Hostages.
[127] Art 9 Hostages Convention, cited in Beckman & Davenport, above n 85, p. 20; Guilfoyle & Roach, above n 78, pp. 37 – 38, paras 36 – 37.
[128] Beckman and Davenport, above n 85, p. 19.
[129] Ibid, citing Art 13 Hostages Convention.
[130] Guilfoyle & Roach et al, above n 78, p. 47, citing the *Crimes (Hostages) Act 1989* (Cth), p. 47; *Crimes (Hostages) Act 1989* (Cth): http://www.austlii.edu.au/au/legis/cth/consol_act/ca1989168/.
[131] Beckman et al, above n 74, Annex 2, p. 2.
[132] The words of s 7 of the Crimes Act are paraphrased here to some extent.
[133] Art 1 of the Hostages Convention does not express an "intention to compel a third party", but this is implied from the words "in order to compel a third party".

(i) a legislative, executive or judicial institution in Australia or in a foreign State;
(ii) an international intergovernmental organisation or;
(iii) any other person (whether an individual or body corporate) or group of persons" to carry out or refrain from carrying out any act as an express or implied condition for freeing the hostage.

Section 8 of the Crimes Act renders the crime of Hostage-taking punishable by Life imprisonment as the maximum sentence. It gives effect to Art 2 of the Hostages Convention which provides for consideration of the "grave nature of the offences"[134]. Further, s 6A of the Crimes Act retains the applicability of Chapter 2 of the Criminal Code. In doing so, the Act criminalises, inter alia, Attempt and Complicity (including Aiding and Abetting) in Hostage-taking[135].

Jurisdiction. Section 5 Crimes Act – "Extraterritorial Jurisdiction". Like Australia's Implementing Legislation for the SUA 1988 Convention, s 5 of the Crimes Act states that the Act covers "acts, matters and things outside Australia" and all persons regardless of their nationality or citizenship. Australian Courts may exercise jurisdiction over the relevant Crime outside Australian Territory, without a need for a jurisdictional nexus between the Offence and Australian Territory. For enforcement purposes, s 8 (3) (b) of the said Act permits charging the alleged Perpetrator where the crime took place outside Australia and aside from an Australian Ship or Aircraft if: (i) s/he was an Australian citizen when the alleged crime occurred, (ii) s/he is "present in Australia" or (iii) the crime was carried out to coerce a "legislative, executive or judicial" body in Australia to do or refrain from doing an act. As s 8 (3) (b) (ii) of the Crimes Act demonstrates, the mere presence of the alleged Perpetrator in Australia is enough to file charges, thereby implementing Art 5 (2) of the Hostages Convention[136]. The said section is subject to s 9 of the Crimes Act, which provides for the exception contemplated by Art 13 of the Hostages Convention, described above[137].

Summing Up. There are no immediate concerns with Australia's Implementing Legislation of the Hostages Convention. However, Attempt and Complicity in Hostage-taking and the mens rea attaching to them could have been specifically set out to implement Art 1 (2) of the Convention more effectively.

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[134] Beckman and Davenport, above n 85, p. 18, citing Art 2 Hostages Convention.
[135] Ibid, p. 19; Art 1 (2) Hostages Convention; *Criminal Code Act 1995* (Cth): http://www.austlii.edu.au/au/legis/cth/consol_act/cca1995115/sch1.html.
[136] Art 5 (2) of the Hostages Convention states that "Each State party shall likewise take such measures as may be necessary to establish its jurisdiction over offences set forth in article 1 in cases where the alleged offender is present in its territory and it does not extradite him to any of the States mentioned in paragraph 1 of this article": Hostages Convention [1990] ATS 17: http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/dfat/treaties/1990/17.html?stem=0&synonyms=0&query=Hostages.
[137] Nevertheless, s 9 (3) of the *Crimes (Hostages) Act 1989* (Cth) still permits jurisdiction if the alleged Perpetrator is only present in the State party's Territory where the Crime took place due to extradition proceedings for that Crime.

UNTOC 2000

The intention behind UNTOC 2000 is to fight "international or transnational crime"[138]. To this end, UNTOC 2000 sought to consolidate the International Community's battle with transnational organised crime[139] by providing a platform for State parties to commit to target organised criminal syndicates which funded such crimes and "break them up". UNTOC 2000 shares 1 similarity with the Hostages Convention by going further than covering Maritime Crimes. In addition, State parties can rely on UNTOC 2000 to proscribe "onshore" planning and preparatory activities against "vessels at sea" and related activities including "money laundering"[140]. UNTOC is unique in covering such associated crimes, supplementing the offences under the other 3 Conventions above[141]. The Crimes under UNTOC, inter alia, include: (i) proscription of "participation in an organised criminal group" (ii) proscription of "laundering of the proceeds of the crime"[142] and (iii) "serious crime", described as acts giving rise to a crime carrying a maximum penalty of 4 years' imprisonment[143].

3 prerequisites have to be satisfied before UNTOC 2000 can be triggered. First, the crimes must qualify to be an UNTOC offence[144]. Second, they must be carried out by an "organised criminal group", which must consist of at least 3 people. Third, the crimes must be "transnational in nature", which includes those committed in 1 State but significantly affects another State[145]. Like the SUA 1988 Convention, UNTOC 2000 sets out when State parties must exercise jurisdiction over such crimes and when they may do so[146]. But unlike the SUA 1988 and Hostages Conventions' Articles imposing broad responsibilities on State parties to cooperate in legal proceedings, UNTOC is unique in having substantive Articles on "mutual legal assistance"[147]. Article 18 (1) of UNTOC obliges State parties to give one another the "widest measure of mutual

[138] Beckman and Davenport, above n 85, pp. 21 – 22 [citing Gerhard Kemp, 'The United Nations Convention Against Transnational Organised Crimes: A milestone in international criminal law' 14 South African Journal of Criminal Justice (2001) 152, p. 152].
[139] UNTOC [2003] ATNIA 33: http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/dfat/nia/2003/33.html?stem=0&synonyms=0&query=transnational%20organised.
[140] Ibid.
[141] Ibid.
[142] It is worth noting that Purchasers of hijacked Ships who would be aware that the Ship has been stolen from the surrounding circumstances of the transaction may be caught by Art 6 (b) (i) UNTOC 2000, which proscribes an "act of laundering the proceeds of crime" because such conduct amounts to "acquiring, possessing or using property" knowing that it is from criminal proceeds[142]. Likewise, people who are involved in putting up a stolen Ship for sale, including those who "repaint" over the Ship's name and doctor its certificate may be charged for the same crime because they participated in the "concealment or disguise of the true "nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime". An "act of laundering proceeds of crime" would need to satisfy the prerequisites that it was carried out by an "organised criminal group" and that it was "transnational in nature": Beckman and Davenport, above n 85, pp. 24 – 25.
[143] Ibid, pp. 22 – 23, citing Art 2 (a) UNTOC 2000.
[144] Ibid, p. 22, citing Art 3 (1) UNTOC 2000.
[145] Ibid, p. 23, citing Art 3 (2) (d) UNTOC 2000.
[146] Ibid, p. 25, citing Art 15 UNTOC 2000.
[147] Ibid, pp. 26 – 27, citing Art 18 UNTOC 2000.

legal assistance in investigations, prosecutions and judicial proceedings" over UNTOC offences. Such assistance includes, but is not limited to:

(i) compiling "evidence or statements",
(ii) conducting "searches and seizures, and freezing",
(iii) giving information, "evidentiary items" and carrying out specialised assessments, and
(iv) "tracing proceeds of crime".

Here UNTOC provides a holistic framework for mutual legal assistance which State parties can use amongst themselves instead of having to conclude ad hoc bilateral agreements with each State. Such "quasi-universality" improves cooperation between State parties in bringing Perpetrators to justice[148].

Australia's Existing Legislation and "New Regulations" implementing UNTOC 2000

Unlike Australia's approach to the other Conventions, the Commonwealth Executive decided that Existing Legislation was enough to implement UNTOC 2000. Where UNTOC obligations could not be covered by Existing Legislation, Regulations were made under the *Mutual Assistance in Criminal Matters Act 1987* (Cth) ["MACM Act"] and the *Extradition Act 1988* (Cth) ["Extradition Act"] to give effect to them[149]. Consistent with past practices, the "proposed treaty action" was presented to Parliament on 3 December 2003[150], before Ratification on 27 May 2004[151].

Existing Legislation and "New Regulations". The Attorney-General's Department explained to JSCOT that Existing Legislation already gave effect to most of UNTOC obligations, particularly "offences and cooperation elements"[152]. But "new regulations" added to the Extradition Act were necessary to implement Art 16 of UNTOC, enabling State parties to UNTOC to become "extradition countries" under Australian law[153]. Likewise, new regulations added to the MACM Act were necessary to give effect to Art 18 of UNTOC, to "apply the Convention between State parties" and facilitate their cooperation[154]. JSCOT's advice, which was consistent with UNTOC Articles, was that where there is already a Bilateral Treaty in place, UNTOC would operate

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[148] Ibid.
[149] Australasian Legal Information Institute (Austlii), UNTOC [2003] ATNIA 33: http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/dfat/nia/2003/33.html?stem=0&synonyms=0&query=transnational%20organised.
[150] Ibid, para 1.
[151] Beckman et al, above n 74, Annex 2, p. 2.
[152] Australasian Legal Information Institute (Austlii), JSCOT Report 59 Chapter 5: 'UN Convention against Transnational Organised Crime, November 2000, and Protocols on Trafficking in Persons and Smuggling of Migrants': http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/jscot/reports/59/chapter5.html?stem=0&synonyms=0&query=transnational%20organised.
[153] Ibid.
[154] Ibid.

alongside it[155]. JSCOT observed that under Australia's mutual assistance legislation, Australia may obtain such assistance from any other State – even in the absence of a Treaty. It noted that due to UNTOC, the need for Bilateral Mutual Assistance Treaties may be reduced. But JSCOT also advised that Other States may require such Bilateral Treaties to accede to Australia's mutual assistance requests. Hence it reminded the Commonwealth Executive that Bilateral Mutual Assistance Treaties were still relevant[156]. On Australia's part, JSCOT heard that Mutual Assistance Regulations would be made to the MACM Act to "apply the Convention between State parties". The JSCOT Report did not specify what amendments would be made.

We do know that Foreign States requesting for mutual legal assistance should follow certain protocols. Section 11 of the MACM Act advises that Foreign States should submit written applications to the Commonwealth Attorney-General or someone s/he authorises for consent, though failure to do so is not enough reason for rejecting the application. Part II of the MACM Act covers requests for "taking evidence", "producing documents" and "providing material lawfully obtained". Part III of the said Act deals with assistance for "searches and seizure", and Part IV of the Act provides for "arrangements for persons to give evidence or assist investigations". Part V provides for "custody of persons in transit". Part VI of the Act deals with "proceeds of crime", including Foreign States' requests for enforcement such as "freezing" assets and requests for "restraining orders"[157]. Broadly the MACM Act gives effect to some provisions under Art 18 UNTOC, which, in any event, provides that mutual legal assistance remains subject to the law of the land[158]. Some commentators have suggested that more uniform Implementing Legislation is needed to give effect to UNTOC. Existing Legislation on Conspiracy and Accessorial Liability were said to be "difficult to prove", making enforcement problematic[159]. Conversely, JSCOT was satisfied that passing uniform Implementing Legislation for UNTOC was not necessary.

Relevant Legislation. Besides, the Commonwealth Parliament has passed the *Proceeds of Crime Act 2002* (Cth), which created a "civil forfeiture regime", permitting "unlawfully acquired property" to be confiscated without need to establish guilt[160]. The Court need only be satisfied that the property was obtained illegally "on the balance of probabilities"[161]. This approach of a reduced standard of proof can strip organised criminal syndicates of their profits more effectively[162]. Further, the Commonwealth Parliament passed the *Crimes Legislation Amendment*

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[155] JSCOT Report 59 Chapter 5, above n 152, paras 5.10 – 5.12.
[156] Ibid, paras 5.62 – 5.63.
[157] *Mutual Assistance in Criminal Matters Act 1987* (Cth): http://www.austlii.edu.au/au/legis/cth/consol_act/maicma1987384/.
[158] Art 18 (3) (i), Art 18 (4) and Art 18 (21) UNTOC 2000.
[159] Parliament of Australia, Parliamentary Joint Committee on Australian Crime Commission, 'Chapter 3: Existing legislative approaches to combating organised crime in Australia': http://www.aph.gov.au/senate/committee/acc_ctte/laoscg/report/c03.htm, paras 3.12 – 3.24.
[160] Ibid, para 3.24.
[161] Ibid.
[162] Ibid.

(People Smuggling, Firearms Trafficking and Other Measures) Act 2002 (Cth) ["Crimes Legislation Amendment Act"] inserting new offences into the Criminal Code such as "trafficking in persons and firearms". The Criminal Code covers Conspiracy, Incitement, and Aiding and Abetting in such acts[163].

Jurisdiction – Extraterritorial jurisdiction[164]. Broadly, JSCOT accepted the Attorney-General's Department's submission that Existing Legislation was sufficient to give effect to Extraterritorial jurisdiction under Art 15 UNTOC. In particular, it noted that the Criminal Code "now" contains "people smuggling" crimes, and that Extraterritorial jurisdiction may be exercised over an Australian citizen or resident involved in such conduct, whether it occurred "in or via Australia"[165]. Even so, there seems to be a need to prove a jurisdictional nexus between the crime of people smuggling and Australia. Schedule 1, Div 73.4 of the Crimes Legislation Amendment Act enables jurisdiction over people smuggling only where:

(i) the alleged Perpetrator is an Australian citizen or resident of Australia and the acts giving rise to the crime took place outside Australia or;

(ii) the said acts happened "wholly or partly in Australia" and the end "result" took place outside Australia, or was intended to take place outside Australia[166].

In this particular context, it appears that the alleged Perpetrator's mere presence on Australian territory is not enough to attract jurisdiction.

Summing up. Further Legislation may be necessary to implement UNTOC 2000 fully and effectively. Any supplementary Implementing Legislation should be delicately crafted to fit into Existing Legislation already in place, but also keep in mind Australia's Human Rights obligations, including, inter alia, as a party to the Convention relating to the Status of Refugees 1951[167]. This is not to suggest that Perpetrators are Refugees, but a nuanced approach is necessary to factor in other Treaty obligations.

[163] Ibid, para 3.21.
[164] JSCOT Report 59 Chapter 5, above n 152, paras 5.64 – 5.65.
[165] Ibid.
[166] *Crimes Legislation Amendment (People Smuggling, Firearms Trafficking and Other Measures) Act 2002* (Cth), Schedule 1 on People Smuggling: http://www.austlii.edu.au/au/legis/cth/num_act/clasftaoma2002781/sch1.html.
[167] Australasian Legal Information Institute (Austlii), Convention Relating to the Status of Refugees [1954] ATS 5: http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/dfat/treaties/1954/5.html?stem=0&synonyms=0&query=Refugee; William Maley, 'Security, People Smuggling and Australia's new Afghan Refugees', Working Paper (Australian Defence Studies Centre) No. 63. Maley speaks not only of "National Security", but "Human Security".

SOFOT 1999 Convention

The intention behind the SOFOT 1999 Convention is to curb the funding of terrorist acts, thereby attacking "terrorism" at its source. To this end it requires State parties to proscribe such funding and work together to "prevent, detect, investigate and prosecute activities that finance terrorism"[168]. The Convention overcame the loose definition[169] of "Terrorism"[170] by using the term "terrorist acts"[171]. Art 2 (1) of the said Convention describes the nature of a terrorist act by criminalising the "provision or collection of funds" intending or knowing that they will be used to:

(a) commit a crime under the Treaties set out in the Annex [Annex A], including under the SUA 1988 Convention and the Hostages Convention; or
(b) "carry out any other act intended to cause death" or serious physical harm to those "not actively involved in hostilities" to threaten the people, or coerce a government or international organisation to do or refrain from doing any act.

Article 2 (1) (a) of the SOFOT 1999 Convention, in criminalising the funding of SUA or Hostage-related Crimes, treats such activity as financing Terrorist acts. Hence the said Convention draws a direct link between SUA Crimes and Hostage-taking or related Crimes and terrorist acts. A Perpetrator who finances such Crimes may also be financing terrorist acts. Alternatively, Art 2 (1) (b) of the said Convention is the catch-all provision that criminalises the financing of terrorist acts. In doing so it describes what constitutes a Terrorist act: any intentional act of violence designed to unsettle the masses and force Governments or International organisations to comply with demands, often with a political agenda[172].

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[168] Australasian Legal Information Institute (Austlii), National Interest Analysis, [2002] ATNIA 17: http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/dfat/nia/2002/17.html?stem=0&synonyms=0&query=suppression%20financing.
[169] Guilfoyle & Roach, above n 78, pp. 3 and 32, para 20.
[170] The SOFOT 1999 Convention does not explicitly define terrorism: International Convention for the Suppression of the Financing of Terrorism [2002] ATS 23: http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/dfat/treaties/2002/23.html?stem=0&synonyms=0&query=terrorism; Igor Primoratz in Tony Coady and Michael O'Keefe (eds), Terrorism and Justice: Moral argument in a Threatened World (2002), p. 32: "For the purposes of philosophical discussion, terrorism is best defined as the deliberate use of violence, or threat of its use, against innocent people, with the aim of intimidating some other people into a course of action they otherwise would not take".
[171] Australasian Legal Information Institute (Austlii), JSCOT Report 47 Chapter 5: 'Convention for the suppression of the financing of terrorism': http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/jscot/reports/47/chapter5.html?stem=0&synonyms=0&query=terrorism, paras 5.11 – 5.12: "Government witnesses pointed out that the Convention refers to terrorist acts rather than offering a definition of terrorism. So, in terms of the Convention, terrorist persons and organisations are defined as perpetrators of terrorist acts. In fact, the Convention does not require that parties criminalise terrorist persons and organisations".
[172] Guilfoyle & Roach, above n 78, p. 3.

The SOFOT 1999 Convention criminalises the Financing of Terrorist acts to prevent or minimise their occurrence[173]. Article 2 (3) of the said Convention states that the funds need not in fact be used to commit the relevant Crime under Art 2 (1). Art 2 (4) of the Convention criminalises Attempt to finance such Crimes. Art 2 (5) of the same criminalises Complicity, "Organisation" or "Contribution" to the financing of Crimes, or Attempts to this end, under Art 2 (1) and 2 (4). Article 3 of the SOFOT 1999 Convention excludes its application where the crime is carried out in a particular State, the alleged Perpetrator is a citizen of that State and is in that State's territory, provided no Other State can exercise jurisdiction.

Australia's Implementing Legislation for the SOFOT 1999 Convention

The Commonwealth Parliament adopted Implementing Legislation giving effect to the SOFOT 1999 Convention by passing the *Suppression of the Financing of Terrorism Act 2002* (Cth) ["SOFOT Act"], which took effect by 6 July 2002, save for Schedule 3 of the Act[174]. The SOFOT Act modified, inter alia, the Criminal Code, the Extradition Act, the *Financial Transaction Reports Act 1988* (Cth), and the MACM Act[175]. Australia ratified the SOFOT 1999 Convention on 26 October 2002[176].

Division 103.1 Criminal Code – Relevant Crimes. Schedule 1 of the SOFOT Act modified the Criminal Code to give effect to the SOFOT 1999 Convention. Division 103.1 said Code prohibits "Financing terrorism", which occurs where a person intentionally "provides or collects funds" and "is reckless as to whether the funds will be used to facilitate or engage in a terrorist act". The Crime of Financing terrorism is punishable by Life imprisonment. It is worth noting that 2 mens rea elements are required for this Crime. Parliament may have learnt some lessons from its Implementing Legislation for the SUA 1988 Convention by specifically preserving "intention" as the "fault element" pursuant to Div 5.6 (1) of the Criminal Code. Although Div 103.1 (3) of the Criminal Code does not specifically implement Art 2 (4) and (5) on Attempt, Complicity, Organisation or Contribution to Financing Terrorist acts, it provides that Perpetrators who finance a Terrorist act could still be convicted even if the act does not materialise.

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[173] JSCOT Report 47 Chapter 5, above n 171, para 5.12: "It assumes that a State is already capable of prosecuting those responsible for terrorist acts. Rather, parties to the Convention are obligated to exercise jurisdiction over persons or organisations that are responsible for the financing of persons or organisations that perpetrate terrorist acts".

[174] Section 2 *Suppression of the Financing of Terrorism Act 2002* (Cth) – Commencement: http://www.austlii.edu.au/au/legis/cth/consol_act/sotfota2002443/s2.html.

[175] The SOFOT Act also amended the *Charter of the United Nations Act 1945* (Cth), though the latter was passed to implement the United Nations Security Council Resolution 1373: Parliament of Australia, House of Representatives, *Suppression of the Financing of Terrorism Bill 2002* (Cth), 12 March 2002, 2nd Reading (Mr Daryl Williams, MP for Tangney and Commonwealth Attorney-General): http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=BillId_Phrase%3Ar1485%20Title%3A%22second%20reading%22%20Content%3A%22I%20move%22%7C%22and%20move%22%20Content%3A%22be%20now%20read%20a%20second%20time%22%20(Dataset%3Ahansardr%20%7C%20Dataset%3Ahansards);rec=1.

[176] *Mutual Assistance in Criminal Matters (Suppression of the Financing of Terrorism) Regulations 2006* (SLI No 7 of 2006), Explanatory Statement: http://kirra.austlii.edu.au/au/legis/cth/num_reg_es/maicmotfotr2006n7o2006998.html.

Curiously, the SOFOT Act does not explicitly draw a link with Terrorist acts described in Art 2 (1) (a) of the SOFOT 1999 Convention. Hence, in Australia, the extent to which financing SUA or Hostage-taking and related Crimes amounts to financing Terrorist acts remains a moot point. Instead, the SOFOT Act sets out its own comprehensive definition of "terrorist act". Division 100.1 of the Criminal Code defines "terrorist act" both positively and negatively. Hence, it is necessary to set out Division 100.1 in full. Division 100.1 (1) defines "terrorist act" in the following way:

(a) any act or threat to act that qualifies for Div 100.1 (2) but falls outside Div 100.1 (2A) and;
(b) the relevant conduct is carried out with intent to further "a political, religious or ideological cause"; and;
(c) the conduct is carried out intending to:
    (i) compel or pressurise "by intimidation" the Commonwealth Government, a State/Territory Government or a Foreign State, or part of a State/Territory Government or Foreign State; or
    (ii) instill fear in the community or part of the community.

Division 100.1 (2) sets out the following conduct, any 1 of which may constitute a "terrorist act", provided the other requirements of Div 100.1 (1) are met and Div 100.1 (2A) does not apply:

(a) causing "serious physical injury" to an individual;
(b) causing "serious damage to property";
(ba) causing death to an individual;
(c) putting someone else's life at risk;
(d) putting the "health and safety" of the community or part of it in "serious risk";
(e) seriously affecting or damaging an "electronic" system, such as, inter alia, public services and telecommunications.

Broadly, Div 100.1 (2A) sets out conduct which excludes "terrorist acts", such as peaceful "advocacy, dissent or industrial action" which is not intended to cause serious physical injury or death to any individual[177], or put the life of an individual or "health and safety" of the community[178] at risk.

Returning to Div 103.1 read together with Div 100.1 (1) of the Criminal Code, it appears to implement Art 2 (1) (b) of the SOFOT 1999 Convention, though it does not cover International organisations. Under Div 100.1 (1) of the said Act, the alleged Perpetrator must intentionally engage in conduct under Div 100.1 (2) but not Div 100.1 (2A) to further "an ideological,

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[177] The individual concerned may be in or outside of Australia: Div 100.1 (3) (a) *Suppression of the Financing of Terrorism Act 2002* (Cth).

[178] This includes any individual or a community of Another State "outside Australia": Div 100.1 (3) (a) and (b) *Suppression of the Financing of Terrorism Act 2002* (Cth).

political or religious cause" and do so to "intimidate" the Commonwealth or State/Territory Government, the community/part of it, or a Foreign State to commit a "terrorist act".

For our purposes, it is difficult to say whether the absence of Implementing Legislation for Art 2 (1) (a) of the SOFOT 1999 Convention is material[179]. Schedule 4 of the SOFOT Act adds Art 2 of the said Convention into the Extradition Act in full, but this is only for the purposes of extradition[180]. From 1 perspective, the lacuna is immaterial because much of the conduct set out in Div 100.1 of the Criminal Code already more or less covers the funding of the SUA and Hostages Conventions' Crimes. In any event Div 103.1 read together with Div 100.1 (1) implements Art 2 (1) (b) of the SOFOT 1999 Convention – the catch-all provision criminalising the funding of Terrorist acts. Conversely, the absence of linkage with, inter alia, the SUA and Hostages Conventions and/or their Implementing Legislation may be indicative of drawing a distinction between funding SUA and Hostage-taking or related Crimes and Terrorist acts.

Jurisdiction – Extraterritorial Jurisdiction. Although the SOFOT Act does not explicitly implement Art 7 of the SOFOT Convention, it does prescribe "the broadest geographical jurisdiction under the Criminal Code"[181]. Division 103.1 (3) of the said Code retains the applicability of Div 15.4 of the same, which provides for Category D "extended geographical jurisdiction" over the Crime of Financing Terrorist acts[182]. Accordingly the Commonwealth of Australia has jurisdiction over the Crime of Financing Terrorist acts regardless of whether the behaviour giving rise to the Crime took place in Australia, and regardless of whether the consequences of such behaviour took place in Australia[183]. Such wide-ranging jurisdiction covers but also goes beyond Australian Ships and/or Aircraft or the alleged Perpetrator's presence in Australia. Further, Div 15.4 of the Criminal Code maintains such "extended geographical jurisdiction" over Aiding and Abetting, Counseling or Procuring, Joint Commission,

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[179] The Explanatory Memorandum stipulates that the Crimes give effect to, inter alia, Art 2 of the SOFOT 1999 Convention: Department of the Parliamentary Library, Information and Research Services, *Suppression of the Financing of Terrorism Bill 2002* (Cth) Bills Digest No 127 2001 – 2002: http://www.aph.gov.au/library/Pubs/bd/2001-02/02bd127.pdf. Turning to the Hansard Reports, the then Commonwealth Attorney-General reported that the *Suppression of the Financing of Terrorism Bill 2002* (Cth) gives effect to, inter alia, "obligations under the International Convention for the Suppression of the Financing of Terrorism". He made no reference to the said Convention's Annex A listing other applicable Conventions, including the SUA 1988 Convention and the Hostages Convention: Parliament of Australia, House of Representatives, *Suppression of the Financing of Terrorism Bill 2002* (Cth), 12 March 2002, 2nd Reading (Mr Daryl Williams, MP for Tangney and Commonwealth Attorney-General), above n 175.

[180] *Suppression of the Financing of Terrorism Act 2002* (Cth), Schedule 4: Amendment of the Extradition Act 1988: http://www.austlii.edu.au/au/legis/cth/consol_act/sotfota2002443/sch4.html.

[181] Parliament of Australia, House of Representatives, *Suppression of the Financing of Terrorism Bill 2002* (Cth), 12 March 2002, 2nd Reading (Mr Daryl Williams, MP for Tangney and Commonwealth Attorney-General), above n 175.

[182] Schedule 1 *Suppression of the Financing of Terrorism Act 2002* (Cth), inserting Div 103.1 (3) of the Criminal *Code Act 1995* (Cth): http://www.austlii.edu.au/au/legis/cth/consol_act/sotfota2002443/sch1.html.

[183] Division 15.4 *Criminal Code Act 1995* (Cth): http://www.austlii.edu.au/au/legis/cth/consol_act/cca1995115/sch1.html.

"Commission by proxy", Attempt, Incitement and Conspiracy[184]. Hence, by way of example, Australia would have Extraterritorial jurisdiction over a charge for Aiding and Abetting in Financing Terrorist acts. In addition, Div 100.1 (3) of the Criminal Code envisages jurisdiction regardless of whether or not the individual or community affected are within Australia[185].

For completeness, it is worth noting that the SOFOT Act implements Security Council Resolution 1373, which provided for "the freezing of terrorist assets"[186]. Schedule 3 of the SOFOT Act amends the *Charter of the United Nations Act 1945* (Cth) ["UN Charter Act"] by including 2 provisions: s 20 of the UN Charter Act criminalises unauthorised transactions involving "freezable assets" and s 21 of the same criminalises the unauthorised giving of an asset "to a proscribed person or entity"[187]. Both sections render such offences punishable by 5 years' imprisonment[188]. Australia enjoys Category A "extended geographical jurisdiction" over such crimes, which is not as wide as Category D jurisdiction, described above. Div 15.1 (1) of the Criminal Code provides that Australia has jurisdiction where:

(a) the behaviour giving rise to the alleged crime takes place "wholly or partly in Australia" or "wholly or partly on board an Australian aircraft or ship"; or
(b) the behaviour giving rise to the alleged crime take place completely outside Australia, but its consequences are "wholly or partly in Australia" or on an Australian aircraft or ship"; or
(c) the behaviour giving rise to the alleged crime takes place completely outside Australia, and at the relevant time the accused was an Australian citizen or a "body corporate" under Commonwealth/State/Territory Law; or
(d) all of the prerequisites below have been met:
    (i) the alleged crime is "an ancillary offence", or incidental to the main crime;
    (ii) the behaviour giving rise to this alleged crime took place completely outside Australia; and
    (iii) the behaviour that gave rise the main crime and led to the "ancillary offence", or the consequences of such behaviour is intended by the alleged Perpetrator to take place "wholly or partly" in Australia or on an Australian aircraft or ship[189].

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[184] Ibid. Division 15.4 of the *Criminal Code Act 1995* (Cth) still applies to the said Offences above pursuant to Div 11.2 (1), 11.2A (1), 11.3 and 11.6 (1) of the same.
[185] Schedule 1 of the *Suppression of the Financing of Terrorism Act 2002* (Cth), inserting Div 100.1 (3) into the *Criminal Code Act 1995* (Cth): http://www.austlii.edu.au/au/legis/cth/consol_act/sotfota2002443/sch1.html.
[186] Parliament of Australia, House of Representatives, *Suppression of the Financing of Terrorism Bill 2002* (Cth), 12 March 2002, 2nd Reading (Mr Daryl Williams, MP for Tangney and Commonwealth Attorney-General), above n 175.
[187] Schedule 3 of the *Suppression of the Financing of Terrorism Act 2002* (Cth), inserting ss 20 and 21 to the *Charter of the United Nations Act 1945* (Cth):
http://www.austlii.edu.au/au/legis/cth/consol_act/sotfota2002443/sch3.html.
[188] Ibid.
[189] Div 15.1 (1) *Criminal Code Act 1995* (Cth):
http://www.austlii.edu.au/au/legis/cth/consol_act/cca1995115/sch1.html.

Further, ss 20 and 21 of the UN Charter Act read together Div 15.1 (1) extends such jurisdiction over Aiding and Abetting, Counseling or Procuring, Joint Commission, "Commission by proxy", Attempt, Incitement and Conspiracy in "dealing with freezable assets" and giving an asset "to a proscribed person or entity".

"Reporting of suspected terrorist financing transactions"[190]. Schedule 2 of the SOFOT Act amended the *Financial Transaction Reports Act 1988* (Cth) ["FTR Act"] to standardise "procedures for international cooperation to combat transnational crime and terrorism"[191]. Further, in this day and age of Terrorist acts there was a need to overcome the "cumbersome" requirement of getting the Commonwealth Attorney-General's written consent before providing Financial Transaction Reports to Foreign authorities under the MACM Act[192]. The intention of the amendment was "to allow swift action to be taken where necessary"[193].

The new s 16 (1A) of the FTR Act states that if a "cash dealer" such as a financial institution participates in a transaction and has "reasonable grounds to suspect": (i) that the transaction is being done in preparation for a "financing of terrorism offence"[194], or (ii) that information obtained about the transaction may be material to the investigation or prosecution of an individual for a "financing of terrorism offence", then the cash dealer must "as soon as practicable" draft a report of the transaction and give the information in the report to the AUSTRAC[195] CEO[196]. After doing so, the cash dealer should, if requested, give further and better particulars where available to the AUSTRAC CEO, "relevant authorities" or "investigating officer"[197].

The new s 27 (6) (a) read together with the new s 27 (11A) of the FTR Act enables the AUSTRAC CEO to give Financial Transaction Report facts or data directly to Foreign authorities, provided the following conditions are satisfied. Section 27 (11A) permits the AUSTRAC CEO to disclose such information to a Foreign State if:

(a) s/he understands that the Foreign State has committed to:

(i) safeguard the "confidentiality of the information"; and

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190 Parliament of Australia, House of Representatives, *Suppression of the Financing of Terrorism Bill 2002* (Cth), 12 March 2002, 2nd Reading (Mr Daryl Williams, MP for Tangney and Commonwealth Attorney-General), above n 175.

191 Parliament of Australia, House of Representatives, *Suppression of the Financing of Terrorism Bill 2002* (Cth), 12 March 2002, 2nd Reading (Mr Daryl Williams, MP for Tangney and Commonwealth Attorney-General), above n 175.

192 Ibid.

193 Ibid.

194 This includes "Financing Terrorism" Crimes pursuant to Div 103 of the *Criminal Code Act 1995* (Cth) or s 20 or s 21 of the *Charter of the United Nations Act 1945* (Cth).

195 Australian Transaction Reports and Analysis Centre ("AUSTRAC").

196 Schedule 2 of the *Suppression of the Financing of Terrorism Act 2002* (Cth), inserting s 16 (1A) of the *Financial Transaction Reports Act 1988* (Cth): http://www.austlii.edu.au/au/legis/cth/consol_act/sotfota2002443/sch2.html.

197 Section 16 (4) *Financial Transaction Reports Act 1988* (Cth): http://www.comlaw.gov.au/comlaw/Legislation/ActCompilation1.nsf/0/9560B8763C48DFC6CA257228001D200F/$file/FinancTransReports1988.pdf.

(ii) check its use; and
(iii) make sure that the information will only be used for the relevant purpose; and
(b) considers that in totality, it is apt to do so[198].

Likewise, the new s 27 (11B) and s 27 (11C) of the FTR Act empowers the Commissioner of the Australian Federal Police ("AFP") or an authorised AFP Member to disclose such information to a Foreign "law enforcement agency", subject to the same commitments just listed above[199]. Section 27AA (5A) states that the Director-General of Security enjoys the same powers and is subject to the same conditions when providing Financial Transaction Report information to "foreign intelligence agencies"[200].

Amendments to the Extradition Act. Schedule 4 of the SOFOT Act wholly imports Art 2 of the SOFOT 1999 Convention into the Extradition Act[201]. It appears that the distinction between the crime of financing SUA and Hostage-related Crimes and financing terrorist acts may remain within Australia, but no such distinction applies for Extradition outside it. Accordingly, Australia may accede to a Foreign State's extradition requests for financing SUA and Hostage-related Crimes if that State treats the funding of such crimes as financing Terrorist acts.

WHERE TO?

Australia is an interesting Case study because it has a transparent Treaty Ratification or Accession process, has entered into several Maritime Security and Human Rights instruments and has passed Implementing Legislation or relied on Existing Legislation and New Regulations with varying degrees of success. Other jurisdictions may wish to be more transparent about treaties being considered, ratified/acceded to, and/or implemented. The Layperson not just deemed "stakeholders" can then be fully informed. S/he may feel – even be, part of a consultative process.

All States – at least in the Asia-Pacific, should continue to strive towards better cooperation to maintain Maritime Security. They should ratify and properly implement the UNCLOS provisions on Piracy and the Conventions set out above, so that the Perpetrators have "no place of refuge"[202]. Uniform Implementing Legislation cutting across jurisdictions in the Asia-Pacific is the key to ensuring that Perpetrators do not exploit loopholes. However, it is just as challenging,

[198] Schedule 2 of the *Suppression of the Financing of Terrorism Act 2002* (Cth), inserting the relevant provisions into the *Financial Transaction Reports Act 1988* (Cth): http://www.austlii.edu.au/au/legis/cth/consol_act/sotfota2002443/sch2.html.
[199] Ibid.
[200] Ibid.
[201] Schedule 4 of the *Suppression of the Financing of Terrorism Act 2002* (Cth), amending s 5 of the *Extradition Act 1988* (Cth): http://www.austlii.edu.au/au/legis/cth/consol_act/sotfota2002443/sch4.html.
[202] Beckman and Davenport, above n 85, p. 28.

if not more, to achieve coherence in Punishment, particularly if the sentence differs "in kind rather than degree"[203]. In this context, State sovereignty remains pervasive.

Equally and consistent with these Conventions, all States should set protocols to prevent abuse of due process rights, which includes subjecting the alleged Perpetrator to trial in Court. The "fisherman" [sic] who is accused of a SUA Crime may be a "Terrorist" – or s/he may not be.

Australia and the International Community face the task of balancing between Maritime Security and Human Rights. The question remains: how? Are both necessarily divorced? If we bring the full brunt of the law to bear on "Terrorists", are we provoking further bloodshed and anarchy? At the Macro level, should the International Community agree on a new "Constitution for the oceans" which reconciles these Conventions with Human Rights Treaty obligations, if at all? As the time bomb ticks away, only time will tell. For now, perhaps we can return to the drawing board to navigate our way. We could start with our objectives, cognisant of other movements.

[203] *Reyes v The Queen* [2002] UKPC 11, para 34 citing ***Furman***.

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