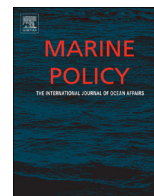




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Australian practice in respect of the continental shelf beyond 200 nautical miles[☆]

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ABSTRACT

Australia's remote location and position on the vast Indo-Australian plate mean that it possesses one of the largest continental shelf areas in the world. The criteria in Article 76 of the United Nations Convention on the Law of the Sea permit the claiming on continental shelf to 200 nautical miles from territorial sea baselines, and if certain criteria are met based on the configuration and content of the seabed, to distances beyond. During the negotiations at UNCLOS III, Australia was a strong proponent of this extended shelf regime, as it was likely to have large areas beyond 200 nautical miles. Article 76 provides for a number of requirements to be met for a coastal State to assert sovereign rights over areas of continental shelf beyond 200 nautical miles, including a ten year deadline from becoming a party. This placed a disproportionate burden upon Australia, as it faced the same ten year time frame to lodge data with the Commission on the Limits on the Continental Shelf (CLCS) as other States with much smaller areas in issue. Australia also chose not to rely upon measures agreed between State parties to effectively extend this deadline, and to limit the requirements to be met within it. This paper looks at how Australian authorities approached the difficult task, while maintaining the standards required for data by the CLCS, and how the task was ultimately implemented. It also examines how the extended continental shelf arrangements interacted with the rest of Australia's law of the sea practice and maritime boundaries with other States. For example, after the entry into force of the Convention, Australia negotiated two maritime boundaries with neighbouring States that each explicitly dealt with areas beyond 200 nautical miles. It concludes with consideration of what issues remain unresolved in respect of the Australian continental shelf beyond 200 nautical miles. The paper will conclude at how Australia's implementation has raised new issues with neighbouring States, including an unresolved dispute in the South Pacific Ocean.

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1. Background to Australia's continental shelf practice

As the only State situated alone on a continental land mass, in an area largely remote from other States, it is not surprising that Australia has long had an interest in claiming the continental shelf around its territory. Australian practice with respect to areas of what is now referred to as the continental shelf substantially predates the Truman Proclamation of 1945¹ which is usually identified as the first significant international action in the

creation of the legal concept of the continental shelf.² Australian interest in seabed areas beyond the territorial sea can be traced to the 1880s, when first the colony of Queensland³ and then Western Australia⁴, sought to extend their jurisdiction over pearling grounds outside of the territorial sea. Concerns about the legitimacy of these legislative acts⁵ were subsequently to be one of the drivers for the first early attempts at federation of the Australian colonies.⁶

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¹ Presidential Proclamation, 28 September 1945: Proclamation No.2667, "Policy of the United States With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf", 10 *Fed. Reg.* 12303.

² For example see D.P. O'Connell (I.A. Shearer (ed.)), *The International Law of the Sea* (Oxford: Oxford University Press, 1982) 470–471.

³ Pearl Shell and Bêche-de-Mer Fishery Act 1881 (Qld).

⁴ Pearl Fishery Act 1886 (WA) and Sharks Bay Pearl Fishery Act 1892 (WA).

⁵ See D.P. O'Connell and A. Riordan, *Opinions on Imperial Constitutional Law* (Sydney: Law Book Company, 1971) 196–197.

⁶ The Federal Council of Australasia, established in 1885, was the first attempt at federating the Australian colonies. It passed the Queensland Pearl Shell and Bêche-de-Mer Fisheries (Extra-territorial) Act of 1888 and the Western Australian Pearl Shell and Bêche-de-Mer Fisheries (Extra-territorial) Act of 1889 which

These early measures were to remain in place over half a century, and were not revisited until after the Truman Proclamation, and then only in response to concerns about the re-emergence of Japanese pearling in Australian waters after World War II. In 1952, Australia passed the Pearl Fisheries Act 1952 (Cth), which purported to extend jurisdiction over areas beyond the territorial sea. A pair of proclamations were also soon made to accompany the Act, which saw the assertion over the areas of continental shelf adjacent to the continental shelf of Australia, and over the United Nations Trust Territory of New Guinea, which was then under Australian stewardship. The proclamations were made to deter increasing Japanese interest in the pearling grounds in northern Australian waters. They do not appear to have been accompanied by enforcement action, and neither proclamation provided a definition of the Australian continental shelf.

Although no Australians played any role in the work of the International Law Commission which looked at the continental shelf in the 1950s, Australia was an enthusiastic participant in the deliberations at the First United Nations Conference on the Law of the Sea (UNCLOS I) held in Geneva in 1958, and was an early ratifier of the Convention on the Continental Shelf.⁷ The definition used in the Continental Shelf Convention, based on depth and exploitability criteria, was passed into Australian law in the 1960s, with the Petroleum (Submerged Lands) Act 1967 (Cth).⁸ The use of these criteria meant that potentially vast areas of shelf, particularly in the north western quadrant of sea around the continent, were brought under national jurisdiction.

International dissatisfaction with conventions concluded at Geneva, including the Convention on the Continental Shelf⁹, saw the opening of negotiations for a new international agreement dealing with the law of the sea, at the Third United Nations Conference on the Law of the Sea (UNCLOS III). During these negotiations, Australia cooperated with a number of other States with potentially large continental margins, with a view to the securing a definition of the continental shelf that would ensure that their existing jurisdiction was not reduced under the new convention. This group of States, in addition to Australia included, among others, Argentina, Brazil, Canada, India, Madagascar, New Zealand and the United Kingdom, and was largely represented by Ambassador Keith Brennan of Australia in Negotiating Group 6 during the Conference.¹⁰ This group was most active during the long process that saw the development of the text subsequently incorporated into Article 76 of the United Nations Convention on the Law of the Sea¹¹, which allowed for extended jurisdiction subject to extensive criteria.¹²

(footnote continued)

extended maritime jurisdiction over pearling grounds beyond the 3 nautical mile territorial sea.

⁷ Convention on the Continental Shelf, done at Geneva, 29 April 1958; entered into force 10 June 1964: 499 UNTS 311. Australia ratified the Convention on 14 May 1963.

⁸ See Section 5, Petroleum (Submerged Lands) Act 1967 (Cth) – note this Act has now been repealed and replaced with new legislation.

⁹ For example, the Nepalese delegation to UNCLOS III, numbered States dissatisfied with the uncertainty of the 1958 definition of the continental shelf as “more than 90”: see United Nations, *Third United Nations Conference on the Law of the Sea - Official Records*, Vol.7, 38.

¹⁰ See M.H. Nordquist, *United Nations Convention on the Law of the Sea - A Commentary* (Dordrecht: Martinus Nijhoff, 1985) Vol.1, 76–77.

¹¹ United Nations Convention on the Law of the Sea, done at Montego Bay, 10 December 1982, entered into force 16 November 1994: 1833 UNTS 3.

¹² Australian engagement with the negotiation process is discussed by Hayes in the broader context of Ireland’s pivotal role in the negotiations: see M. Hayes, *The Law of the Sea: The Role of the Irish Delegation at the Third United Nations Conference* (Dublin: Royal Irish Academy, 2011) 58, 80, 103, 153–155 and 175–177.

In 1994, Australia ratified the Law of the Sea Convention, a little over a month before the Convention entered into force. At the same time, Australia moved to harmonise its maritime legislation, include recasting the definition of the continental shelf, to reflect the definition under Article 76.¹³ While the definition was remade, it is important to note that the extent of the continental shelf is actually determined by a Proclamation made under the Seas and Submerged Lands Act 1973 (Cth). For a new Proclamation to be made, it became necessary for Australia to engage with the process outlined in Part VI of the Law of the Sea Convention. That is, it would be necessary to collect the data required under the Convention’s processes for the Commission on the Limits of the Continental Shelf, before a Proclamation could be made to set the new limits for the Australian continental shelf.

2. Process

In order to comply with Article 76 and Annex II of the Law of the Sea Convention, Australia needed to provide data to the Commission on the Limits of the Continental Shelf, and to do so within 10 years of the Convention’s entry into force.¹⁴ Even before Australian ratification of the Convention, significant effort in identifying areas for consideration as areas of continental shelf beyond 200 nautical miles had been undertaken. In 1988, Symonds and Willcox published a study considering the implications for Australia of the new Article 76 definition. In hindsight, this work can be shown to be a far-sighted and remarkably accurate appraisal of the ultimate extent of the Australian continental shelf.¹⁵ Both were heavily involved in subsequent efforts to manage the Australian submission to the Commission on the Limits of the Continental Shelf, and Symonds was elected a member of the Commission.¹⁶

The Australian Foreign Minister, together with the Minister for the Environment announced on 2 December 1999 that Australian would prepare a submission to the Commission. The deadline of 10 years loomed large at the time the announcement was made, as 10 years from the date of Australia becoming a party to the Law of the Sea Convention was 16 November 2004, slightly less than five years into the future. While subsequent meetings of the state Parties to the Law of the Sea Convention reached an accommodation over the implementation of this ten year deadline, that substantially mitigated the obligation of submitting data both in terms of timing, and in the submission of preliminary information, at the time of the announcement, the ten year deadline was still timed to run from 16 November 2004, when the Convention entered into force. This presented a huge logistical challenge for Australia, as the area to be the subject of data collection and analysis was truly vast.

A number of areas were identified as likely to generate areas of extended continental shelf, and planning began to undertake appropriate survey. Such survey needed to include bathymetric

¹³ See section 11, Maritime Legislation Amendment Act 1994 (Cth).

¹⁴ Article 4, Annex II of the Law of the Sea Convention.

¹⁵ See P.A. Symonds and J.B. Willcox, “Definition of the Continental margin using U.N. Convention on the Law of the Sea (Article 76), Using its Applications to Australia” *Bureau of Mineral Resources, Geology and Geophysics: Record* (1988) No.38.

¹⁶ Both in terms of his work as a member of the Commission on the Limits of the Continental Shelf, and in his work in preparing the Australian shelf submission, the value of Phil Symonds’ efforts cannot be overstated. The latter was formally recognised in 2005 with his being awarded the Public Service Medal. The citation reads: “For outstanding public service in the field of geoscientific aspects of maritime boundaries, in particular his contribution to Australia’s submission for extended continental shelf under the United Nations Convention on the Law of the Sea.” See (http://www.itsanhonour.gov.au/honours/honour_roll/search.cfm?aus_award_id=1136410&search_type=quick&showInd=true).

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