

THE *CRIMES AT SEA ACT* – ITS IMPACT ON ADF OPERATIONS

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I INTRODUCTION

Jurisdiction over crimes at sea was, until recently, exercised in accordance with Admiralty rules or Imperial Acts.¹ The common law jurisdiction was limited to the low water mark of a State's external coast.² In 2000, the Commonwealth, together with the Australian states and the Northern Territory, enacted co-operative scheme legislation.³ The scheme attempts to ensure a national uniform approach to crimes committed at sea.⁴

The Australian Government is increasingly using the Australian Defence Force ('ADF') to enforce the laws of the Commonwealth. This in turn has caused some uncertainty as to the jurisdictional application of the *Crimes at Sea Act 2000* (Cth)⁵ ('*CaSA*') and the *Defence Force Discipline Act 1985* (Cth) ('*DFDA*'). The *CaSA* was drafted in an attempt

to give Australia a modern crimes at sea scheme. The increasing incidence of people smuggling in the last year has highlighted the importance of having an effective legal regime to govern the seas around Australia's coastline...The new crimes at sea scheme will be simpler to understand and apply, and will result in more effective law enforcement...The bill implements a new national, uniform, cooperative scheme to apply Australian criminal law offshore.⁶

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1 See, eg, *Australian Courts Act 1828* (Imp) 9 Geo IV, c 83; *Admiralty Offences (Colonial) Act 1849* (Imp) 12 & 13 Vict c 96; Butterworths, *Halsbury's Laws of Australia* [2702220].

2 *R v Keyn (The Franconia)* (1876) 2 Ex D 63, 162 (Cockburn CJ). See also *R v Anderson* [1861–73] All ER Rep 999.

3 *Crimes at Sea Act 1998* (NSW); *Crimes at Sea Act 2001* (QLD); *Crimes at Sea Act 1998* (SA); *Crimes at Sea Act 1999* (VIC); *Crimes at Sea Act 1999* (TAS); *Crimes at Sea Act 2000* (WA); *Crimes at Sea Act 2000* (NT). There are no equivalent provisions in the Australian Capital Territory.

4 Butterworths, above n 1, [2702225].

5 To avoid confusion, only the Commonwealth *CaSA* will be referred to, although the States enacted their own *CaSAs*.

6 Second Reading Speech, *Crimes at Sea Bill 1999* (Cth), Legislative Council, 30 September 1999 (Dr Stone, Member for Murray).

The purposes of the *CaSA* are stipulated as not only giving legal force to the co-operative scheme but also ‘to provide for the application of Australian criminal law in certain cases beyond the area covered by the scheme’. Therefore the *CaSA* legislates Australian criminal jurisdiction not only in an area up to 200 nautical miles or the outer limit of the Continental Shelf, whichever is the greater, from Australia’s baselines, but potentially beyond and into other countries’ territorial waters.

The effect of the *CaSA* would be to enforce Australia’s criminal law beyond 200 nautical miles from Australia’s baseline. In comparison, the *DFDA* imposes a disciplinary code on ADF personnel both in and outside Australia.⁷ The uncertainty regarding *CaSA* and the *DFDA* is that two legislative schemes concurrently apply to criminal actions of ADF personnel when at sea. Some ability to determine the jurisdictional factors between the two Statutes is required.

The *DFDA* has been in operation for 20 years.⁸ The only existing document which assists analysis regarding the application of State or Commonwealth criminal law to actions of ADF personnel is a Defence Policy document.⁹ This Instruction assists Commanders to determine the jurisdiction of criminal actions of ADF personnel.¹⁰ The Instruction utilises the ‘service connection’ test applied by Brennan and Toohey JJ in *Re Tracey; Ex Parte Ryan*¹¹ (*‘Re Tracey’*) to determine jurisdiction. This test is by no means an exact science, a fact that some ADF Commanders find frustrating.

To date, there have been four High Court judgments on the issue of the jurisdiction of the *DFDA*¹² (the ‘Jurisdictional cases’). The most recent High Court judgment, *Re Colonel Aird; Ex parte Alpert* (*‘Alpert’*)¹³ was handed down on 9 September 2004. Out of the four cases, it is the only one to determine jurisdiction of the *DFDA* overseas. Since it was handed down, the Defence Instruction has not been updated to reflect the extension of the *DFDA*’s application. The extension to the *DFDA* is, according to Kirby J, ‘erroneous’ and a ‘misapplication of the *Constitution...*’.¹⁴ With this view in mind, it is arguable

7 *Defence Force Discipline Act 1985* (Cth) s 9.

8 For an update of the *DFDA* since its enactment, see Hyder Gulam, ‘An Update on Military Discipline – the 20th Anniversary of the Defence Force Discipline Act’ (2004) *Deakin Law Review* 10.

9 Defence Instruction (General) PERS 45-1, *Jurisdiction under Defence Force Discipline Act – Guidance for Military Commanders* (DI(G)PERS 45-1) promulgated at 17 February 1999.

10 Whether or not a member is charged under the *DFDA* or the matter is referred to the DPP is an exercise of a Commander’s discretion. ADF Legal officers generally advise Commanders regarding the issues to assist the jurisdictional determination.

11 (1989) 166 CLR 518.

12 *Re Tracey* above n 11; *Re Nolan and Anor; Ex parte Young* (1991) 172 CLR 460; *Re Tyler and Anor; Ex parte Foley* (1994) 181 CLR 18; *Re Colonel Aird; Ex parte Alpert* (2004) 209 ALR 311. Prior to the enactment of the *DFDA*, the High Court also determined the jurisdiction of the *Naval Discipline Act 1910* in *R v Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452 and the jurisdiction of the *Defence Act 1903* (Cth) in *R v Cox; Ex parte Smith* (1945) 71 CLR 1.

13 (2004) 209 ALR 311.

14 *Ibid.*, [328]–[329].

that the Defence Instruction is now obsolete and, therefore, there is no up-to-date document to assist ADF Commanders when determining criminal jurisdiction.¹⁵

With only an out of date document to assist them, determining the jurisdiction of the *CaSA* is made all the more difficult for Commanders. Further complicating matters are the arguments contained in the Jurisdictional cases¹⁶ regarding the extent of the defence power under the second limb of s 51(vi) *Commonwealth of Australia Constitution Act 1901* ('the *Constitution*').¹⁷ These arguments raise the question as to whether or not actions by ADF personnel conducted under the second limb are military in character. If not, then it is possible that any criminal actions by ADF personnel when engaged in activities under the second limb of s 51(vi) fall outside the ambit of the *DFDA* but within the jurisdiction of the *CaSA*.

The activities conducted by ADF personnel under the second limb of s 51(vi) of the *Constitution* that are generally not considered to be typically military or defence in nature are those relating to the enforcement of the 'laws of the Commonwealth'. These non-defence activities include enforcement of breaches of the *Crimes Act 1914* (Cth), *Fisheries Management Act 1991* (Cth), *Migration Act 1958* (Cth), *Customs Act 1901* (Cth), *Navigation Act 1912* (Cth) and *Maritime Transport Security Act 2003* (Cth).¹⁸ This expansion in the use of the military to enforce Commonwealth laws has recently attained a rising profile in the Australian media. The monitoring, detection and apprehension of illegal fishing operators centred in the Australian Fishing Zone ('AFZ') adjacent to Heard Island and McDonald Islands ('HIMI') and Northern Australia¹⁹ has increased the involvement of the Royal Australian Navy ('RAN') and other ADF assets in such activities.²⁰ The apprehension of an illegal fishing vessel catching Patagonian Toothfish in the HIMI AFZ was the most notable of the recent high profile operations. The Tampa incident also saw the ADF involved in the political machinations of the Government. The main consequence of the ADF involvement in Tampa²¹ and in Fisheries enforcement is the diversion of ADF materiel from their primary role and into the undesirable territory of Commonwealth law enforcement.²²

15 Although the Instruction is currently under review by the Directorate of Military Justice at the Defence Legal Division.

16 See above n 12.

17 Section 51 provides: 'The Parliament shall, subject to this *Constitution*, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: ... (vi) the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth.'

18 There are several other Commonwealth laws that have been enacted and have the potential for ADF personnel to be involved in enforcement activities, but ADF personnel have not as yet been instructed by the Government. See, eg, *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth); *Protection of the Sea (Powers of Intervention) Act 1981* (Cth).

19 Australian Fisheries Management Authority, Factsheet No 13 'Illegal Foreign Fishing' <<http://afma.gov.au/>> at 23 March 2005.

20 Such as ADF boarding parties and monitoring and communication assets.

21 Michael White and Stephen Wright, 'Australian Maritime Law Update: 2003' (2004) 35 *Journal of Maritime Law and Commerce* 313, 323–324. See also below n 32.

22 Justice Margaret White, 'The Executive and the Military' (Paper presented at the 8th Annual Public Law Weekend, Constitutional Law Weekend, Canberra, 7–9 November 2003) <<http://law.anu.edu.au/>>

At the time of writing there are no articles²³ that assist in a working application and understanding of the *CaSA*. Users of the legislation have to resort to interpreting the wording of the *CaSA* itself. This paper seeks to analyse and discuss the application of the *CaSA* and provide guidance to those who need to understand the *CaSA*.

This paper will discuss the effects of the Jurisdictional cases, if any, on the operations of the co-operative scheme in the various Australian maritime zones. Specifically, discussion and analysis will centre on the actions of ADF personnel undertaking enforcement activities under the various Commonwealth laws which provide them with powers to conduct boarding parties (referred hereafter as ‘non-defence activities’). These non-defence activities are conducted to ‘execute and maintain the laws of the Commonwealth’ via the second limb of s 51(vi) of the *Constitution*. This paper also seeks to analyse the conflict in jurisdictional application between the *CaSA* and the *DFDA*. This jurisdictional issue is important to ADF Commanders as the issue currently exists, arguably, in a vacuum of policy guidance. Further, this issue provides even more of a challenge for ADF Commanders as non-defence activities, specifically interdiction and boardings, are becoming more commonplace and high profile.

II BOARDING PARTIES

An increasing governmental trend is the use of Royal Australian Navy (‘RAN’) assets to conduct boarding parties for non-defence activities. The current ADF Doctrine²⁴ allows for ADF assets to be employed as boarding parties. This Doctrine relies upon the defence power to engage ADF assets and sets out the various reasons for ADF support, which include the enforcement of international customary laws, the *United Nations Convention on the Law of the Sea* (‘*UNCLOS*’),²⁵ operational requirements and Commonwealth laws.

Generally, organising and establishing boarding parties is a whole of ship activity.²⁶ A set core personnel is stipulated for boarding parties. The boarding team will usually consist of three elements: Bridge team, Security team and Sweep team.²⁷ Each team has set tasking during the boarding. The Bridge Team

cipl/2003conference.asp> at 4 April 2005. Ivan Shearer, ‘The Development of International Law with Respect to the Law Enforcement Roles of Navies and Coastguards in Peacetime’ in Schmitt and Green (eds), ‘The Law of Armed Conflict into the next Millennium’, *US Naval War College International Study* 71 (1998) 429.

23 Except for commentary: Butterworths above n 1, [270-2220 – 270-2260].

24 This document holds a Restricted classification and cannot be referred to by name in the general public arena. It will be referred to as the ‘Doctrine’. See ‘Mission Complete’, *Navy News* <<http://www.defence.gov.au/news/navynews/editions/4717/topstories/story20.htm>> at 23 March 2005.

25 *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, ATS 1994 31, art 2 (entered into force 16 November 1994).

26 Whole ship activities refers to the extent of the effect that organising and deploying a boarding party has on the Ship. Members of the boarding party come from various working areas on the ship. Also the Ship undergoes a state of alertness during the deployment of a boarding party.

27 ‘Mission Complete’, above n 24.

conducts information gathering and is generally located at the Bridge of the boarded ship. The Security Team locates all crew and ensures the security of the crew and ship superstructure from internal and external threats during the conduct of the boarding. The Sweep Team is responsible for the inspection, maintenance and control of the ship's engine room. ADF personnel selected as boarding party personnel require on-going specialist training and must also possess a high level of fitness and display professionalism, good communication skills, critical judgment skills under stress and knowledge of the Law of the Sea and in particular the degree of force they can employ.²⁸

Boarding parties are currently being used in three ADF operations:²⁹ *Operation Cranberry*, *Operation Relex II* and *Operation Mistral*.³⁰ *Operation Cranberry* operates sea, air and land surveillance in Northern Australia. The ADF contingent, primarily RAN Patrol Boats and Army personnel, support the civil agencies, such as Customs and Coastwatch to detect 'any illegal activity within Australian waters'.³¹ *Operation Relex II* is the successor of the first operation during which the *MV Tampa* incident occurred.³² The mission of this ADF operation is to protect Australia's borders. The Operation is a 'whole-of-government' program to 'detect, intercept and deter vessels carrying unauthorised arrivals from entering Australia through the North-West maritime approaches'.³³ In November 2003, a boarding party from *HMAS Geelong* boarded an Indonesian fishing vessel *Minasa Bone*. The *Minasa Bone* had arrived at Melville Island, located off the coast of the Northern Territory, with illegal immigrants on board. The vessel was detained under s 245F(8)

28 Ibid.

29 Australian Government: Department of Defence, 'Current Overseas Operations' <<http://www.defence.gov.au/globalops.cfm>> at 23 March 2005.

30 Ibid.

31 Ibid.

32 This paper will not discuss the Tampa incident in detail, as the matter already has many publications devoted to it: Jean-Pierre L Fonteyne, 'All Adrift in a Sea of Illegitimacy – International law perspective on Tampa Affair' (2001) 12(4) *Public Law Review* 249; Paul Ames Fairall, 'Asylum-Seekers and People Smuggling – From St Louis to the Tampa' (2001) 8 *James Cook University Law Review* 18; Judith Gardam and Rosemary Owens 'Border Protection Legislative Package – MV Tampa's Removal comes under scrutiny' (2001) 23(11) *Law Society Bulletin (South Australia)* 30; Michael Head, 'The High Court and the Tampa Refugees' (2002) 11(1) *Griffiths Law Review* 23; Philip Lynch and Paula O'Brien, 'From Dehumanisation to Demonisation – MV Tampa and Denial of Humanity' (2001) 26(5) *Alternative Law Journal* 215; Geoffrey Lindell, 'Reflections on the Tampa affair' (2001) 4(2) *Constitution Law & Policy Review* 21; Tara Magner, 'A less than 'Pacific' Solution for Asylum Seekers in Australia' (2004) 16 *International Journal of Refugee Law* 53; Ryszard Piotrowicz, 'The Case of MV Tampa: State and Refugee Rights collide at sea' (2002) 76(1) *Australian Law Journal* 12; Steven Rares SC, 'The independent bar and human right' (2005) *Australian Business Review* 11; Don Rothwell, 'The law of the sea and the MV Tampa Incident: Reconciling Maritime Principles with Coastal Sovereignty' (2002) 13 *Public Law Review* 118; Graham Thorn, 'Human Rights, Refugees and the MV Tampa Crisis' (2002) 13(2) *Public Law Review* 110; Martin Tsamenyi and Chris Rahman (eds), 'Protecting Australia's Maritime Borders: The MV Tampa and Beyond' *Wollongong Papers on Maritime Policy No 13* (2002); *Public Law Review: The Tampa Issue* (2002) 13(2); Michael White, 'MV Tampa Incident and Australia's Obligations' (2002) 122 *Maritime Studies* 7; Michael White, 'Tampa Incident: Shipping, International and Maritime legal issues' (2004) 78(2) *Australian Law Journal* 101; Michael White, 'Tampa Incident: Some subsequent legal issues' (2004) 78(4) *Australian Law Journal* 249; Mr Justice PW Young, 'Arrest on the 'Tampa': Whether lawful – case note; R v Disun' (2004) 78(1) *Australian Law Journal* 23; Frank Brennan, *Tampering with Asylum: A Universal Humanitarian Problem* (2003); Julietta Jameson, *Christmas Island: Indian Ocean* (2001); David Marr and Marion Wilkinson, *Dark Victory* (2003).

33 Department of Defence website on 'Current Overseas Operations', above n 29.

of the *Migration Act* for contravening the Act by bringing individuals into Australian waters unlawfully.³⁴

Operation Mistral is an ADF deployment providing ‘support to the civil agencies enforcing Australian sovereign rights and fisheries laws in the Southern Oceans’.³⁵ This Operation provides ADF personnel to support non-defence activities pursuant to the second limb of the defence power for the enforcement of the ‘laws of the Commonwealth’. There have been several high profile pursuits and interdictions of suspected vessels since 2001. The second longest hot pursuit of an illegal fishing vessel was the 14 day pursuit of the fishing vessel *South Tomi* in 2001. The *South Tomi* was detected trawling illegally in Australian waters near Heard Island. It was eventually boarded 320 nautical miles off South Africa by ADF personnel assisted by the South African defence forces.³⁶ Another apprehension which received a high media profile was the pursuit of the illegal fishing vessel *Viarsa* in August 2003 in the Australian Fishing Zone around HIMI. After 21 days of pursuit over 3,900 nautical miles, the boarding of the *FV Viarsa* ended the longest pursuit in Australia’s maritime history.³⁷ The vessel was brought back by a RAN steaming party to Fremantle under arrest.³⁸ In January 2004, the RAN apprehended another illegal fishing vessel *Maya V* again in Australian waters adjacent to HIMI.³⁹ In this case, the boarding party had to overcome dangerous seas to board the *Maya V* by fast rope. Under escort by *HMAS Warramunga* and with a RAN steaming party on

34 See *Cox (in her capacity as Director of the Northern Territory Legal Aid Commission) v Minister for Immigration and Multicultural and Indigenous Affairs and Others* (2003) 179 FLR 474.

35 Australian Government: Department of Defence, ‘Current Overseas Operations’, above n 29.

36 Joint Statement, Senator Ian Macdonald, Senator Chris Ellison and Dr Sharman Stone, ‘Dangerous ice pursuit of *Viarsa* now longest in Australian maritime history’ (Press Release, 25 August 2003) <<http://www.customs.gov.au/site/page.cfm?u=4232&print=1&C=3788>> at 10 April 2005; Joint Statement, Senator Ian Macdonald and Wilson Tuckey, ‘*South Tomi* goes from villain to hero’ (Press Release, 18 September 2004) <<http://www.mffc.gov.au/releases/2003/04199mj.html>> at 10 April 2005; Senator Ian Macdonald, ‘Illegal fishing boat soon to become dive wreck off WA’ (Press Release, 13 April 2003) <<http://www.mffc.gov.au/releases/2003/03058mj.html>> at 10 April 2005. See also ‘Southern Ocean Operations – *Viarsa* chase’, *Operational Updates* (19 August 2003 – 3 October 2003) <<http://www.customs.gov.au/site/page.cfm?u=4691&print=1>> at 10 April 2005.

37 Joint Statement, Senator Ian Macdonald, Senator Chris Ellison and Dr Sharman Stone, ‘*Viarsa* is boarded’ (Press Release, 28 August 2003) <<http://www.mffc.gov.au/releases/2003/03171mj.html>> at 10 April 2005.

38 Joint Statement, Senator Ian Macdonald, Senator Chris Ellison and Senator Robert Hill, ‘Navy to bring *Viarsa* home’ (Press Release, 31 August 2003) <<http://www.mffc.gov.au/releases/2003/03175mj.html>> at 10 April 2005.

39 Joint Statement, Senator Ian Macdonald and Senator Robert Hill, ‘Navy catches suspected Illegal Fishing Vessel’ (Press Release, 24 January 2004) <<http://www.mffc.gov.au/releases/2004/04015mj.html>> at 10 April 2005.

board, the *Maya V* was brought back to Fremantle.⁴⁰

With the frequency of boarding parties increasing, an understanding of the Australian maritime zones and the jurisdiction of the *CaSA* and the *DFDA* is required by ADF personnel, to ensure compliance with Commonwealth and international customary laws.

III MARINE ZONES

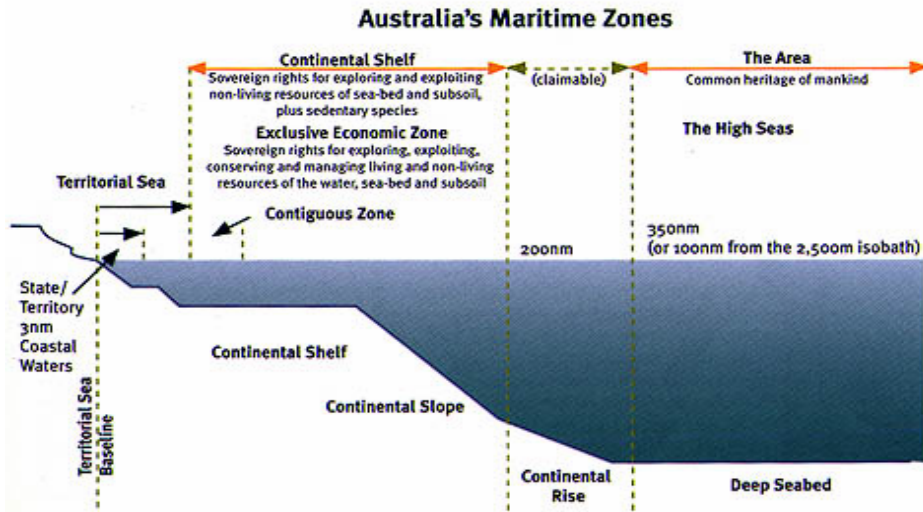


FIGURE 1: AUSTRALIA'S MARITIME ZONES⁴¹

In late 1994, Australia ratified the United Nations Convention on the Law of the Sea ('*UNCLOS*')⁴². A number of maritime zones are defined under *UNCLOS* according to their distance from a State's Baseline. The maritime zones that Australia implements and enforces in accordance with *UNCLOS* that are relevant to this paper are: Coastal Waters; Territorial Seas; Contiguous Zone; and the Exclusive Economic Zone.⁴³

40 *Maya V* senior officers were fined A\$30 000 each and 37 crew members were fined A\$1000 plus a five year good behaviour bond each for breaches of the *Fisheries Management Act 1991* (Cth). See Senator Ian Macdonald, 'Penalties given to *Maya V* crew' (Press Release, 1 April 2004) <<http://www.mffc.gov.au/releases/2004/04052m.html>> at 10 April 2005; Senator Ian Macdonald, 'Maya V crew penalties' (Press Release, 24 August 2004) <<http://www.mffc.gov.au/releases/2004/04178m.html>> at 10 April 2005; Senator Ian Macdonald, 'Maya V Convictions' (Press Release, 9 September 2004) <<http://www.mffc.gov.au/releases/2004/04195m.html>> at 10 April 2005.

41 Courtesy of National Oceans Office. See <http://www.oceans.gov.au/content_policy_v1/default.jsp> at 6 September 2005.

42 *UNCLOS*, opened for signature 10 December 1982, 1994 ATS 31, art 2 (entered into force 16 November 1994).

43 Australia also enforces its rights regarding its Continental Shelf. However, for the purpose of this paper, it has not been mentioned in detail.

A Coastal Waters

The Australian states and the Northern Territory in agreement with the Commonwealth, pursuant to s 51(xxxviii) of the *Constitution*, have jurisdictional rights over the water column and subjacent seabed to 3 nautical miles from the baseline.⁴⁴ The waters inland from the Baseline remain the jurisdiction of the States or Northern Territory.⁴⁵ However, the jurisdiction for the employment of ADF assets in both areas is the same. Internal and coastal waters are considered territorial seas.⁴⁶ The jurisdiction of the area is relevant to the use of ADF boarding parties to enforce counter-terrorism and security for ships and vessels that are in port.

B Territorial Sea

UNCLOS article 2 establishes the extension of a State's sovereignty to the territorial sea, air space, sea bed and subsoil.⁴⁷ *UNCLOS* article 3 sets the limit of the territorial sea from the baseline out to 12 nautical miles.⁴⁸

UNCLOS article 27 establishes the general rule that a state's criminal jurisdiction on foreign ships should not be exercised but provides exceptions to this rule as follows:

- (a) if the consequences of the crime extend to the coastal State;
- (b) if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea;

44 *Coastal Waters (State Powers) Act 1980* (Cth); *Coastal Waters (Northern Territory) Act 1980* (Cth); Australian Government, Geoscience Australia, 'Maritime Boundary Definitions' <<http://www.ga.gov.au/nmd/mapping/marbound/bndrs.htm>> at 23 March 2005. *UNCLOS*, opened for signature 10 December 1982, 1994 ATS 1994 31, art 7 (entered into force 16 November 1994).

45 *Coastal Waters (State Powers) Act 1980* (Cth) s 5; *Coastal Waters (Northern Territory) Act 1980* (Cth) s 5.

46 *UNCLOS*, opened for signature 10 December 1982, 1994 ATS 31, art 2 (entered into force 16 November 1994).

47 Australia claims sovereignty over the territorial sea and seabed through *Seas and Submerged Lands Act 1973* (Cth) s 6, which has been upheld by the High Court in *New South Wales v Commonwealth (Seas and Submerged Lands Case)* (1975) 135 CLR 337. As to the constitutional position with respect to the Australian States see *Coastal Waters (State Title) Act 1980* (Cth); *Coastal Waters (State Powers) Act 1980* (Cth); *Port MacDonnell Professional Fishermen's Assn Inc v South Australia* (1989) 168 CLR 340; Butterworths, above n 1, [215-185].

48 *UNCLOS*, opened for signature 10 December 1982, 1994 ATS 1994 31, arts 5, 6, 7 (entered into force 16 November 1994). Although, originally Australia had a 3 nautical miles territorial sea, in 1990 it was extended to reflect the position in *UNCLOS*. On 20 November 1990 the territorial sea was extended to 12 nautical miles by *Proclamation under Seas and Submerged Lands Act 1973* (Cth) s 7. See also Brian Opeskin and Donald Rothwell, 'Australia's Territorial Sea: International and Federal Implications of its Extension to Twelve Miles' (1991) 22 *Ocean Development and International Law* 395-431. The territorial sea remains at three nautical miles in the area around the islands in the Torres Strait, in accordance with the *Treaty between Australia and the Independent State of Papua New Guinea concerning Sovereignty and Maritime Boundaries in the area between the two Countries, including the area known as Torres Strait, and Related Matters*, opened for signature 18 December 1978, 1985 ATS 4, art 3(2) (entered into force 15 February 1985).

- (c) if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State; or
- (d) if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.

Article 27(2) *UNCLOS* provides a further exception that article 27 does not 'affect the rights of the coastal State to take any steps authorised by its laws for the purpose of an arrest or investigation on board a foreign ship passing through the territorial sea after leaving internal waters'. It would appear that the inner adjacent area defined in the *CaSA* reflects the position under *UNCLOS* article 27. However, instead of a State's criminal jurisdiction operating by exception as under *UNCLOS*, the State's criminal jurisdiction under *CaSA* operates as a general rule.

An example of employment of ADF assets to enforce Commonwealth laws in the Territorial Sea was the Australian Federal Police (AFP) *Operation Sorbet*.⁴⁹ In late March 2003, the vessel *Pong Su* had sailed from North Korea to Singapore, down the coast of Western Australia, then east along the Australian coastline to Victoria. At the coastline near the Victorian town of Lorne, crewmen disembarked with a cache of heroin. The *Pong Su* originally brought itself to the attention of the authorities when it failed to declare its presence in Australian waters and then refused to stop.⁵⁰ The *Pong Su*, by these actions, heightened national security sensitivities and was initially thought to be conducting people smuggling activities. ADF assistance was requested by the AFP and resulted in the interdiction of the *Pong Su* by *HMAS Stuart* with elements of the Special Forces boarding her.

C Contiguous Zone

UNCLOS article 33 provides a further zone between 12 nautical miles to 24 nautical miles from the baseline for Australia to exercise control over to prevent or punish infringements of customs, fiscal, immigration or sanitary regulations within its territory or territorial sea. Various Australian legislation appoints ADF personnel as 'authorised officers'⁵¹ to effect 'customs, fiscal, immigration and sanitary law'.⁵² The practical application of the Contiguous Zone is that it allows Australia more time to organise an interdiction of identified vessels breaching Australian laws. For example, along the coastline of Northern Australia, this zone allows for a time and space 'buffer' so that interception may be made of suspect vessels before they are able to effect landfall.

49 Department of Defence, <<http://www.defence.gov.au/media>> at 23 March 2005.

50 Ibid.

51 Also 'officers' or 'authorised persons'.

52 *Migration Act 1958* s 245F(18); *Customs Act 1901* s 4 (although the Act does not specifically mention ADF members, but requires CEO authorisation to exercise powers under the Customs Act); *Fisheries Management Act 1991* (Cth) s 83; *Maritime Transport Security Act 2003* (Cth) s 147.

D Exclusive Economic Zone / Australian Fishing Zone

UNCLOS article 55 provides for the legal regime of the Exclusive Economic Zone ('EEZ') and the Australian Fishing Zone ('AFZ')⁵³ which covers the area between 12 nautical miles and 200 nautical miles from the baseline.⁵⁴ The EEZ extends the coastal State's sovereign rights with regards to conserving and managing the natural maritime resource, both living and non-living. This also includes the jurisdiction over artificial islands, installations and structures, marine scientific research and protection and preservation of the marine environment. The AFZ was a precursor to the EEZ. However, it has been retained for the purposes of fisheries management through the Australian Fisheries Management Authority ('AFMA') and Fishing Industry Policy Council.⁵⁵ The enforcement of Australian sovereignty in the EEZ (and hence the AFZ) can be illustrated by the various apprehensions or pursuits involving Commonwealth agencies and assisted by the ADF. Examples include the pursuit of the fishing vessels *Viarsa*, *South Tomi*, *Lena*, *Volga* and *Maya V*, all cases of illegal fishing taking place in the EEZ/AFZ adjacent to HIMI. These recent naval operations have demonstrated a marked increase in the use of boarding parties.

E High Seas

Those waters that are not Australian territorial seas, contiguous zones or EEZ comprise the High Seas. The High Seas are 'open waters' and States are free to navigate these waters for peaceful purposes. No State can exercise jurisdiction over any ships of other States, interfere with or detain them, unless under the doctrine of hot pursuit.⁵⁶ Unless the suspect vessel is an Australian flag vessel, hot pursuit may be commenced whilst the suspect vessel is within the Territorial Sea, Contiguous Zone or EEZ.⁵⁷ Hot pursuit is a common occurrence for illegal fishing operations when the suspect vessel is attempting to escape or evade Australian authorities.⁵⁸ The rights bestowed by *UNCLOS* article 111 provide the primary jurisdiction for the ADF to board suspect vessels on the High Seas when conducting non-defence activities. However, it would appear that the *CaSA*

53 In 1967 Australia established a 12 nautical miles fishing zone. From 1 November 1979, the AFZ was extended to 200 nautical miles. Butterworths, above n 1, [215-260].

54 The EEZ was established as a new maritime zone to recognize coastal States' claims for fishing zones. The rights and jurisdiction of Australia in its EEZ are vested in and exercisable by the Crown in right of the *Seas and Submerged Lands Act 1973* (Cth) s 10A.

55 The AFZ does not include coastal waters or areas of waters that are subject to an international agreement between Australia and a foreign country: *Treaty between Australia and the Independent State of Papua New Guinea concerning Sovereignty and Maritime Boundaries in the area between the two Countries, including the area known as Torres Strait, and Related Matters*, opened for signature 18 December 1978, 1985 ATS 4, art 7 (entered into force 15 February 1985); *Torres Strait Fisheries Act 1984* (Cth).

56 *UNCLOS*, opened for signature 10 December 1982, 1994 ATS 31, art 11 (entered into force 16 November 1994).

57 Article 111(1) mentions the territorial sea or contiguous zone of the coastal state. Article 111(2) stipulates that the right of hot pursuit applies *mutatis mutandis* to the EEZ and continental shelf.

58 *R v Lijo, Eiroa & Folgar* [2004] WADC 29, which involved illegal fishing offences on a vessel within the Australian Fishing Zone whereby the vessel was apprehended outside the Australian Fishing Zone after hot pursuit.

widens the ability for Australia to board foreign vessels⁵⁹ which breach Australian criminal laws on the High Seas.

It is when ADF personnel are employed as boarding parties in the various maritime zones for non-defence purposes that they are subject to the possible jurisdiction of the *CaSA*.

IV APPLICATION OF THE *CRIMES AT SEA ACT*

A Background

On 1 November 1979 the *Crimes at Sea Act 1979* (Cth) came into force.⁶⁰ It was an agreed scheme of complementary Commonwealth and State⁶¹ legislation that would ensure ‘an appropriate body of Australian criminal laws – either State or Territory – [was] applicable to ships and to activities in offshore areas coming under Australian jurisdiction’.⁶² State legislation under the scheme dealt with ‘offences in the territorial sea and offences committed on voyages between two ports in one State, or [voyages] that began or ended at the same port in a State’.⁶³ During the Premiers Conference on 29 June 1979, the Commonwealth and States agreed that the territorial sea would only be of 3 nautical miles breadth.⁶⁴ The *Crimes at Sea Act 1979* (Cth) applied to offences:

committed on Australian ships which are on overseas, inter-state or Territory voyages. The Act also applies to offences on Australian ships in foreign ports, offences by Australian citizens on foreign ships where they are not members of the crew, and offences in offshore areas outside the territorial sea in relation to matters within Australian jurisdiction. In certain limited cases the Act can also be applied to offences committed on foreign ships.

Although the *Crimes at Sea Act 1979* (Cth) applied to Australian ships and citizens and, in limited cases foreign ships its main limitation was that State jurisdiction extended only over the territorial sea up to 3 nautical miles.

B *Crimes at Sea Act 2000*

The *CaSA* was assented to on 31 March 2000 but came into force on 31 March 2001⁶⁵ and stands at the head of a cooperative scheme of legislation enacted⁶⁶ in

59 Subject to conditions under *CaSA* s 6.

60 It would appear that the scheme was enacted due to the effects of *Oteri and Another v The Queen* (1976) ALR 142. In this case, the Privy Council went to extraordinary lengths to apply the English *Offences at Sea Act 1799* (UK) to alleged offences occurring 22 nautical miles from the Western Australian coastline.

61 Including the Northern Territory but excluding the Australian Capital Territory.

62 Attorney-General’s Department, *Offshore constitutional settlement: A milestone in co-operative federalism* (1980), 12.

63 *Ibid.*

64 *Offshore constitutional settlement*, above n 62, 7.

65 This timeframe was to allow the States and Northern Territory time to enact their legislation under the scheme.

each Australian State and the Northern Territory.⁶⁷ The *CaSA* establishes the application of substantive criminal law⁶⁸ of either the State, Northern Territory or Commonwealth to defined areas.⁶⁹ To date, there has been only one case that has noted the application of the *CaSA*: *Blunden v Commonwealth of Australia*.⁷⁰ Justice Kirby noted that, although the provisions of the *CaSA* did not apply to the matter, ‘they demonstrate the fact that, where there is a will, the Federal Parliament can enact specific laws governing the consequences under Australian municipal law of events having an Australia connection although actually occurring on the High Seas, that is, in international waters’.⁷¹ However, there has been no publication⁷² on the extent of the implementation of the *CaSA* with respect to incidents involving ADF personnel.

The *CaSA* legislates the application of States’ criminal jurisdiction⁷³ to the area on the landward side of the baseline and the area from the baseline up to 12 nautical miles.⁷⁴ The *CaSA* refers to this as the ‘inner adjacent area’.⁷⁵ The area from 12 nautical miles up to 200 nautical miles⁷⁶ adjacent to the particular State, by force of Commonwealth law, also applies the criminal jurisdiction of the particular State. The *CaSA* refers to this as the ‘outer adjacent area’.⁷⁷ Both areas combined are referred to as the ‘Adjacent area’ to a particular State.⁷⁸ See the indicative map from Appendix 1 of the *CaSA* for an illustration of the area.⁷⁹

Parts 1–4 of the *CaSA* stipulate the conditions to which Commonwealth laws will apply to criminal acts pursuant to incidental power under s 51(xxxix) of the *Constitution*. Schedule 1 of the *CaSA* establishes the legislative and administrative grounding of the co-operative scheme agreed to by the Commonwealth and the States for enactment by the States.⁸⁰ The first half of the *CaSA* deals with the application of Commonwealth laws in the Adjacent area and beyond. Schedule 1 deals with the operation of the State criminal jurisdiction in the Adjacent area only.

66 *CaSA*, sch 2(2): The *Crimes at Sea Act 1979* although repealed from 31 March 2001 when *CaSA* sch 1 commenced. However, the 1979 Act continues to apply in relation to conduct that took place prior to 31 March 2001. *CaSA* sch 2(3) also provides that where any conflict as to whether the conduct occurred either before or after commencement of sch 1, the presumption is that it occurred before commencement.

67 The Australian Capital Territory was not involved in the cooperative scheme as it is land locked and has no traditional off-shore jurisdiction.

68 Which is defined at *CaSA* sch 1 cl 1(1).

69 *CaSA*, Preamble and sch 1 cl 1 Definitions.

70 (2003) 203 ALR 189.

71 *Ibid*, [204].

72 Butterworths, above n 1, [270-2220 – 270-2260] discusses the structure of the *CaSA* but provides no discussion about the extent or application to the *DFDA*.

73 Including the Northern Territory.

74 *CaSA* sch 1, cl 1(1).

75 *CaSA* sch 1, cl 1(1). This area extends the traditional State jurisdiction from 3 nautical miles.

76 or the outer limit of the Continental Shelf, whichever is greater.

77 *CaSA* sch 1, cl 1(1).

78 *CaSA* s 4 and sch 1 cl 1(1).

79 *CaSA* sch 1, appendix 1 – Indicative map.

80 See above n 5 for list of the State and Northern Territory *Crimes at Sea* Acts enacted.

There are two very detailed definitions in the *CaSA*: ‘law of criminal investigations, procedure and evidence’⁸¹ and ‘substantive criminal law’.⁸² Both definitions include the written and unwritten⁸³ laws and any interpretations regarding the defined phrase. It is interesting to see a common legal understanding legislated in such a way. However, by defining these two phrases, any requirement to specify the numerous pieces of legislation, cases and court procedure has been removed. It also potentially provides some clarity as to the extent of the phrases. However, only time will tell whether this attempt to ‘cover the field’ is effective.

C State jurisdiction

Schedule 1 of the *CaSA* sets out the co-operative scheme which was enacted by the States in separate legislation.⁸⁴ The substantive criminal laws of the States apply throughout the Adjacent area.⁸⁵

81 *CaSA* sch 1, s 1. *Law of criminal investigation, procedure and evidence* means law (including unwritten law) about:

- (a) the investigation of offences (including coronial inquiry); or
- (b) immunity from prosecution and undertakings about the use of evidence; or
- (c) the arrest and custody of offenders or suspected offenders; or
- (d) bail; or
- (e) the laying of charges; or
- (f) the capacity to plead to a charge, or to stand trial on a charge; or
- (g) the classification of offences as indictable or summary offences (and sub-classification within those classes); or
- (h) procedures for dealing with a charge of a summary offence; or
- (i) procedures for dealing with a charge of an indictable offence (including preliminary examination of the charge); or
- (j) procedures for sentencing offenders and the punishment of offenders; or
- (k) the hearing and determination of appeals in criminal proceedings; or
- (l) the rules of evidence; or
- (m) other subjects declared by regulation to be within the ambit of the law of criminal investigation, procedure and evidence; or
- (n) the interpretation of laws of the kinds mentioned above.

82 *CaSA* sch 1, s 1. *Substantive criminal law* means law (including unwritten law):

- (a) creating offences or imposing criminal liability for offences; or
- (b) dealing with capacity to incur criminal liability; or
- (c) providing a defence or for reduction of the degree of criminal liability; or
- (d) providing for the confiscation of property used in, or derived from, the commission of an offence; or
- (e) providing for the payment of compensation for injury, loss or damage resulting from the commission of an offence, or the restitution of property obtained through the commission of an offence; or
- (f) dealing with other subjects declared by regulation to be within the ambit of the substantive criminal law of a State; or
- (g) providing for the interpretation of laws of the kinds mentioned above.

83 The meaning of ‘unwritten law’ is not defined in the *CaSA*. It may refer to common legal procedural practices although the definition is left open for interpretation, possibly deliberately, or may refer to Customary International law with regard to the Laws of the Sea.

84 See above n 3.

85 *CaSA* sch 1, cl 2(1)–(2).

The ‘area of administrative responsibility’ for a particular State is defined to include:

- (a) the area of the State; and
- (b) the inner adjacent area for the State; and
- (c) other parts of the adjacent area in which the State has, under the intergovernmental agreement, responsibility (which may be either exclusive or concurrent) for administering criminal justice.⁸⁶

The States’ criminal laws are limited in two ways. Firstly, to the extent that they are incapable of applying in the Adjacent area or are limited by express terms.⁸⁷ Secondly, to the extent that a State law has no legal effect in the Adjacent area.⁸⁸ Commonwealth laws apply to the investigation, procedures and acts done by a Commonwealth authority. State laws apply similarly to State authorities exercising jurisdiction within the State’s Area of Administrative Responsibility. Further, the *CaSA* stipulates that in any Commonwealth or State judicial proceeding,⁸⁹ the authorities will use their respective Commonwealth or State Laws regardless of whether the maritime offence is a State or Commonwealth offence or where the offence took place in the Adjacent area.⁹⁰

Interestingly, sch 1, cl 3(3) specifies that the application of laws set out in cl 3 are to prevail over any State or Commonwealth laws that are inconsistent with it. On first glance this appears to override s 109 of the *Constitution*. However, the co-operative scheme was a joint States, Territory and Commonwealth agreement, enacted under s 51(xxxix) of the *Constitution*. Although sch 1 sets out the law to be enacted by the State, it is an enactment of a Federal law and therefore not in contravention of s 109 of the *Constitution*.

Schedule 1, cl 4 provides that in a proceeding for a maritime offence under State criminal laws, all that is required to be proved is the location of the alleged act or omission. This requirement can be proved through an allegation in information or a complaint if there is no other evidence available. The presumption created by sch 1, cl 4 has the affect of strengthening the substance of a complaint or information without any other evidence. This assumption apparently prevails even where only the defendant ‘is in a position to accurately identify’ the conduct’s location.⁹¹ However, this assumption is unlikely to be used in practice as general ADF boarding party procedure requires location to be determined prior to conducting the boarding.⁹²

86 *CaSA* sch 1, cl 3(1).

87 *CaSA* sch 1, cl 2 (3)(a). An example provided by the *CaSA* with respect to incapability is: A law making it an offence to drive a motor vehicle at a speed exceeding a prescribed limit on a road could not apply in an adjacent area because of the inherent localising elements of the offence.

88 *CaSA* sch 1, cl 2 (3)(b). An example provided by the *CaSA* regarding the lack of legal effect is: If the effect of a provision of the substantive criminal law of a State is limited under s 109 of the *Constitution* within the area of the State, the effect is similarly limited in the outer adjacent area for the State even though the provision applies in the outer adjacent area under the legislative authority of the Commonwealth.

89 ‘Commonwealth judicial proceeding’ and ‘State judicial proceedings’ defined in *CaSA* sch 1, cl 3(1).

90 *CaSA* sch 1, cl 3(2).

91 Explanatory Memorandum, Crimes at Sea Bill 1999 (Cth) [43].

92 See ‘Mission Complete’, above n 24.

One question that is raised regarding this is: what kind of ‘evidentiary proof’ is required to rebut this presumption? Further, the standard required to rebut may be different in a State judicial proceeding using State criminal laws than if in a Commonwealth judicial proceeding. For example, under Commonwealth criminal laws, the *Criminal Code Act 2002* (Cth) (‘*Criminal Code*’) is applicable. Section 58 of the *Criminal Code* establishes the evidentiary burden of proof. Section 59 of the *Criminal Code* stipulates that a legal burden of proof⁹³ is only imposed on a defendant if it is expressly stipulated or there is a presumption that the burden applies. In this matter, without any express stipulation or presumption, it would appear that under the *Criminal Code*, to rebut the presumption under cl 4, the defendant has an evidentiary burden.⁹⁴

The *CaSA* ensures that the States may charge individuals for a maritime offence within the Adjacent area. However, the Commonwealth Attorney-General’s consent is required in circumstances where the offence is alleged to have been committed on or from a foreign, and the ship is not an Australian registered ship, and the county of registration would have jurisdiction under international law.⁹⁵ Prior to granting consent, the Commonwealth Attorney-General will take into account the view of the country of registration.⁹⁶ However, any delay in granting consent will not prevent or delay arrest of the alleged offender, laying of charges, extradition proceedings or remand proceedings.⁹⁷ If the Attorney-General’s consent is refused, then the proceedings are permanently stayed.⁹⁸

D Commonwealth jurisdiction

Parts 1–4 of *CaSA* legislates the application of the substantive criminal law of the Jervis Bay Territory to the sea outside the Adjacent area.⁹⁹ The law of the Jervis Bay Territory applies to criminal acts outside the Adjacent area¹⁰⁰ in the following three situations:¹⁰¹

1. Australian Ship

on an Australian ship¹⁰²; or in the course of activities controlled from an Australian ship;¹⁰³ or a person who has abandoned, or temporarily left, an Australian ship and has not returned to land;¹⁰⁴

93 Balance of probabilities.

94 An evidentiary burden is a lower standard when compared to the standard of balance of probabilities: *Criminal Code Act 1995* (Cth) s 13.3 regarding ‘evidential burden’ and ss13.4, 13.5 regarding ‘legal burden’.

95 *CaSA* sch 1, cl 7(1).

96 *CaSA* sch 1, cl 7(2).

97 *CaSA* sch 1, cl 7(3).

98 *CaSA* sch 1, cl 7(4).

99 Part 3A deals with the Joint Petroleum Development Area (JPD Area) which was developed through agreement between Australia and East Timor. The JPD Area applies Northern Territory criminal law.

100 Putting aside the JPD Area at this time.

101 *CaSA* s 6(11).

102 *CaSA* s 6(1)(a).

103 *CaSA* s 6(1)(b).

2. Australian Citizen

(other than a member of the crew) on a foreign ship¹⁰⁵ or in the course of activities controlled from a foreign ship¹⁰⁶; or who has abandoned, or temporarily left, a foreign ship and has not returned to land¹⁰⁷; and

3. Foreign Ship

on a foreign ship¹⁰⁸ or in the course of activities controlled from a foreign ship¹⁰⁹; of a person who has abandoned or temporarily left a foreign ship and has not returned to land, if the first country at which the foreign ship calls, or the person lands, after the criminal act, is Australia or an external territory of Australia.¹¹⁰

Through the external affairs power under the *Constitution*,¹¹¹ if the conditions stipulated in s 6 of the *CaSA* are met, the *CaSA* applies to criminal acts allegedly committed on the High Seas and potentially in other countries' waters. A further interesting point is that the *CaSA* also has a primary enforcement jurisdiction for criminal conduct on or from a Defence Force ship as such vessels are included in the definition of an 'Australian ship'.¹¹² Therefore, the jurisdictional scope of the *CaSA* is wide, in that, it could apply to anywhere on the ocean as long as the conditions in s 6 are met.

As mentioned above, proceedings involving an offence occurring outside the Adjacent area require the Attorney-General's consent before any charge can proceed to hearing or determination.¹¹³ If it is an indictable offence, then the charge cannot proceed to preliminary examination in committal proceedings without the Attorney-General's consent.¹¹⁴ Further, the Attorney-General must take 'into account any views expressed by the government of a country other than Australia whose jurisdiction over the alleged offence is recognised under principles of international law'.¹¹⁵ If there is another country's jurisdiction in issue, the *CaSA* provides that it is a defence for the accused to prove that:

104 *CaSA* s 6(1)(c).

105 *CaSA* s 6(2)(a).

106 *CaSA* s 6(2)(b).

107 *CaSA* s 6(2)(c).

108 *CaSA* s 6(3)(a).

109 *CaSA* s 6(3)(b).

110 *CaSA* s 6(3)(c).

111 *Australian Constitution* s 51(xxix).

112 *CaSA*, s 4 and sch 1 cl 1(1). '(a) a ship registered in Australia; or (b) a ship that operates, or is controlled, from a base in Australia and is not registered under the law of another country; or (c) a ship that *belongs to an arm of the Defence Force*.' (Emphasis added).

113 *CaSA* s 6(4).

114 *Ibid*.

115 *CaSA* s 6(5).

No corresponding offence exists under the law of the other country; or [s]uch a corresponding offence does exist but a defence to a charge of the corresponding offence could be made out under the law of the other country.¹¹⁶

Similar to the State exercise of jurisdiction in the Adjacent area, any delay in granting consent does not consequentially delay arrest, laying of charges, extradition proceedings or remand proceedings.¹¹⁷ Also, refusal of consent results in a permanent stay of proceedings.¹¹⁸

E Excluded areas of jurisdiction

There are certain areas where the *CaSA* does not apply. An act to which s 15 of the *Crimes (Aviation) Act 1991* (Cth) applies is excluded from the jurisdiction of the *CaSA*.¹¹⁹ Further, s 6(10) specifies the exclusion of the territorial waters of Norfolk Island¹²⁰ and the coastal seas of Australian external Territories including: Christmas Island,¹²¹ Cocos (Keeling) Islands,¹²² Australian Antarctic Territory, Heard and McDonald Islands, Ashmore and Cartier Islands and the Coral Sea Islands.¹²³ These excluded areas are important to note, especially considering Commonwealth authorities, such as Customs, have been engaged in boarding parties within these areas for fisheries violations. The *CaSA* does not itself specify what laws apply in these excluded areas. However, the explanatory memoranda tabled during the second reading speech states that sub-s (10) ‘preserves the existing legal regime in the coastal waters of Australia’s external Territories’. Therefore, the *CaSA* does not affect the criminal law that currently applies in the territorial seas of Norfolk Island¹²⁴ and the external Territories.

Another excluded area from the application of the *CaSA* is the Joint Petroleum Development Area (‘JPD Area’). In the JPD Area the substantive criminal laws of the Northern Territory are applied.¹²⁵ There are also several circumstances where acts are excluded from the application of the *CaSA*. Acts done on or from a ship or aircraft, or acts by East Timorese nationals or residents who are not also nationals of Australia are also excluded.¹²⁶ The most common offences committed in the JPD Area by East Timor nationals are fishing offences. It would appear that excluding acts from ships and aircrafts limited the application of NT criminal laws¹²⁷ to oil platforms that are located within the JPD Area. Further, the

116 *CaSA* s 6(9).

117 *CaSA* s 6(6).

118 *CaSA* s 6(7).

119 *CaSA* s 8.

120 *CaSA* s 6(10)(a).

121 The laws of the Northern Territory apply.

122 *Ibid.*

123 *CaSA* s 6(10)(b).

124 Within the Territorial Sea of Norfolk Island, the law of Norfolk Island applies.

125 *CaSA* pt 3A.

126 *CaSA* s 6A(2).

127 As defined by *CaSA* s 6A(1).

CaSA also recognises the principle of double jeopardy by excluding an accused being charged if criminal proceedings were undertaken in East Timor.¹²⁸

With no other publication or cases to assist in a working application and interpretation of the *CaSA*, one must rely on the text of the *CaSA*. An analysis of the application of the *CaSA* has been simplified into the following table:

	Inner & Outer Adjacent area	Outside Adjacent area
Law of criminal investigation, procedure and evidence	<p>State criminal laws</p> <p><i>Jurisdiction:</i></p> <ul style="list-style-type: none"> ▪ as a right in Inner Adjacent area ▪ by force of Cth laws in Outer Adjacent area <p><i>Limitations:</i></p> <ul style="list-style-type: none"> ▪ Cth AG consent for any conduct including indictable offence if; <ul style="list-style-type: none"> ○ conduct on or from foreign ship; ○ ship registered in non-Aus country; ○ Country of registration has jurisdiction over conduct under international law. <p><i>Exclusions:</i></p> <ul style="list-style-type: none"> • <i>Constitution</i> invokes Cth Jurisdiction • Excluded external Territories laws -cl 9 • JPD Area – cl 10 • Section 15 Crimes (Aviation) Act 	<p>Commonwealth criminal laws</p> <p><i>Limitations:</i></p> <ul style="list-style-type: none"> • Australian ship; • Australian citizen on foreign ship • foreign ship If 1st country is Australian – s 6 <p><i>Conditions:</i></p> <ul style="list-style-type: none"> • AG Consent – ss 6(4)–(5) • Non-Australian Country jurisdiction – s 6(9) <p><i>Exclusions:</i></p> <ul style="list-style-type: none"> • Excluded external Territories – s 6(10). • JPD Area – Part 3A • Section 15 Crimes (Aviation) Act
Substantive criminal law	<p>State criminal laws</p> <p>See State <i>Jurisdiction, Limitations & Exclusions</i> above</p> <p>Exceptions:</p> <ul style="list-style-type: none"> • Laws incapable of applying or expressly limited: ie driving car offences - sch 1 cl 2(3); • No legal effect: ie Conflict with Cth laws re s 109 <i>Constitution</i> – sch 1 cl 2(4) 	<p>Commonwealth criminal laws</p> <p>See Cth <i>Limitations, Conditions & Exclusions</i> above.</p>
Cth judicial proceeding	<p>Commonwealth criminal laws</p> <p><i>Constitution</i> gives Cth jurisdiction: ie Fisheries or Customs.</p> <p>See Cth <i>Conditions & Exclusions</i> above.</p>	<p>Commonwealth criminal laws</p> <p>See Cth <i>Limitations, Conditions & Exclusions</i> above.</p>
State judicial proceeding	<p>State criminal laws</p> <p>See State Jurisdiction & Limitations above</p> <p><i>Assumption:</i></p> <ul style="list-style-type: none"> • If act found to occur in another State, State whom initiated proceedings first continues under its own laws - Sch 1 cl 3(2) <p>See State Exclusions above.</p>	No State jurisdiction

FIGURE 2: APPLICATION OF JURISDICTION FOR CRIMES AT SEA.

128 *CaSA* s 6A(3). See also Explanatory Memorandum, Crimes at Sea Bill 1999 (Cth) [20].

Because the definition of an ‘Australian ship’ includes ships belonging to an ‘arm of the Defence Force’, the conduct of ADF personnel while performing tasks as part of a boarding party is not exempt from the provisions of the *CaSA*. Therefore, depending on the location of the alleged conduct that breaches criminal law, ADF personnel will be subject to the civilian criminal laws of the relevant State or the Commonwealth. The issue is how far the recent *Alpert* case has changed the way the ADF determines jurisdiction between civilian criminal law and the *DFDA*.

V APPLICATION OF THE DEFENCE POWER

The Australian Government has used the ADF to conduct boardings to enforce the laws of the Commonwealth for some time. In 1991, and then in 1997, the Parliament of Australia conducted an ‘examination of the legal basis for Australian Defence Force involvement in ‘non-defence’ matters’.¹²⁹ The paper concluded that ‘Constitutional lawyers agree that the Commonwealth can use the defence force to enforce its laws and protects its interests and property’.¹³⁰ Therefore, the power of the Commonwealth to legislate in matters regarding the ADF is wide.

A Defence Power under s 51(vi) of the Constitution

Section 51 of the *Constitution*, with respect to the ADF,¹³¹ provides:

The Parliament shall, subject to this *Constitution*, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

- (vi) the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth.

129 Elizabeth Ward, ‘Call Out the Troops: an examination of the legal basis for the Australia Defence Force involvement in “non-defence” matters’ (Research Paper no. 8, Law and Bills Digest Group 1997/1998) <http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?ID=176&TABLE=PRSPUB> at 10 April 2005.

130 Ibid 6.

131 There are other provisions of the *Constitution* which are relevant to the ADF but will not be discussed further, such as:

Section 61 – Executive Power: The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen’s representative, and extends to the execution and maintenance of this *Constitution*, and of the laws of the Commonwealth.

Section 68 – Command of naval and military forces: The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen’s representative.

Section 114 – States may not raise force: The State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force...

Section 119 – Protection of the States from invasion and violence: The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence.

The defence power has been described as a ‘purposive’¹³² power in that it seems to ‘treat defence or war as the purpose to which legislation must be addressed’.¹³³ The power also expands in times of war and contracts in times of peace.¹³⁴ The defence power has been described as having two purposes or limbs:¹³⁵

- First limb: the naval and military defence of the Commonwealth and of the several States; and
- Second limb: the control of the forces to execute and maintain the laws of the Commonwealth

In *Re Tracey*, these two limbs are seen as having distinct and separate purposes:¹³⁶ The first dealing with defence or the military and the second relating ‘to the work of law enforcement’¹³⁷ that ‘is not the ordinary function of the armed services to ‘execute and maintain the laws of the Commonwealth’.¹³⁸ Nothing further of substance was added to the discussion of the second limb in the second and third High Court cases considering the jurisdiction of the *DFDA*.¹³⁹ In *Alpert*,¹⁴⁰ the most recent *DFDA* jurisdictional case, Gummow J reiterated the interpretation in *Re Tracey* of the second limb. However, despite non-defence activities not being the ‘ordinary function’ of the ADF, these activities are nonetheless undertaken.

The use of ADF under the second limb of s 51(vi) was previously considered in *Li Chia Hsing v Rankin*.¹⁴¹ The case considered the legality of an interdiction undertaken by a Naval Officer commanding *HMAS Aware* about 10 nautical miles from the baseline in the Gulf of Carpentaria. The Court upheld the employment of ADF personnel in the enforcement of the laws of the Commonwealth.¹⁴²

The ADF provides non-military law enforcement or ‘aid to the civil power’ in three ways. Firstly, aid to the Commonwealth or Territory Authorities for law enforcement tasks, such as protection of Commonwealth interests.¹⁴³ Secondly,

132 *Stenhouse v Coleman* (1944) 69 CLR 457, 471. *Re Tracey*, above n 11, 596.

133 *Stenhouse v Coleman*, *ibid*, 471 (Dixon J).

134 *Marcus Clark & Co Ltd v Commonwealth* (1952) 87 CLR 177; *Australian Communist Party v Commonwealth (Communist Party Case)* (1951) 83 CLR 1. Also see David P Derham, ‘The Defence Power’ in Justice Else-Mitchell (ed), *Essays on the Australian Constitution*, (2nd ed, 1961).

135 *Re Tracey*, above n 11, 597 (Gaudron J).

136 *Ibid* 597 (Gaudron, J).

137 *Ibid* 540 (Mason CJ, Wilson & Dawson JJ) (emphasis added).

138 *Ibid* 540 (emphasis added).

139 *Re Nolan*, above n 12; There is a brief mention of the two limbs of s 51(vi) by Gaudron J at 495. In *Re Tyler*, above n 12, only Brennan and Toohey JJ again discussed and reinforced to the dichotomy of the section: ‘The submission [of the Attorney-General for New South Wales] ... contended that the second limb of par (vi) is not concerned with matters of service discipline...’, 29 (emphasis added).

140 *Alpert*, above n 13.

141 (1978) 141 CLR 182.

142 Although it has been noted that the Court in this instance provided ‘scant’ discussion of the argument. Only Murphy J provided some minor dissent to a broad employment of the ADF in civil affairs. See Justice Margaret White, above n 22, 7.

143 Reliance on s 61 of the *Constitution* to invoke s 51 of the *Defence Act* regarding ‘call-out’ of the Defence Force.

aid to State authorities for law enforcement tasks, such as surveillance and detection of criminals.¹⁴⁴ Lastly, execution and maintenance of certain statues of the Commonwealth, such as aiding customs or fisheries agencies.¹⁴⁵ The first two situations deal with aid within Australia and require the imposition of certain legislated procedures before the ADF can be ‘called out’.¹⁴⁶ However, it is the last situation that utilises ADF assets for internal and external aid and requires no specific procedure other than that ADF personnel be stipulated as ‘authorised officers’ under the various Commonwealth laws that allow the Commonwealth to employ the ADF expeditiously.

The use of ADF under the second limb of s 51(vi) was previously considered in *Li Chia Hsing v Rankin*.¹⁴⁷ The case considered the legality of an interdiction undertaken by a Naval Officer commanding *HMAS Aware* about 10 nautical miles from the baseline in the Gulf of Carpentaria. The complainant Master and his boat were observed in the declared fishing zone with ‘equipment for taking, catching and capturing fish’.¹⁴⁸ The Master and boat were arrested by the Naval Officer under the provisions of the *Fisheries Act 1952* (Cth). The High Court dismissed the applicant’s ‘no case to answer’ application.

The applicant had submitted that the Naval Officer was not an ‘authorised officer’ under the Act. It was argued that it was ‘beyond the legislative competence of the Commonwealth’ to utilise ADF personnel for the purposes of civil arrest. Alternatively, the ADF ‘officer was not specifically authorised’ to exercise the powers by virtue of the *Defence Act 1903* (Cth) or *Naval Defence Act 1910* (Cth) which limited ADF operations or aid to civil authority to suppress riots.¹⁴⁹

An unanimous Court agreed with Barwick CJ and declared ‘no substance’ to the applicant’s submissions regarding the illegality of the ADF officer’s actions, saying: ‘[t]here is no constitutional objection to the employment of a member of the defence forces in the performance of acts in furtherance of the provisions of the Fisheries Act...’.¹⁵⁰ Justice Gibbs went further by stating that ‘[t]here is no constitutional reason why an officer of the naval forces should not assist in the enforcement of a law of the Commonwealth such as the *Fisheries Act*’.¹⁵¹ This case affirmed that using the ADF for ‘non-defence’ activities was not an abuse of

144 Such aid or protection regarding s 119 of the *Constitution* and s 51 of the *Defence Act 1903* (Cth) for call-out of troops to protect a State against domestic violence.

145 This aid refers directly to the second limb of s 51(vi) of the *Constitution* regarding the ability of the Commonwealth to utilise the ADF to execute and maintain the laws of the Commonwealth.

146 See Defence Instruction (General) OPS 01-1 *Defence Force Aid to the Civil Power (DFACP) – Policy and Procedures*. This Instruction holds a Restricted classification and is not for general public information.

147 (1978) 141 CLR 182.

148 *Ibid* 186.

149 *Ibid* 186–7.

150 *Ibid* 192.

151 *Ibid* 195.

the defence power under s 51(vi) of the *Constitution* and thereby solidified the Government deployment of ADF assets for this task.¹⁵²

Until the *MV Tampa* incident in August 2001, the use of ADF assets had not been the focus of consistent media attention. The Tampa incident again raised the issue of the government's use of ADF assets to enforce its laws. The judgement in *Ruddock v Vadarlis*¹⁵³ did not question whether the use of ADF assets (in this case SASR troops) was an abuse of the second limb of the defence power.¹⁵⁴ However, the case and the consequences of the Tampa incident ensured that the deployment of ADF assets to enforce Commonwealth laws was and continues to be a topic of public discussion.

This focus on the conduct of ADF boarding parties to 'execute and maintain the laws of the Commonwealth' was again recently questioned by a case involving the apprehension of the fishing vessel *Volga* in February 2002.¹⁵⁵ The *Volga* was apprehended and boarded by RAN personnel for fishing in Australia's EEZ adjacent to HIMI in breach of the *Fisheries Management Act 1991* (Cth).¹⁵⁶ The owners of the *Volga* submitted that the vessel was not properly forfeited under the Act as there had been no conviction for any of the Act's offences prior to apprehension. Alternatively, the Act was unconstitutional on grounds that it 'violated the separation of powers under Ch III' of the *Constitution*, in that the 'provisions were beyond the powers of the Commonwealth' and that the Act 'effected an acquisition of property other than on just terms'.¹⁵⁷ Justice French determined that there was no infringement of the judicial or executive power by the *Fisheries Management Act 1991* (Cth) and further held that the forfeiture of the vessel was automatic upon commission of one of the 'qualifying offences' under the Act.¹⁵⁸ The senior crewmen of the *Volga* also challenged the validity of the Act and sought a permanent stay of proceedings on the basis that the boarding was unlawful due to breaches of international law regarding hot pursuit (*UNCLOS* art 111) and that the provisions of the Act were beyond the powers of the Commonwealth.¹⁵⁹ This application was also rejected. The issue regarding hot pursuit will not be further discussed in this paper.

152 Although it has been noted that the Court in this instance provided 'scant' discussion of the argument. Further only Murphy J provided some minor dissent to a broad employment of the ADF in civil affairs. See Her Honour Justice Margaret White, above n 22, 7.

153 (2001) 183 ALR 1.

154 The grounds of the appeal was focused on the actions by the Government in which it sought to rely on the extent of its executive power under s 61 of the *Constitution* to remove or exclude aliens. See Her Honour Justice Margaret White, above n 22, 11.

155 *Olbers Co Ltd v Commonwealth of Australia and Anor* (2004) 205 ALR 432 ('*Olber's case*'); *R v Lijo*, above n 58.

156 Senator Macdonald and Senator Robert Hill, 'Suspected illegal fishing vessels arrive in Fremantle' (Press Release, 19 February 2002) <<http://www.mffc.gov.au/releases/2002/02011mj.html>> at 10 April 2005.

157 *Olber's case*, above n 155, 455 (French J). Senator Macdonald, 'New chapter in maritime law – attempt to claim back the Volga rejected' (Press Release, 13 March 2004) <<http://www.mffc.gov.au/releases/2004/04042m.html>> at 10 April 2005.

158 *Olber's case*, *ibid*.

159 *R v Lijo*, above n 58. Senator Macdonald, 'Court upholds Australia's jurisdiction in Volga case' (Press Release, 27 February 2004) <<http://www.mffc.gov.au/releases/2004/04033m.html>> at 10 April 2005.

In light of the judgments involving the *Volga*, the validity of the Commonwealth using ADF assets has solidified and therefore, the trend towards use of ADF boarding parties will only continue and possibly increase. In light of this trend, the effects of the jurisdiction of the *CaSA* on ADF personnel is heightened.

B DFDA Jurisdiction

Section 51(vi) of the *Constitution* does not specifically provide for the *discipline* of the naval and military defence of the Commonwealth. However, it was discussed by Mason CJ, Wilson & Dawson JJ in *Re Tracey* that:

Although the *Australian Constitution* does not expressly provide for disciplining the defence forces, so much is necessarily comprehended by the first part of s 51(vi) for the reason that the naval and military defence of the Commonwealth demands the provision of a disciplined force or forces.¹⁶⁰

It was noted in *Alpert* that the first limb of s 51 of the *Constitution* ‘authorised the making of the *DFDA*’.¹⁶¹ Further, the first limb has also been relied upon to support the validity of the *DFDA*’s jurisdiction and extra-territorial operation.¹⁶²

The *DFDA* applies to conduct of defence members. Its jurisdiction relies directly on whether or not the person is a member of the ADF. A determination of the application of the *DFDA* to members of the ADF Reserve Forces is focused on whether or not they are ‘acting or purporting to act in the capacity as a member’.¹⁶³ Therefore, the *DFDA* applies to all ADF members based on their membership of the ADF.

Prior to 2003, the issue of the jurisdictional validity of service tribunals for events occurring in Australia was before the High Court on five occasions. Two cases, in 1942 and 1945,¹⁶⁴ involved the interpretation of military discipline prior to the enactment of the *DFDA*. In the trilogy of *DFDA* Jurisdictional cases between 1989 and 1994 (*Re Tracey*,¹⁶⁵ *Re Nolan*¹⁶⁶ and *Re Tyler*¹⁶⁷), the High Court upheld the constitutional validity of the exercise of military jurisdiction. The conduct charged in these three cases was inherently criminal in character and involved, inter alia, offences of dishonesty. In each instance the Court was concerned with the constitutional validity of the exercise of the military jurisdiction under the *Constitution* which potentially impacted on the exercise of State criminal jurisdictions.

160 *Re Tracey*, above n 11, [540] (Mason CJ, Wilson and Dawson JJ).

161 *Alpert*, above n 13, [317] (McHugh J).

162 See *DFDA* s 9: ‘The provisions of this Act apply, according to their tenor, both in and outside Australia but do not apply in relation to any person outside Australia unless that person is a defence member or a defence civilian.’

163 *DFDA* s 3(4).

164 Prior to the enactment of the *DFDA*, the High Court also determined the jurisdiction of the *Naval Discipline Act 1910* (Cth) in *R v Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452 and the jurisdiction of the *Defence Act 1903* in *R v Cox; Ex parte Smith* (1945) 71 CLR 1.

165 *Re Tracey*, above n 11.

166 *Re Nolan*, above n 12.

167 *Re Tyler*, above n 12.

This paper will not discuss in detail the ‘divergence of opinion’¹⁶⁸ between the judgments in *Re Tracey*. However, the test applied by Brennan and Toohey JJ has become the common test when determining the jurisdiction of the *DFDA*. That test is commonly referred to as the ‘service connection’ test and states that:

proceedings may be brought against a defence member or a defence civilian for a service offence, if but only if, those proceedings can *reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline*.¹⁶⁹

Alpert was the first High Court case to deal with the jurisdiction of the *DFDA* outside of Australia.¹⁷⁰ In a decision of 4:3 majority, the High Court held that the conduct of a member on overseas service, despite being on leave,¹⁷¹ was within the jurisdiction of the *DFDA*. The member was charged with an offence of rape,¹⁷² which in accordance with the ADF Instruction¹⁷³ and the *DFDA*, is a charge that is generally referred to civilian agencies for prosecution. *Alpert*, therefore, potentially extended the jurisdiction of the *DFDA* to offences committed overseas during the period the member is deployed, including any leave time.

It would appear that at its broadest application, factors arising from *Alpert* have widened the service connection test to be, in reality, a service status test. The Supreme Court of the United States returned to a Service Status test in 1987 after 18 years using a ‘service connection’ test.¹⁷⁴ By *Solorio v United States*¹⁷⁵ rejecting the ‘service connection’ test, members of the Armed Forces could be charged with any offence on the basis that they were a member of the military. Therefore, as raised by Kirby J in *Alpert*, the jurisdiction of the *DFDA* has expanded and ‘represents an attempt to move away from a “service connected” approach to one of “service status”’.¹⁷⁶

In *Re Tracey*, the court discussed the definition of a service offence. Two schools of thought emerged through the trilogy of cases prior to *Alpert*. Firstly,

168 Richard Tracey, ‘The Constitution and Military Justice’ (Paper presented at the 8th Annual Public Law Weekend, Constitutional Law Weekend, Canberra, 7–9 November 2003) <<http://law.anu.edu.au/cipl/2003conference.asp>> at 4 April 2005.

169 *Re Tracey*, above n 11, [570] (emphasis added).

170 *Alpert*, above n 13. Decision of Judge Advocate in General Court Martial Private Alpert of 10 March 2003 (copy obtained as author was Assisting Prosecutor before the General Court Martial). The member was charged and appeared before a General Court Martial in February 2003. The member’s counsel made an application regarding jurisdiction of the Court Martial. In March 2003, the Judge Advocate determined the Court Martial had jurisdiction to hear the charge based on the prior trilogy of High Court decisions. On that decision the member sought leave to the High Court through writs of prohibition and certiorari.

171 The member was on stand down leave from his deployment to the Royal Malaysian Air Force Base at Butterworth. Stand down was granted with conditions to geographical regions and was subject to immediate recall to duty.

172 *Alpert* was charged with one offence under s 61 of the *DFDA*, that being the commission of a Territory offence under the *Crimes Act 1900* (ACT), s 54(1) namely sexual intercourse without consent.

173 DI(G)PERS 45–1, above n 9, [7].

174 *O’Callahan v Parker* (1969) 395 US 258. In *O’Callahan*, the US Supreme Court held that Court Martial to have jurisdiction to try a member of the Armed Forces, the offences must have a ‘service connection’. In *Relford v Commandant, US Disciplinary Barracks, Ft Leavenworth* (1971) 401 US 355, the US Supreme Court further elucidated 12 factors to establish service connection.

175 (1987) 483 US 435.

176 *Alpert*, above n 13, [97] (Kirby J).

that there were only offences of a military character or civil nature.¹⁷⁷ Secondly, that there were three types of offences: military in character, civilian in nature and a hybrid of the two.¹⁷⁸ In *Alpert* the court was again divided into these two schools of thought.¹⁷⁹ The majority, lead by Mason CJ, agreed that you cannot ‘draw a clear and satisfactory line’ between the two types of offences.¹⁸⁰ The strong dissenting judgment of Kirby J in *Alpert* warned that the extension of jurisdiction into ‘non-service related’¹⁸¹ offences, including that of rape, was ‘pushing the boundary of service discipline beyond its constitutional limits’¹⁸² and ‘would effectively render the requirements of connection to some aspect of national “defence” meaningless’¹⁸³. Kirby’s discussion regarding the three types of offences raises another potential issue. When determining the juxtaposition of the *DFDA* and *CaSA*, is the factor that the alleged offence occurred while conducting a non-defence activity relevant?

VI CONCLUSION

The *CaSA* was enacted to provide a national uniform scheme in cooperation with the States and the Northern Territory. The *CaSA* has jurisdiction over ADF ships operating in and beyond the Adjacent area, namely beyond 200 nautical miles of the Australian baseline.

In today’s environment, the Commonwealth of Australia is employing ADF assets to assist it to ‘execute and maintain’ its laws. Although this is not an ‘ordinary function’ of the ADF, it is becoming common. ADF personnel have been employed to conduct boarding parties and in undertaking these tasks are exposed to the jurisdiction of both civilian criminal law and the military disciplinary code.

The *CaSA* applies to ADF personnel every time they are deployed to sea. This jurisdiction extends not only to the conduct of boarding parties on civilian ships but also to conduct on board ADF ships. The *DFDA* applies to defence members either in or outside Australia. Therefore, there are two sets of criminal laws that apply to ADF personnel when they are deployed to sea: one civilian and one military. A third set of civilian laws relevant to the application of the *CaSA* are those from other countries.

177 *Re Tracey*, above n 11, 544 (Mason CJ, Wilson & Dawson JJ), 551–553 (Brennan & Toohey JJ); *Re Nolan*, above n 12, 471–472 (Mason CJ & Dawson J), [478] (Brennan & Toohey JJ). *Re Tyler*, above n 12, 26 (Mason CJ & Dawson J), 28 (Brennan & Toohey JJ).

178 *Re Tracey*, above n 11, 583 (Deane J); 593–594 (Gaudron J). *Re Nolan*, above n 12, 489–490 (Deane J), 493–494 (Gaudron J, 499 (McHugh J); *Re Tyler*, above n 12, 34–35 (Gaudron J) following her judgment in *Re Nolan*, 38–39 (McHugh J) following his judgment in *Re Nolan*.

179 *Alpert*, above n 13, two types of offences see 319 (McHugh J); 323 (Gummow J following conclusions by McHugh J), three types of offences see 333–334 (Kirby J).

180 *Re Tracey*, above n 11, 532 (Mason CJ, Wilson & Dawson JJ).

181 *Alpert*, above n 13, 96 (Kirby J).

182 *Ibid*.

183 *Ibid* 336 (Kirby J).

In most cases, the jurisdiction of the *DFDA* applies prima facie to the conduct of ADF personnel. However, the test for jurisdictional application is an exception to the general rule: *DFDA* will only apply if there is sufficient service connection. The creation of the *DFDA* relied on the first limb of s 51(vi) of the *Constitution* which has been described as dealing with defence.¹⁸⁴ The second limb of s 51(vi) has been described as non-military in that it relates to ‘law enforcement’. Specifically, by being deployed on non-military activities, does the deployment enliven the debate about whether or not the *DFDA* applies as the purpose of the deployment is to ‘execute and maintain the laws of the Commonwealth’ and not the ‘naval or military defence of the Commonwealth’? Therefore, if ADF personnel are conducting boarding parties for a non-defence activity, is the *DFDA* still applicable to their actions? One could argue that as the non-defence activities are not in the furtherance of defence, then the *DFDA* does not apply for the duration that ADF are engaged in non-defence activities. A more practical view is that whenever a member of the ADF is tasked to perform a duty as a member of the ADF, the *DFDA* has jurisdiction over him for the duration of that task.

Membership of the ADF is defined in s 3 of the *DFDA* and is critical to the argument of the jurisdiction of the *DFDA*. The definition does not focus on the activities that the person was undertaking. Even when jurisdiction over ADF reservists is in issue, the definition focuses on their status and not what activities or tasks they are undertaking. Therefore, it would appear that the practical view prevails in that when ADF members are engaged in non-defence activities, the *DFDA* would apply.

The jurisdiction of the *DFDA* undoubtedly covers ADF personnel in operations. However, the increase in the use of ADF boarding parties to enforce the Commonwealth suite of legislation against illegal immigrants and poachers has raised the existence of a conflict between civilian criminal laws and military discipline. Does one set of laws override the other? In the author’s opinion, this depends on the circumstances that the conduct occurs in with the location of the conduct, whether inside or outside 200 nautical miles, also being relevant. As a general rule, the *CaSA* applies as a primary source of law. The *DFDA* will only apply if there is a service connection. If there is a service connection, then due to prior agreements with the State and Commonwealth Directors of Public Prosecutions, ADF personnel can be charged under the *DFDA* instead of the *CaSA*.

The extent of the application of the *DFDA* has been widened by the recent High Court decision in *Alpert*. The existing ADF Instruction¹⁸⁵ to assist in the determination of the *DFDA* jurisdiction has potentially been rendered obsolete due to the widening of the factors used in *Alpert* to determine service connection. As there is no up to date ADF Instruction incorporating the factors considered in *Alpert*, although a redraft is currently being undertaken, factors relevant to determining the jurisdictional conflict between the *CaSA* and the *DFDA* could be

184 See, eg, *Re Tracey*, above n 11, 597 (Gaudron J).

185 DI(G)PERS 45–1, above n 9.

overlooked by ADF Commanders. This may create some confusion regarding the applicability of the *CaSA* to ADF members.

As the *CaSA* is applicable to ADF ships and their personnel, any criminal act committed by ADF personnel anywhere within Australian waters, or any offence committed beyond the Commonwealth area, is covered. The process of determining which law applies is rendered simple by determining whether or not the conduct was committed within 200 nautical miles. Within 200 nautical miles, the State criminal law applies and it would then be the issue of whether or not there is sufficient service connection to raise the jurisdiction of the *DFDA*. If the conduct is committed outside 200 nautical miles from Australia's baseline, then it would prima facie fall within the jurisdiction of the Commonwealth and the *CaSA* and then the question of nexus to raise *DFDA* jurisdiction must be asked.

However, there may exist the possibility of another country's laws being applicable. If this were to occur, the Attorney-General would have to consider the views of that other country before consent could be granted to commence a hearing. In a practical sense, if the other country objected to Australia initiating proceedings for conduct committed inside the other country's territorial waters, the Commonwealth may hand over the matter to the other country, in the interests of continued good relations. However, any involvement of another country's laws becomes a very challenging matter if the accused is an ADF member on ADF operations.

Generally, a Status of Forces Agreement ('SOFA') between the ADF and another country would have been entered into prior to any commencement of ADF operations in foreign waters. According to the SOFA, if the other country's jurisdiction would apply, then the matter would be handed over regardless of the *CaSA*. If the SOFA stipulated the matter fell within the Australian laws, then there would be a conflict between the application of the *CaSA* and the *DFDA*.

If an ADF boarding party member commits an offence outside 200 nautical miles area and both the *CaSA* and *DFDA* applied, what would be the process of determining jurisdiction? The determination of jurisdiction would depend on the nature of the offence. The range of possible offences that boarding parties may commit could be limitless. However, more common possibilities would be murder (if in breach of the rules of engagement), theft and assault.

Taking the murder example, *CaSA* makes it clear that such an offence committed by an ADF member would be within its jurisdiction if it occurred on an ADF ship or on a foreign ship, as the jurisdiction would fall within the application to an Australia ship under s 6(1) or possibly under s 6(2)(a) in that the ADF member is an Australian citizen on a foreign ship. Although s 63 of the *DFDA* stipulates that consent of the DPP is required before military proceedings could be instituted in cases of murder¹⁸⁶, it is possible due to the expansive jurisdiction in *Alpert*,¹⁸⁷ that the same reasoning applied therein could allow a murder offence to be heard by a military tribunal, as long as there was sufficient service connection. In the case of a boarding party, if a murder offence was allegedly committed, then the factors that

186 Other offences such as treason, rape and prescribed offences under the *DFDA* also required DPP consent.

187 Where a rape offence was held to be within the jurisdiction of the military tribunal.

assist to determine the service connection test may be whether the member was on duty, conducting military operations, in uniform or with other ADF members present. Then arguably the *DFDA* could have jurisdiction if the DPP consents. However, if the offence occurs in another jurisdiction or the DPP decides not to proceed, then arguably, based on *Alpert*, the *DFDA* would have jurisdiction without the consent of the DPP.

In the case of theft or assault the factors to assist the determination of the service connection test would be the same as for the murder offence example above. The effects of *Alpert* would render the jurisdiction within the *DFDA* again. It appears that the concerns raised by Kirby J in *Alpert* could be an eventuality, in that, ‘virtually every serious criminal offence by service personnel’ would be classified as service connected.¹⁸⁸ However, despite the extremely wide application of the *DFDA*’s jurisdiction, there is still the application of DPP jurisdiction through s 63 of the *DFDA*. If at any time the DPP wished to initiate proceedings for an offence allegedly committed by an ADF member, then s 63 of the *DFDA* permits this. Although the consequences of *Alpert* is that it provides the *DFDA* with an expanded jurisdiction over serious criminal offences, the *CaSA* would still have the ‘primary enforcement responsibility for criminal conduct on or from a Defence Force ship’¹⁸⁹ for those offences the DPP chooses to prosecute (excluding those offences assumed by another country). However, this primary enforcement responsibility may lose some weight when the offence is military in character or, if committed outside of 200 nautical miles, is a summary offence and therefore perceived as not so serious. Only time will tell whether any dichotomy in the application of the *CaSA* and *DFDA* between serious and not so serious offences committed outside of 200 nautical miles will eventuate.

188 *Alpert*, above n 13, 98 (Kirby J).

189 Second Reading Speech, Crimes at Sea Bill 1999 (Cth), above n 6.