



RACHEL BAIRD  
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EDITORS

Australian  
**Coastal and  
Marine Law**

THE FEDERATION PRESS

***Australian Coastal and Marine Law***, edited by Rachel Baird and Donald R. Rothwell, explains the legal and regulatory framework which operates within Australia's coastal and marine environment, extending from the waters of ports, harbours, bays and estuaries to the outer limits of Australia's continental shelf.

The book's coverage extends across Australian coastal and marine law including all areas within Commonwealth control and regulation and State and Territorial jurisdiction. It explains how Australian law regulates and manages a range of issues which arise in the coastal zone and the marine environment, including the continental shelf, fishing, indigenous rights, marine parks, marine pollution, native title, ports and harbours and shipping.

Authored by academic and professional experts in coastal and marine law, the book will be invaluable for lawyers, environmental managers, planners and marine scientists.

**FROM THE FOREWORD:**

*This book provides a most welcome and timely analysis of the most important elements of Australian coastal and marine law. Dr Baird and Professor Rothwell, as editors and also contributors, are joined by nine other experts to provide a comprehensive overview of an area of law vital to the Australian national interest.*

*Emeritus Professor Ivan Shearer, AM*

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COVER DESIGN: WIDE OPEN MEDIA

THE  
FEDERATION  
PRESS  
[www.federationpress.com.au](http://www.federationpress.com.au)

ISBN 978-1-86287-844-0



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# AUSTRALIAN COASTAL AND MARINE LAW

Editors

**Rachel Baird**  
**Donald R Rothwell**

Foreword

*Emeritus Professor Ivan Shearer, AM*

THE FEDERATION PRESS  
2011

## Foreword

Australia is an island continent heavily dependent on sea-borne trade. As a sparsely populated country it has an anxious concern for protecting its external borders. As an economy that finds it difficult to compete with the lower wage economies of some other countries, it relies largely on the exploitation of its natural resources, including marine resources, to sustain its high standard of living. In the strategic environment, Australia shares with its allies a commitment to a stable order of the world's oceans in which freedom of navigation is maintained to the greatest extent consistent with legitimate national jurisdictions.

These considerations underpin the chapters of this book and justify its Australian flavour. However, Australia is not an island in the sense that it is detached from the community of nations and the rule of international law. Quite to the contrary, Australia has made significant contributions to the evolution of the modern international law of the sea; the regimes of coastal and marine law dealt with in this book all find their grounding and legitimacy in that law. Australia played an active role in the deliberations of the United Nations First Conference on the Law of the Sea, 1958, which essentially adopted the preparatory work of the International Law Commission. It played an even more active role in the United Nations Third Conference on the Law of the Sea (1973-1982) where political factors were dominant. Australia performed crucial service in helping to negotiate the compromise between high seas freedoms and national resource jurisdictions reflected in the regime of the exclusive economic zone. It was similarly influential in the outcome of the tortuous negotiations regarding the extent of national jurisdiction over continental shelves extending beyond 200 nautical miles. Following the disappointing slowness of the developed states to ratify the resulting 1982 United Nations Convention on the Law of the Sea, Australia became a leading member of a group known as "the Friends of the Convention". On an Australian proposal, a compromise regime regarding the deep sea bed was adopted in an instrument separate from the Convention, which enabled previously reluctant states - with the notable exception of the United States - to become parties.

The 1982 Convention does not, however, mark the final stage in the development of the international law of the sea. The Convention had hardly entered into force in 1994 when new pressures emerged, especially in relation to rapacious overfishing of the high seas and threats to the international marine environment, which the 1982 Convention had not adequately

Published in Sydney by  
The Federation Press  
PO Box 45, Annandale, NSW, 2038.  
71 John St, Leichhardt, NSW, 2040.  
Ph (02) 9552 2200. Fax (02) 9552 1681.  
E-mail: [info@federationpress.com.au](mailto:info@federationpress.com.au)  
Website: <http://www.federationpress.com.au>

National Library of Australia  
Cataloguing-in-Publication entry

Australian coastal and Marine Law / editors Rachel J Baird; Donald R Rothwell

Includes index.  
ISBN 978 186267 844 0 (pbk)

Law of the sea - Australia.  
Maritime law - Australia.

341.45

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Typeset by The Federation Press, Leichhardt, NSW.  
Printed by Ligare Pty Ltd, Riverwood, NSW.



The book has been printed on paper certified by the Programme for the Endorsement of Forest Certification (PEFC). PEFC is committed to sustainable forest management through third party forest certification of responsibly managed forests.

addressed. Moreover, gaps and ambiguities in that Convention, resulting from the need to find political compromises in certain of its formulations, have led to protracted disputes. These are above all evident in relation to the juridical nature of the exclusive economic zone, passage and over-flight by warships and military aircraft in foreign exclusive economic zones and archipelagic waters, and the declaration of security zones. The 1982 Convention was successful in producing a framework for dispute resolution in the law of the sea, but the use of its procedures have been slow in coming. Australia has been one of the countries which have been most ready to resort to litigation under the Convention: it has initiated two sets of proceedings against Japan (the Southern Bluefin Tuna, and Scientific Whaling cases) and has defended cases brought against it by the flag states of vessels arrested for offences against Australia's fishery laws.

The international law of the sea had its origins in customary international law going back to the 17th century. Although that law may now be regarded as largely codified by conventional law, above all by the United Nations Convention of 1982, customary law is still capable of influencing the interpretation of the conventional provisions and of filling in gaps. In its close engagement with the law of the sea, through its legislation and its practice, Australia has shown itself to be a significant player in that process.

International law does not, however, regulate the division of power and jurisdiction over coastal waters in the case of federal states. This is a matter for regulation by domestic law. The *Seas and Submerged Lands Act 1973* (Cth) vested sovereignty over the territorial sea of Australia, internal waters, and the continental shelf in the Crown in right of the Commonwealth. The validity of this legislation was upheld by the High Court of Australia in the *Seas and Submerged Lands case* in 1975. However, pursuant to its policy of cooperative federalism, the Fraser government entered into an agreement with the States known as the *Offshore Constitutional Settlement*, confirmed by a package of legislative measures in 1980 allocating powers and responsibilities for the offshore areas, including fishing, among the States and the Commonwealth.

This book provides a most welcome and timely analysis of the most important elements of Australian coastal and marine law. Dr Baird and Professor Rothwell, as editors and also contributors, are joined by nine other experts to provide a comprehensive overview of an area of law vital to the Australian national interest.

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May 2011

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## Preface

Australia historically has had an integral connection with its coastal and marine environment. Indigenous Australians hunted and lived along the coast, and when European settlers arrived it was Australia's coastal areas that were pivotal to the initial success of the colonies. Maritime trade and commerce was at the core of Australia's development as a young nation, and the development of ports and a shipping industry was essential to that process. This phenomenon has continued and remains central to Australia's ongoing prosperity. Australians and international visitors have also developed a love of Australia's beaches, its coastal areas and its marine environment, especially its natural wonders like the Great Barrier Reef. These factors have inspired strong support for coastal and marine environmental protection and management throughout Australia.

While only a relatively recent development, the growth in Australian coastal and marine law has been remarkable over the past four decades. Since the landmark enactment of the *Seas and Submerged Lands Act 1973* (Cth), and the subsequent High Court decision in *New South Wales v Commonwealth*, there have been rapid developments in both law and policy. The *Offshore Constitutional Settlement* paved the way for offshore management between the Commonwealth, States and the Northern Territory, and from this foundation a raft of new environmental laws were adopted in the 1980s and 1990s, often promoted by international developments such as the 1982 *United Nations Convention on the Law of the Sea*, or through new marine pollution conventions adopted by the International Maritime Organisation. The 1990s not only awakened a new global environmental consciousness, through events such as the 1992 Rio Conference, but the decade also brought about further developments in Australia which saw adoption of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and also moves for the development and eventual implementation of an *Australia's Oceans Policy*. The States and Territories played an active role in this process through the enactment of new coastal laws dealing with management and planning, often backed up with policies designed to achieve integrated coastal zone management.

Throughout this flurry of legal and policy development there has also been a much greater public consciousness about the need to protect the coastal and marine environment. Iconic places such as the Great Barrier Reef, Ningaloo Reef and Fraser Island have always had a strong presence in the public mind when it comes to environmental management, but in the past

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## Contributors

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**Brad Jessup** is a Teaching Fellow at the Australian Centre for Environmental Law at the Australian National University. He is a human geographer and an environmental law specialist. He teaches environmental law, planning law and foundation law subjects. Brad's research and teaching draws on political theories and his expert knowledge of environmental law processes, and is usually grounded in case study examples. He has developed an expertise in the regulation of the coast, because the coast is a place of considerable national environmental conflict. Before joining the ANU, Brad practised environmental and planning law at law firm Freehills, where he was involved in advising on two high-profile marine projects: Basslink and the Channel Deepening Project.

**Samantha Hepburn** is an Associate Professor in the Faculty of Business and Law at Deakin University. Samantha researches and publishes in the area of property law, native title and equity and trusts. She has published a number of books and articles in these areas in Australia and internationally. Samantha has also taught at the Australian National University. She undertook her doctorate, which examined the capacity of the Australian

land framework to properly incorporate native title, at the University of Melbourne.

**Cameron Moore** is a Senior Lecturer in the School of Law, University of New England. His publications include the book *ADF on the Bent: A Legal Analysis of Offshore Enforcement by the ADF* (2004), and other articles and chapters on the Australian Defence Force and maritime security. Between 1996 and 2003, Cameron was a Legal Officer in the Royal Australian Navy serving at sea, as well as advising on fisheries and border protection operations and the *Tampa* incident. Cameron is still an active Navy reservist and works closely with Border Protection Command.

**Matthew Osborne** has worked as a lawyer and policy officer in the Commonwealth government (Department of the Prime Minister and Cabinet, Australian Maritime Safety Authority, Australian Fisheries Management Authority and the Department of Environment and Heritage) and the Queensland government (Department of the Premier and Cabinet, Maritime Safety Queensland and the Department of the Environment and Resource Management). Matthew served as a Permanent Legal Officer in the Royal Australian Air Force between 2001 and 2005 and is an active member of the RAAF Specialist Reserve.

**Stathis (Stan) Palassis** is a Senior Lecturer at the University of Technology Sydney. He joined the UTS Law Faculty in 2003 after completing doctoral studies on the topic of liability and compensation for marine pollution damage. His main research interest is the Law of the Sea and International Environmental Law. He has published a variety of work on Marine Pollution and Environmental Damage. Dr Palassis also has a strong commitment to legal education: he teaches across both undergraduate and postgraduate programs, coaches moot teams and has recently completed graduate studies in education.

**Tim Power** is a partner and Head of Environment at the law firm Freehills. He has practised as an environmental lawyer for nearly 20 years, and has worked on the environmental assessment and approval of some of the largest infrastructure, energy, and resource projects in Australia. This experience has included advising on offshore petroleum, resource and telecommunications projects. Tim was also consulted by the Commonwealth government's review into the decommissioning of offshore petroleum infrastructure.

**Donald R Rothwell** is Professor of International Law at the ANU College of Law, Australian National University, where he has taught since 2006, and previously was Challis Professor of International Law at the University of Sydney (2004-2006). His research areas include the law of the sea, the law of the polar regions, international security law, and international law in

Australia. He was previously co-chair of the Australian Canadian Oceans Research Network (ACORN), and in 2006 and 2008 respectively chaired the Sydney and Canberra Panels of Independent International Legal Experts on *Japan's Special Permit ("Scientific") Whaling Under International Law*.

**Andrew Serdy** is a Reader in Public International Law at the University of Southampton. He previously worked for many years in the Australian Government Department of Foreign Affairs and Trade. There he first served in a number of diplomatic positions before specialising from 1996 in the law of the sea – as he still does – in the Department's Sea Law, Environmental Law and Antarctic Policy Section. For much of that time he was involved with the preparation of Australia's submission to the Commission on the Limits of the Continental Shelf under Article 76 of the UN Convention on the Law of the Sea, as well as with the negotiation of the 2003 Sunrise-Troubadour unitisation agreement with East Timor and the 2004 maritime boundary treaty with New Zealand.

**Tim Stephens** is a Senior Lecturer at the Faculty of Law, University of Sydney, and Director of the Sydney Centre for International Law. Tim teaches and researches in public international law with a focus on international environmental law and the law of the sea. He is the author with Donald R Rothwell of *The International Law of the Sea* (Hart, Oxford 2010).

ACT	ACT
ANT	Antarctica
AR	Arctic
ATL	Atlantic
AW	Antarctic
BA	Bahamas
BB	Barbados
BC	British Columbia
BD	Bangladesh
BE	Belgium
BF	Burkina Faso
BG	Bulgaria
BH	Bahrain
BI	Burundi
BJ	Benin
BK	Bosnia and Herzegovina
BL	Belize
BM	Bermuda
BN	Brunei
BO	Bolivia
BR	Brazil
BS	Bahamas
BT	Bhutan
BV	Bouvet Island
BW	Botswana
BX	Bulgaria
BY	Belarus
BZ	Belize
CA	Canada
CC	Cocos (Keeling) Islands
CD	Congo (Kinshasa)
CE	Cape Verde
CF	Congo (Brazzaville)
CG	Cape Verde
CH	China
CI	Côte d'Ivoire
CK	Cook Islands
CL	Chile
CM	Cameroun
CN	China
CO	Colombia
CR	Costa Rica
CU	Cuba
CV	Cape Verde
CW	Curaçao
CX	Christmas Island
CY	Cyprus
CZ	Czechia
DE	Germany
DF	Democratic Republic of Congo
DG	Dominican Republic
DH	Dominican Republic
DI	Dominican Republic
DJ	Dominican Republic
DK	Denmark
DM	Dominican Republic
DN	Dominican Republic
DO	Dominican Republic
DP	Dominican Republic
DQ	Dominican Republic
DR	Dominican Republic
DS	Dominican Republic
DT	Dominican Republic
DU	Dominican Republic
DV	Dominican Republic
DW	Dominican Republic
DX	Dominican Republic
DY	Dominican Republic
DZ	Dominican Republic
EA	East Asia
EB	East Asia
EC	Ecuador
EE	Estonia
EF	East Africa
EG	Egypt
EH	Equatorial Guinea
EI	Equatorial Guinea
EJ	Equatorial Guinea
EK	Equatorial Guinea
EL	Equatorial Guinea
EM	Equatorial Guinea
EN	Equatorial Guinea
EO	Equatorial Guinea
EP	Equatorial Guinea
EQ	Equatorial Guinea
ER	Eritrea
ES	Spain
ET	Eritrea
EU	European Union
EV	Equatorial Guinea
EW	Equatorial Guinea
EX	Equatorial Guinea
EY	Equatorial Guinea
EZ	Equatorial Guinea
FA	Fiji
FB	Fiji
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FY	Fiji
FZ	Fiji
GA	Ghana
GB	Great Britain
GC	Great Britain
GD	Grenada
GE	Georgia
GF	French Guiana
GG	Guernsey
GH	Ghana
GI	Guinea-Bissau
GJ	Guinea-Bissau
GK	Guinea-Bissau
GL	Greenland
GM	Guinea
GN	Guinea
GO	Guinea
GP	Guinea
GQ	Guinea
GR	Greece
GS	South Georgia and the South Sandwich Islands
GT	Guatemala
GU	Guam
GV	Guinea-Bissau
GW	Guinea-Bissau
GX	Guinea-Bissau
GY	Guyana
GZ	Guinea-Bissau
HA	Haiti
HB	Haiti
HC	Haiti
HD	Haiti
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HF	Haiti
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HK	Hong Kong
HL	Haiti
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HN	Haiti
HO	Haiti
HP	Haiti
HQ	Haiti
HR	Croatia
HS	Haiti
HT	Haiti
HU	Hungary
HV	Haiti
HW	Haiti
HX	Haiti
HY	Haiti
HZ	Haiti
IA	India
IB	India
IC	India
ID	Indonesia
IE	Ireland
IF	Ireland
IG	Ireland
IH	Ireland
II	Ireland
IJ	Ireland
IK	Ireland
IL	Israel
IM	Ireland
IN	India
IO	British Indian Ocean Territory
IP	Ireland
IQ	Iraq
IR	Ireland
IS	Iceland
IT	Italy
IU	Ireland
IV	Ivory Coast
IW	Ireland
IX	Ireland
IY	Ireland
IZ	Ireland
JA	Japan
JB	Japan
JC	Japan
JD	Japan
JE	Jersey
JF	Jersey
JG	Jersey
JH	Jersey
JI	Jersey
JK	Jersey
JL	Jersey
JM	Jersey
JN	Jersey
JO	Jersey
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LS	Lebanon
LT	Lithuania
LU	Luxembourg
LV	Latvia
LW	Lebanon
LX	Lebanon
LY	Lebanon
LZ	Lebanon
MA	Mali
MB	Mali
MC	Monaco
MD	Moldova
ME	Mexico
MF	Mexico
MG	Madagascar
MH	Marshall Islands
MI	Maldives
MJ	Maldives
MK	Maldives
ML	Maldives
MM	Myanmar
MN	Mongolia
MO	Moldova
MP	Marshall Islands
MQ	Marshall Islands
MR	Mali
MS	Maldives
MT	Malta
MU	Mauritius
MV	Maldives
MW	Malawi
MX	Mexico
MY	Malaysia
MZ	Mozambique
NA	Namibia
NB	Namibia
NC	Norway
ND	Norway
NE	Niger
NF	Norfolk Island
NG	Nigeria
NH	Norway
NI	Nicaragua
NJ	Norway
NK	Norway
NL	Netherlands
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NO	Norway
NP	Nepal
NQ	Norway
NR	Norway
NS	Norway
NT	Norway
NU	Norway
NV	Norway
NW	Norway
NX	Norway
NY	Norway
NZ	New Zealand