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The Australian Resources and Energy Law Journal hereby unreservedly apologises to Christopher Davie, part of whose 2004 AMPLA National Conference paper, which was published in 2005 in the AMPLA Yearbook 480 as "*Aboriginal Cultural Heritage: Emerging from the Shadows of Native Title*", appeared in 24 (2005) Australian Resources and Energy Law Journal in the legislative note "*Aboriginal Cultural Heritage In Western Australia: Practical Issues For Miners*" without due recognition and attribution. The legislative note of that name is hereby retracted from publication

CUSTOMS REGULATION OF OFFSHORE RESOURCES INSTALLATIONS

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This paper examines the regulation of offshore resources installations by the Australian Customs Service and discusses some of the specific provisions of the Customs Act 1901 (Cth) as they relate to offshore resources installations. Amongst other things the paper discusses the jurisdiction of customs over offshore platforms, attachment of platforms to the seabed, customs powers and sanctions. The paper also briefly reviews international custom law with respect to customs control of offshore installations.

1. INTRODUCTION

Offshore resources platforms and drilling rigs have become a common feature of many continental shelfs around the world, Australia is not an exception. The industry has developed a large portfolio of offshore technology including new types of floating and fixed rigs and production complexes.[1] Such offshore platforms often attract the attention of Customs. In fact, depending on the country's legislative framework, offshore resources platforms may fall under the direct control of Customs authorities.

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1 J Joy, 'Discussion Paper on the Need for an International Legal Regime for Offshore Units, Artificial Islands and Related Structures Used in the Exploration for and Exploitation of Petroleum and Seabed Resources', *Canadian Maritime Law Association* (1996) <http://www.cmla.org/papers/MAR96.htm> at 28 August 2005.

Customs may be concerned with various aspects of the offshore oil and gas industry including the attachment of offshore platforms to the seabed, the movement of people, goods and stores to and from platforms, the export and import of platforms, as well as the export of oil and gas directly from them. In Australia, there are a number of specific provisions in the *Customs Act* 1901 (Cth) (the Customs Act) that regulate offshore platforms located in the Exclusive Economic Zone (the EEZ) and the continental shelf area of Australia.[2] Since Customs exercises control over offshore installations, it has a primary responsibility of ensuring compliance with Customs laws and regulations.

2. CONCEPTUAL ISSUES

It might be appropriate to start the discussion with a brief analysis of some of the definitions in the Customs Act relevant to the offshore oil and gas industry. The Customs Act does not use the term 'offshore installation'; instead it uses the term 'installation', which basically has the same meaning.[3] In the context of the Customs Act, offshore installations may be categorised by 'type' and 'nationality'.[4]

A 'resources installation' is defined under section 4 of the Customs Act as resources industry fixed structure,[5] or mobile unit,[6] which is used or is to be used offshore in any operations or activities associated with exploration and exploitation of natural resources. The term 'sea installation' has the same meaning as in the *Sea Installations Act* 1987 (Cth) (the SI Act), and includes any man-made structure (either in physical contact with the seabed or floating) that can be used for the environment related activity, but does not include a resources industry fixed structure or a resources industry mobile unit.[7] To avoid confusion, from this point, any reference in the paper to offshore installations or offshore platforms shall be taken as a reference to offshore resources installations only, and not any other sea installations.

Section 4(1) of the Customs Act defines 'Australian resources installation' as an installation that that is deemed to be part of Australia because of the operation of section 5C of the Customs Act. Section 5C states that an offshore installation that is or becomes attached to the Australian seabed is deemed to be part of Australia.[8] An 'overseas resources installation' is defined as an offshore

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2 The Customs Act repeats some of the provisions of the *Sea Installations Act* 1987 (Cth).

3 Customs Act 1901, s 4(1).

4 For example, in the Customs Act, offshore installations are categorised as 'sea installations' and 'resources installations' (type), and also as 'Australian installations' and 'overseas installations' (nationality).

5 Customs Act 1901, s 4(5)(a). Fixed structure, which is not able to move or be moved as an entity from one place to another.

6 Ibid, s 4(6)(b). Mobile unit includes a vessel or a structure that is able to float or be floated and is able to move or be moved as an entity from one place to another. However, under section 4(8) of the Customs Act, the definition of offshore mobile unit does not include a vessel that is used wholly or principally in transporting persons or goods to or from a resources installation or used in manoeuvring a resources installation, or in operations relating to the attachment of a resources installation to the Australian seabed.

7 See the SI Act, s 4(1).

8 Section 5C(2) of the Customs Act 1901 states that an offshore installation ceases to be part of Australia if it becomes detached from the Australian seabed for the purpose of being taken to a place outside the outer limits of Australian waters.

installation that is in Australian waters and it has been brought into Australian waters from a place outside the outer limits of Australian waters.[9]

The definition of 'Australian waters' in the Customs Act, as it relates to offshore installations, means waters above the Australian seabed.[10] The 'Australian seabed' means so much of the seabed adjacent to Australia (other than the seabed within the Joint Petroleum Development Area) within the area comprising of the areas described in Schedule 2 to the *Petroleum (Submerged Lands) Act* 1967 (Cth) (the PSL Act), the Coral Sea area, and part of the seabed beneath the coastal area, or the continental shelf of Australia.[11]

Under the provisions of the Customs Act, an offshore installation is deemed to be attached to the Australian seabed if the installation is in physical contact with the Australian seabed and is used wholly or principally in any operations associated with exploring or exploiting natural resources; or the installation is in physical contact with another offshore installation that is deemed to be attached to the Australian seabed.[12]

The term 'place outside Australia' includes the waters in the Joint Petroleum Development Area (the JPDA) or an offshore installation in the JPDA.[13] The definition in section 4(1) of the Customs Act excludes any other area of waters outside Australia or any other offshore installation outside Australia, or a ship outside Australia, or a reef, or an uninhabited island outside Australia.

'Master' in relation to an offshore installation, means the person in charge of the installation, but does not include a pilot or government officer.[14]

3. CUSTOMS JURISDICTION

In international law, pursuant to Article 60(2) of the *United Nations Convention on the Law of the Sea* 1982,[15]Australia has exclusive jurisdiction over offshore installations in the Exclusive Economic Zone with respect to customs, fiscal, health, safety and immigration laws.

In Australia, the offshore jurisdiction of Customs is sourced from the external affairs power of the Constitution.[16] Under section 51(xxix) of the *Constitution* 1901, the Commonwealth has comprehensive authority to legislate for areas geographically external to Australia.[17] The Commonwealth can also create offences (whether Customs offences or not) applying outside the limits of the States and can confer whatever powers of search, seizure and arrest it chooses in those

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9 Customs Act 1901, s 4(1). This definition expressly excludes 'Australian resources installation'.

10 Ibid, s.4(1).

11 Ibid.

12 *Customs Act 1901*, s 4(9)(a).

13 Also see the *Petroleum (Timor Treaty) Act* 2003 (Cth).

14 *Customs Act 1901*, s 4(1).

15 United Nations Convention on the Law of the Sea 1982, 1833 UNTS 3, signed in Montego Bay on 10 December 1982 entered into force on 16 November 1994. Also see the discussion in H Esmaeili, *The Legal Regime of Offshore Oil Rigs in International Law*, Ashgate/Dartmouth, England, 2001, 103-107.

16 *The Constitution* 1901, s 51(xxix).

17 *New South Wales v The Commonwealth (Seas and Submerged Lands Act)* (1975) 135 CLR 337.

areas.[18] For the purposes of ensuring better compliance with the Customs law, certain Customs powers and enforcement measures extend to offshore areas.[19]

4. ATTACHMENT AND OPERATION OF INSTALLATIONS

As stated above, an offshore installation that is or becomes attached to the Australian seabed is deemed to be part of Australia.[20] The attachment of overseas offshore installations is controlled by Customs.[21] The Customs Act prohibits persons to cause an overseas offshore installation to be attached to the Australian seabed without first obtaining permission from Customs.[22] Customs may grant a permit and may impose certain conditions on the permit,[23] including a condition requiring the master of an offshore installation to bring the installation to a specified place for examination for quarantine purposes.[24] Customs can revoke or vary the permit or any condition imposed therein before an offshore installation is attached to the Australian seabed.[25] An overseas resources installation that becomes attached to the Australian seabed without the permission of Customs may be forfeited to the Crown.[26]

The operation and use of offshore installations is also subject to the control of Customs by virtue of section 33A of the Customs Act. Permission must be obtained from Customs before an offshore installation can be used in activities associated with exploring and exploiting the Australian seabed.[27] Customs may impose conditions upon the permit to operate an installation and in some instances may suspend or revoke the permit.[28]

5. THE MOVEMENT OF OBJECTS TO AND FROM INSTALLATIONS

The Customs Act, amongst other things, provides a Customs framework for regulating people, ships, aircrafts and goods moving to and from offshore installations,[29] and the movement of installations themselves.

5.1 Offshore Installations

Where an overseas resources installation becomes attached to the Australian seabed or is brought to a place in Australia and is to be taken from that place into Australian waters for the purposes of being attached to the Australian seabed, the installation and any goods on the installation are deemed to have been imported into Australia.[30] The beneficial owner of the offshore installation becomes an importer at the time of importation if the installation they own was brought from overseas and becomes attached to the Australian seabed.[31]

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18 J Greenwell, *Customs and Excise: Offshore Application,* Australian Law Reform Commission, 1989, 2.
19 Ibid, 1.
20 *Customs Act 1901*, s 5C.
21 Ibid, s 5A.
22 Ibid, s 5A(1) and s 5A(2).
23 Ibid, s 5A(3) and s 5A(5).
24 Ibid, s 5A(5)(b).
25 Ibid, s 5A(4).
26 Ibid, s 228A.
27 Ibid, s 33A(2).
28 Ibid, s 33A(4).
29 M White, *Marine Pollution Laws of the Australasian Region*, Federation Press, 1994, 246.
30 Customs Act 1901, s 49B.
31 Ibid, s 269T(1).

Where an offshore installation ceases to be part of Australia, the installation and any goods on the installation are deemed to have been exported from Australia at the time when the installation ceases to be part of Australia.[32] However, where an offshore installation is taken from a place in Australia into Australian waters for the purpose of becoming attached to the Australian seabed, the installation and any goods on the installation shall not be deemed top be exported.[33]

5.2 Ships and Aircrafts

It is an offence for the master of the ship or pilot of an aircraft to allow the ship or aircraft to 'enter' at any place other than a port or airport without the permission of Customs (unless from stress of weather or other reasonable cause).[34] A reference in section 58 to a ship or aircraft entering, or being brought to, a place other than a port or airport, includes a reference to the ship or aircraft being brought to a ship that is at an offshore resources installation.[35] The offence clearly has offshore application in that it applies to entry at an offshore installation.[36] However, the precise point at which the offence is normally committed is uncertain. It is not clear whether a person or goods have to be transferred to an offshore installation before the offence occurs.[37]

5.3 Goods and Stores

Goods on board offshore installations brought from overseas to a place in Australia, are deemed to be imported when the installation is attached to the Australian seabed.[38] Goods are subject to the control of Customs from the time of importation.[39] The beneficial owner of the goods becomes an importer in relation to goods that are brought from overseas to the offshore installation or that were on board the overseas resources installation at the time when the installation was attached to the Australian seabed.[40] Section 126B states that where goods are taken from an installation that is deemed to be part of Australia for the purpose of being taken to a place outside Australia, the goods are deemed to have been exported from Australia at the time when they are so taken from the installation.

It is also an offence for any goods to be landed on an offshore installation from an 'external place' or to be taken from an offshore installation to an 'external place' (a place other than Australia) without travelling via Australia, so as to allow examination of the goods by Customs.[41] This clearly applies wherever the offshore installation is situated in Australian waters or within the defined 'adjacent area',[42] which can be several hundred nautical miles offshore. Customs officers can place a seal or a lock upon any goods on an offshore installation and it would be an offence to remove or break that seal or lock.[43]

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32 Ibid, s 126A(1).
33 Ibid, s 126A(2).
34 Ibid, s 58.
35 Ibid, s 58(6).
36 Ibid, s 58(6).
37 J Greenwell, *Customs and Excise: Offshore Application,* Australian Law Reform Commission, Research Paper No 1, Sydney, February 1989, 16.
38 Customs Act 1901, s 49B.
39 Ibid, s 30.
40 Ibid, s 269T(1).
41 Ibid, s 58A. Also see the SI Act, s 51.
42 The definition of the 'adjacent area' in section 4(1) of the Customs Act 1901 refers to section 5 of the SI Act. However, the most comprehensive definition is in Schedule 2 of the PSL Act 1967.
43 *Customs Act 1901*, s 191.

5.4 People and Animals

It is also an offence for any person to travel directly to an offshore installation from an 'external place' or to be taken from an offshore installation to an 'external place' without travelling via Australia, to allow questioning of the person by Customs.[44] Section 58A offence is a strict liability offence.[45] There is a defence available to this offence, if it is established that the journey was either necessary to secure the safety of human life, a ship, an aircraft, or an offshore installation.[46] Section 58B, in a similar fashion, prohibits direct travelling to and from an offshore installations located in the JPDA without travelling through Indonesia or Australia.

If requested, the master of an offshore installation shall by all reasonable means facilitate the boarding of the installation by Customs or other persons authorised under the Customs Act.[47] Customs officers may require the master of an offshore installation to gather together all of the people on board the installation,[48] and require any person to produce identity documents.[49]

6. ENFORCEMENT POWERS AND SANCTIONS

Customs officers have a range of enforcement powers available to them under the Customs Act. For example, they can board offshore installations and search goods aboard any offshore installation subject to the control of Customs. They may also board any vessel that has come from overseas to such an offshore installation.[50] The power of Customs officers to board extends to staying on board any offshore installation. Customs may station an officer on board an installation, in which case the master of an installation will be required to provide adequate sleeping accommodation in the cabin and sufficient food for the officer.[51] The power of an officer to search extends to every part of any offshore installation and authorises the opening of any package, locker, or place and the examination of all goods.[52]

An officer of Customs may question any person who is on board an offshore installation as to whether that person or any child or other person accompanying him has on his person, in his baggage or otherwise with him any dutiable goods, excisable goods, or prohibited goods.[53] A person shall answer questions put to him in pursuance of subsection 195(1).[54] Customs officers are also allowed to question persons aboard the vessels that visit offshore installations.[55] Evidently, the powers of Customs under sections 187 and 195 in relation to offshore installations and ships visiting them apply wherever those installations are.

Customs officers can detain and search persons they reasonably suspect to be unlawfully carrying prohibited goods imports or goods subject to the control of Customs.[56] For example, given that the

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44 Ibid, s 58A.
45 Ibid, s 58A(5A).
46 Ibid, s 58A(6).
47 Ibid, s 61(1).
48 *Migration Act* 1958 (Cth), s 226(2) and s 226(3).
49 Ibid, s 226(4).
50 Customs Act 1901, s 187.
51 Ibid, s 188.
52 Ibid, s 189.
53 Ibid, s 195.
54 Section 195 offence is a strict liability offence.
55 Customs Act 1901, s 195.
56 Ibid, Division 1B.

prohibited imports do not actually have to have been imported to qualify as prohibited imports,[57] there is a strong argument that it is intended to apply aboard offshore installations, which are deemed to be part of Australia.[58] Customs may also detain persons on board an offshore installation for the purpose of conducting a frisk search.[59]

There is also a power to secure goods aboard offshore installations and vessels visiting them.[60] Section 203 of the Customs Act gives Customs officers power to seize goods. For example, in *R v Bull*[61], Justices Gibbs and Mason considered that the power of seizure, which then was expressed to apply 'upon land or waters', was intended to apply offshore and not just on inland waters. The power to seize includes a power to seize 'forfeited goods'[62]. It is strongly arguable that the power of seizure extends to goods on an offshore installation.

Most of the offences in the Customs Act with respect to offshore resources installations are strict liability offences. In the Customs Act, penalties for non-compliance with provisions relating to offshore installations are mainly administrative penalties. The penalties may range from 5 penalty units,[63] to 500 penalty units,[64] depending on the significance of the offence.

The *Maritime Transport and Offshore Facilities Security Act* 2003 (Cth) (the Offshore Security Act) gives additional powers to 'authorised' Customs officers with respect to offshore resources installations for the purposes of determining the compliance with the Offshore Security Act.[65] Customs officers may be authorised to enter an offshore installation and inspect its operational areas, observe and record operating procedures, and photograph and copy any security record.[66] The authorised Customs officers may also stop and search a person or a vessel,[67] request any person to leave ships or zones,[68] and remove persons or vessels from zones.[69]

7. DECISIONS AND APPEALS

There is a right of review of Customs decisions by the Administrative Appeals Tribunal (the AAT) available under section 273GA of the Customs Act. That section contains a large list of provisions of the Customs Act. The decisions and determinations made under provisions listed in section 273GA may be reviewed by the AAT.

Surprisingly, with the exception of section 58A(6),[70] no other provisions relating to offshore resources installations are listed in section 273GA of the Customs Act.

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57 *R v Bull* (1974) 48 ALJR 232.

58 J Greenwell, *Customs and Excise: Offshore Application,* Australian Law Reform Commission, Research Paper No 1, Sydney, February 1989, 19.

59 *Customs Act 1901*, s 219L.

60 Ibid, s 187(g).

61 *R v Bull* (1974) 48 ALJR 232, 252.

62 Forfeited goods are defined in section 229 of the Customs *Act 1901*.

63 For offences under section 188 – power to board.

64 For offences under section 5A for attaching an installation to the Australian seabed without the permission of Customs.

65 *Offshore Security Act 2003*, s 147, s 148A(1).

66 Ibid, s 148A(2).

67 Ibid, s 153, s 155.

68 Ibid, s 156.

69 Ibid, s 157, s 159.

70 By virtue of section 273GA(1)(aaa), a decision refusing to authorise a journey to or from an offshore installation may be reviewed by the AAT.

Review of decisions made under the Customs Tariff Act 1995[71] and decisions relating to the diesel fuel rebate is also available.[72] *Esso Australia Ltd v CEO of Customs*[73] illustrates a review of a Customs decision relating to the diesel fuel rebate. In that case, the operator of the offshore installation applied to the AAT for a review of the decision with respect to the diesel fuel rebate relating to the operations of the supply vessel between an onshore marine terminal and offshore facilities. There are not many cases that deal with the issues of Customs regulation of offshore resources installations except those few cases relating to Customs tariffs and diesel fuel rebates.[74]

8. OVERVIEW OF INTERNATIONAL CUSTOMS LAW

There are currently no commonly accepted international principles that address the issue of Customs control of offshore resources installations. Unfortunately, the *International Convention on the Simplification and Harmonization of Customs Procedures* 1999 (the Revised Kyoto Convention) does not have any provisions with respect to offshore installations and does not specify how Customs authorities should exercise control over such installations.

There is also a lack of literature on this topic. The question of Customs and immigration control of offshore oil platforms is discussed by Dr Hossein Esmaeili in his book on regulation of offshore platforms in international law.[75] That discussion primarily deals with the question of jurisdiction of States in the EEZ (and beyond EEZ) with respect to customs, fiscal, and immigration laws. Similarly, the World Customs Organisation ("WCO") has not issued any recommendations or guidelines with respect to offshore resources installations.

9. CONCLUSIONS

Research has shown that not many international initiatives with respect to Customs regulation of offshore installations have been pursued by international organisation or individual countries. In Australia, Customs has not devoted much attention to this area either. Information in relation to Customs treatment of offshore installations is not readily available. It appears that Australian Customs has adopted a self-regulation compliance strategy, where operators or owners of offshore resources installations have to ensure that they comply with Customs laws and regulations. Since the offshore petroleum industry is an expensive and relatively sensitive industry, it is in the best interests of the operators of offshore platforms to comply with Customs laws and regulations.

It can be concluded that the current legislative base in Australia with respect to Customs regulation of offshore resources installations is adequate. It has sufficient flexibility to achieve a risk-managed style of regulatory compliance and to have the ability to treat compliers in a more favourable way than non-compliers.[76]

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71 Customs Act 1901, s 273H.

72 Ibid, s 273JB.

73 *Esso Australia Ltd v Chief Executive Officer of Customs* (1998) AATA 12919. For judicial discussion relating to diesel fuel rebate see *Chief Executive Officer of Customs v WMC Resources Ltd (as agent for East Spar Alliance)* [1998] FCA 1271.

74 Also see *BHP Billiton Petroleum Pty Ltd v Chief Executive Officer of Customs* [2002] AATA 705.

75 See the discussion in H Esmaeili, *The Legal Regime of Offshore Oil Rigs in International Law*, Ashgate/Dartmouth, England, 2001, 103-107.

76 D Widdowson, 'Intervention by Exception: A Study of the Use of Risk Management by Customs Authorities in the International Trading Environment', *Doctor of Philosophy Thesis*, University of Canberra, 2003, 227.