

AZIMUTH

ADVISORY

Implementing International Law into Australian National Law: The Case of International Criminal Law and International Space Law



Legal Studies Information Night

Steven Freeland

Emeritus Professor, Western Sydney University

Professorial Fellow, Bond University

Co-Principal, Azimuth Advisory

23 August 2021

Relationship Between International Law and National Law

- How does International Law become a part of National Law?
- The distinction between the 'Monist' and 'Dualist' approaches
- The 'incorporation' and 'transformation' theories
- Australia:
 - Customary International Law 'influential' but not binding in domestic law – a 'source' of national law
 - Treaties – require transformation (implementation) – but still may raise 'legitimate expectation' or 'legitimate influence'

-
- Accountability for ‘international crimes’ that ‘deeply shock the conscience of humanity’
 - (Largely) directed towards accountability for individuals
 - Enforced through established mechanisms of international criminal justice

-
- (current) Crimes within mandate of the International Criminal Court (agreed in 1998):
 - Genocide
 - intention to destroy all or part of a national, ethnic, racial or religious group, as such
 - Crimes Against Humanity
 - widespread or systematic attack on any civilian population
 - War Crimes
 - breach of Geneva Conventions / laws and customs of armed conflict
 - Aggression – 2010 definition

-
- ***War Crimes Act 1945 (Cth)***
 - Violations of laws and usages of war
 - committed against Australians / allies since 1/9/1939
 - allowed for post WWII trials (military courts)
 - 310 trials of approximately 1000 people between November 1945-April 1951
 - ***War Crimes Amendment Act 1988 (Cth)***
 - War Crimes
 - committed in war in Europe 1/9/1939-8/5/1945
 - by Australian citizens / residents
 - domestic courts – due process
 - 3 prosecutions - including *DPP v Polyukhovich* (1991)
 - Special Investigation Unit disbanded 1992
 - renewed calls for domestic trials
 - ***International War Crimes Tribunals Act 1995 (Cth)***
 - implementing legislation for ICTY / ICTR
 - ***International Criminal Court Act 2002 (Cth)* and *International Criminal Court (Consequential Amendments) Act 2002 (Cth)***
 - both implementing legislation following ratification of Rome Statute (1/7/2002)
-

- ***International Criminal Court Act 2002 (Cth)***

- principal object – ‘to facilitate compliance with Australia’s obligations’ under the Rome Statute
- ‘does not affect the primacy of Australia’s right to exercise its jurisdiction’ over crimes that are within jurisdiction of ICC
- deals with requests for co-operation, arrest, surrender and assistance made by ICC
- Provides for:
 - Investigations/sittings of ICC in Australia
 - Enforcement in Australia of ICC reparation orders / fines
 - Forfeiture of proceeds of international crimes in Australia
 - Enforcement in Australia of sentences imposed by ICC
 - Requests by Australia to ICC
- Attorney-General must/may postpone/refuse request by ICC for co-operation/arrest/surrender/assistance where:
 - conflict with Australia’s obligations under international law or Art 98 Agreement unless waiver/consent by appropriate non-party foreign State
 - information/documents requested by ICC provided by non-party foreign State (or IGO/IO) under confidentiality unless consent
 - where co-operation/disclosure of information/documents would prejudice Australia’s national security interests

-
- ***International Criminal Court (Consequential Amendments) Act 2002 (Cth)***
 - jurisdiction of ICC 'complementary to the jurisdiction of Australia'
 - *International Criminal Court Act 2002* 'does not affect the primacy of Australia's right to exercise its jurisdiction' over crimes that are within jurisdiction of ICC (Division 268)
 - confirms Rome Statute regarding:
 - command responsibility
 - defence of superior orders
 - confirms application of double jeopardy
 - other necessary amendments to various Acts
 - creates crimes within jurisdiction of ICC as crimes in Australia (Division 268 ***Criminal Code Act 1995 (Cth)***)
 - Genocide
 - Crimes Against Humanity
 - War crimes
 - Crimes against the administration of the justice of the ICC
-

Space is Multi-Faceted and Ubiquitous

→ This Requires a Holistic Approach to Space Governance

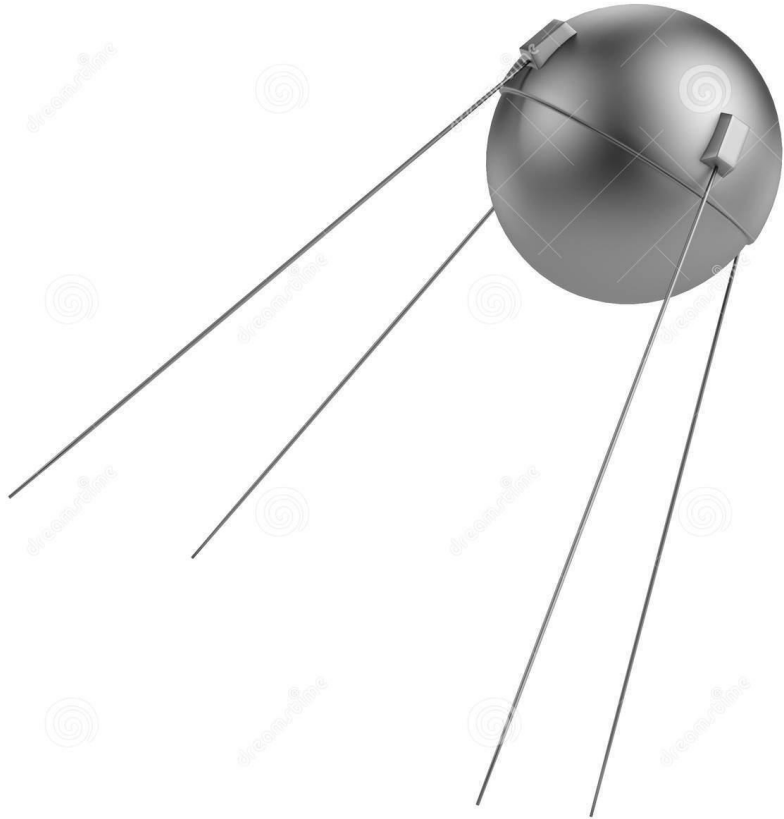
We need to hear all of these 'voices'

- Political
- Military / National Security
- Commercial
- Legal
- Scientific
- Exploratory
- Civil
- Cultural
- Religious
- Heritage
- Other?

→ inextricably linked to human rights and the future of humanity



What / Where is Outer Space? (at least for purposes of space law)



- Sputnik 1 – ‘instant’ customary law?
 - Implications for Regulation
 - Territorial / Jurisdictional issues
 - Definition? / Delimitation?



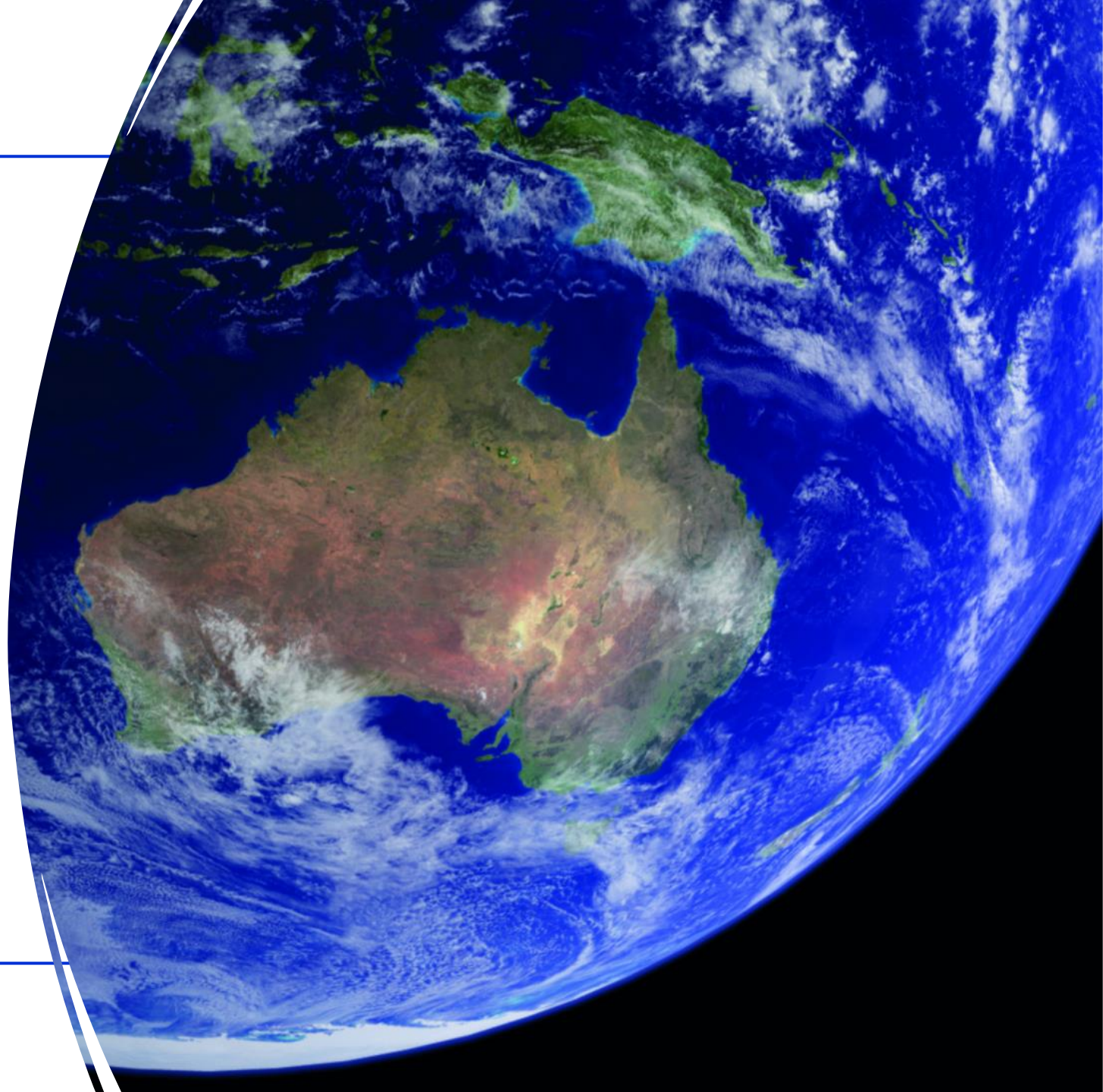
There is Already a Lot of Important International Space Law!

- Outer space is not a 'lawless' frontier
- Customary International Law 1957-1967
- UNGA Resolutions 1960s - major points reflected in a series of United Nations Treaties
- UN Treaties – through auspices of UNCOPUOS
 - ☐ **Outer Space Treaty (1967)**
 - ☐ **Rescue Agreement (1968)**
 - ☐ **Liability Convention (1972)**
 - ☐ **Registration Convention (1975)**
 - ☐ **Moon Agreement (1979)** - 'rejected' by major industrialised powers → inability to agree on further treaties
- 1980s →
 - UNGA Principles - Increasingly complemented by 'hard' and 'soft' law guidelines – including TCBMs
 - emergence of **national law** (approximately 30-40 States and counting ...)

Where does Australia stand?

Australia ...

... is a party to all five major
UN Space Treaties

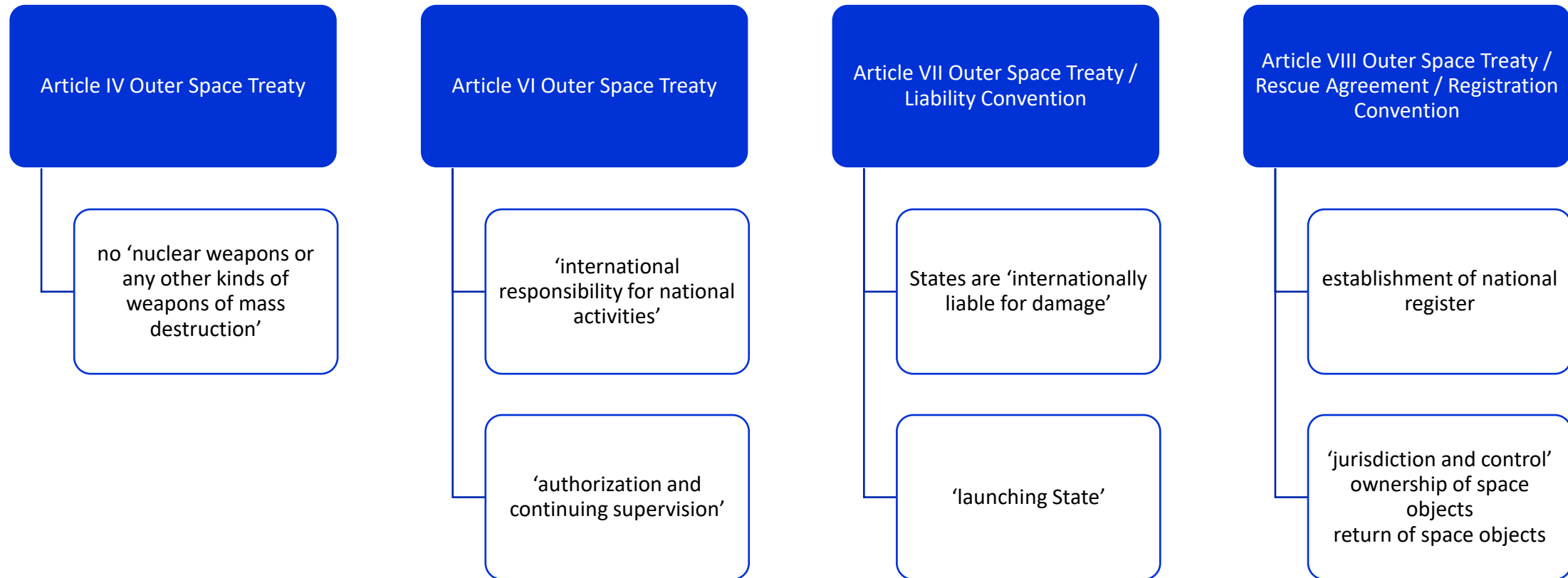


Other (non-Treaty) Elements of the International Regulatory Framework

- Legal Principles Declaration (1963)
 - Direct Broadcast Principles (1982)
 - Remote Sensing Principles (1986)
 - Nuclear Power Source Principles (1992)
 - enhanced by UNCOPUOS / IAEA Safety Frameworks (2009)
 - Developing Countries Declaration (1996)
 - IADC (2002) / **UN Space Debris Mitigation Guidelines (2007)**
 - 'Launching State' Resolution (2004)
 - Registration Resolution (2007)
 - **National Legislation Resolution (2013)**
 - PAROS Resolutions (various)
 - TCBM Resolutions (various) including GGE Report (2013)
 - **LTS Guidelines (2019)**

International Space Law: Implications for National Space Legislation

- Implementation of international (treaty) obligations and 'soft law' guidelines / standards - but also
- The advent of non-Governmental (private) activities in outer space → the increasing 'commercialization of space':
 - not bound by Space Treaties
 - control / regulation by State with jurisdiction over private activities



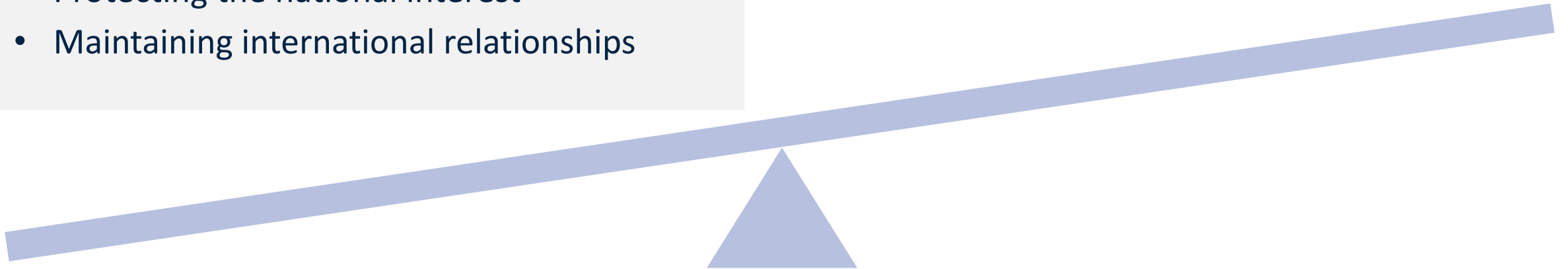
National Regulation of space activities: Getting the balance right

Protecting the State – licensing space activities

- Complying with international obligation to supervise and authorise
- Ensuring safety of activities
- Requiring insurance or contractual measures to protect the State against 3rd party claims
- Protecting the space environment
- Protecting the national interest
- Maintaining international relationships

Encouraging local space industry

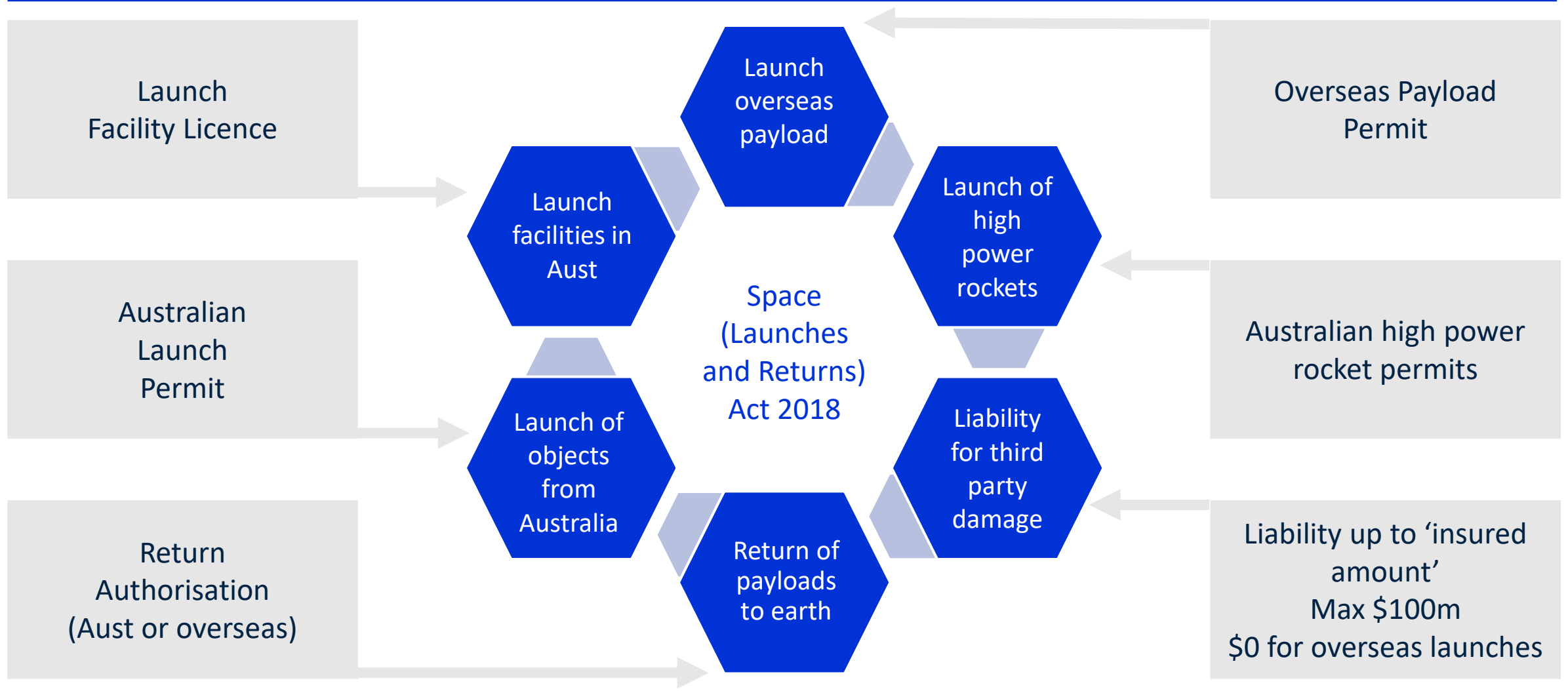
- Low barriers to entry
- Industry friendly jurisdiction
- Streamlined licensing – no delay
- Easy to understand laws
- Pointing the way to best practice



The Australian Experience: Reform of Existing Legislation

- *Space Activities Act 1998*
 - background history
 - principle motivation ...
 - application in practice
- Emerging / changing nature of industry
 - calls for reform
 - reform process
- → Amended legislation: *Space (Launches and Returns) Act 2018*
(in force August 2019)

Regulation of Australian Space Activities





AZIMUTH

A D V I S O R Y

Thank you!

sfreeland@azimuthadvisory.com.au

s.freeland@westernsydney.edu.au

sfreelan@bond.edu.au