OFFSHORE JURISDICTION AND SOVEREIGNTY

PROLOGUE

By force of circumstances this paper has become more a narrative than a critical analysis.

In the international field the law of the sea is undergoing what can only be described as rapid and substantial change. In the domestic field, the fourteen bills designed to give effect to the offshore constitutional settlement reached last year between the Commonwealth and the States were introduced into Federal Parliament while this paper was being written.

This called for a redrafting of the paper to record these developments. Because of the deadline to be met for printing and distribution, any analysis of the constitutional strengths and weaknesses of the legislation must await the Conference.

OFFSHORE JURISDICTION AND SOVEREIGNTY

by The Hon. G. Clarkson, Q.C.*

The question "who owns the sea?" has intrigued men since they started sailing on it. With the discovery of the New World and the countries of the Pacific the subject assumed great political and economic importance in the late 16th and early 17th centuries. From about the beginning of the 14th century, England had claimed jurisdiction over the seas which washed her shores and at least from the beginning of the 16th century Portugal and Spain with Papal authority claimed the exclusive right respectively to the seas around South Africa and the East Indies and the seas around America.

The Dutch who were endeavouring to open up trade with the East Indies disputed these claims and the argument for freedom of the sea was put by the Dutch jurist Hugo Grotius in "Mare Liberum".

Although this work was written to refute the claims of Spain and Portugal the same arguments could be used against the claim by England to the seas around her and the English lawyer and scholar John Selden wrote his "Mare Clausum" in answer.

Grotius referring to the Portuguese claim said "the question at issue then is not one that concerns an inner sea . . . the question at issue is the outer sea, the ocean, that expanse of water which antiquity describes as the immense, the infinite, bounded only by heavens, parent of all things; the ocean which the ancients believed was perpetually supplied with water not only by fountains, rivers and seas but by the clouds and by the very stars of heaven themselves; the ocean which although surrounding this earth, the home of the human race, with the ebb and flow of its tides, can be neither seized nor enclosed; nay, which rather possesses the earth than is by it possessed."[1]

In answer to the argument of Grotius that the high seas were open to all Selden argued first "that by the law of nature or nations the sea is not common to all men but capable of private dominion or property as well as the land". Second, "that the King of Great Britain is Lord of the Sea flowing about as an inseparable and perpetual attendant of the British Empire".

In his dedication of the work to Charles I, Selden said "there are among foreign writers who rashly attribute your Majesty's more southern and eastern seas to their princes. Nor are there a few who following chiefly some of the ancient Caesarian lawyers endeavour to affirm or beyond reason too easily admit that all seas are common to the universality of

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1. *The Freedom of the Seas: Carnegie Endowment for International Peace.* Oxford University Press, 1916, p. 37.

mankind".[2] The same source comments "It is like all the works of Selden replete with learning; but in this case the propositions in support of which that learning is used are so directly at variance with the most elementary rights of men that the learning was wasted."

In due course there emerged the compromise solution that the jurisdiction of a coastal State extended seaward for a distance which marked the maximum effective range of land-based weapons and beyond that were the high seas. Although this concept of the territorial sea was expounded early in the 18th century, there has never been general acceptance of a common width. Many countries including Great Britain and the United States of America have until now adopted the limit of three nautical miles—a marine league, but other countries claim a four, six, nine or twelve mile limit and a general move to a twelve mile limit seems likely.

In the last 50 years substantial changes have occurred in internationally accepted rules in respect of the relationship of a coastal State to its offshore waters and the rights and duties of that State in relation to those waters, their seabed and the living and non-living products of both.

Man has come to appreciate that the products of the sea and seabed are not inexhaustible and that care and planning is necessary in their management and harvesting.

The increasing demand for these products resulting from an increase in world population and higher standards of living in some countries is being met by the use of vastly improved harvesting methods such as submarine drilling and deep sea trawling which enable not only a more efficient recovery rate but the harvesting of areas previously inaccessible.

The danger is that modern technology enables areas with renewable resources which traditionally produce food and wealth to be stripped to such an extent as to jeopardise any real renewal.

The realisation of the possible dangers led the United States of America in 1945 to declare it would in future exercise jurisdiction and control over the natural resources of the subsoil and seabed of the continental shelf beneath the high seas contiguous to the United States of America.[3]

This was the commencement of a move by coastal nations to claim exclusive use of large areas of the sea and seabed contiguous to the land mass. For instance, in 1946 Chile and Peru made claims for exclusive use of offshore fishing resources to a distance of 200 miles.

In 1953 Australia by proclamation declared sovereign rights over the seabed and subsoil of the continental shelf contiguous to its coasts and the coasts of territories under its authority.[4]

2. *Dictionary of National Biography*, Selden.
3. Hingorani, "Modern International Law", p. 63.
4. See (1953) 27 A.L.J. 458.

Law of the Sea Conferences

An outstanding attempt to rationalise national interests in the seas has been made at a number of conferences established by the United Nations on the law of the sea.

The first conference in 1958 drew up four conventions.

The Territorial Sea Convention (*Seas & Submerged Lands Act* 1973, Sched. 1) recognised the sovereignty of a State over the territorial sea although no agreement was reached on the breadth of the territorial sea.

Secondly, the High Seas Convention called for freedom of navigation, fishing, overflight and freedom to lay cables in the high seas and stated that no State may subject any part of the high seas to claims of sovereignty.

The third Convention recognised the special claims of coastal States in the conservation of living resources in those parts of the high seas contiguous to the territorial sea.

The fourth Convention (*Seas and Submerged Lands Act* 1973, Sched. 2) which is of considerable commercial importance recognised the coastal States' rights to explore and exploit the continental shelf which was defined as the submarine areas adjacent to the coast out to a depth of 200 metres or beyond that limit "to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas" (Article 1).

Although as stated earlier there was no agreement in the Territorial Sea Convention as to the breadth of the territorial sea, it is argued that a maximum breadth appears to have been impliedly fixed by a decision relating to what is known as the contiguous zone.

The 1958 Conference confirmed a contiguous zone extending not more than 12 miles from the baseline of the territorial sea. In that area the coastal State can take what steps are necessary to prevent breaches of its laws relating to various matters including immigration and customs. Since this zone is a zone of the high seas contiguous to the territorial sea it can be argued that the breadth of the territorial sea cannot in any circumstances exceed 12 miles.

The provision that the continental shelf may extend so far as the depth of water permits exploitation has caused some misgivings. Theoretically the continental shelf of a coastal State may expand as its technological expertise to exploit the seabed in deeper waters increases.

The second Law of the Sea Conference was held in 1960. It also failed to define the breadth of the territorial sea or to solve existing problems regarding fisheries.

The third United Nations Conference on the Law of the Sea commenced in 1974 and still continues. The conference is in its ninth session which adjourned in New York on the 4th April, 1980, and is to resume in Geneva on the 28th July, 1980. For some, progress is slow, but it should be recognised that progress has been substantial.

Admittedly there are important problems still unresolved but the development of a negotiating text of over 300 articles with 7 annexures which can form the basis of a draft treaty is an outstanding achievement.

This comprehensive text deals with the rights and obligations of States using the sea for various purposes including navigation and research and lays down rules for the reasonable and proper exploitation of the sea and its bed and the protection of the marine environment.

For about three centuries the law of the sea was reasonably stable. States recognised a territorial sea which was part of the territory of the coastal State, and a contiguous zone which extended beyond the territorial sea. Beyond the contiguous zone lay the high seas which were free to all nations.

For the purpose of allocating national jurisdiction the United Nations Conferences have distinguished between the territorial sea and the contiguous zone both of which are the subject of the Territorial Sea Convention drawn up by the 1958 Conference, the continental shelf, an exclusive economic zone, the high seas and the deep seabed.

As already mentioned, the territorial sea, the contiguous zone and the high seas were familiar concepts.

The continental shelf comprises the seabed and subsoil of the natural prolongation of the land mass beyond the territorial sea. The coastal State has sovereign rights over all the resources of this part of the seabed and subsoil. These rights, as opposed to the complete dominion of sovereignty are exercised for the purpose of exploring the continental shelf and exploiting its natural resources[5] and do not affect the legal status of the high seas and air space above the shelf.[6]

The exclusive economic zone is an area comprising neither the territorial sea nor the high seas extending to 200 nautical miles from the coast. The coastal State has exclusive rights over the living resources of the water and all resources of the seabed and subsoil.

The deep seabed is the area beyond the continental shelf and the exclusive economic zone. No State may claim sovereignty over the resources of the seabed or subsoil of this area which with outer space is "the common heritage of mankind".

Some of the developments during the third United Nations Conference deserve special mention. I have already referred to a weakness which some saw in the method of defining the continental shelf, the limits of which could vary with the coastal States' ability to exploit it. A current proposal which appears likely to be accepted is that the limit of the continental shelf should be 150 nautical miles beyond the 200 nautical mile economic zone or 100 nautical miles beyond the 2,500 metre isobath, with the coastal State being free to use either formula in a particular area.

5. Convention on the Continental Shelf, Article 2. See Sched. 2 to the *Seas & Submerged Lands Act* 1973.
6. Articles 3 and 4. See also the *Submerged Lands* case (1975) 135 C.L.R. 337, Barwick C.J., at p. 364.

There appears also to have been considerable progress with plans for the exploitation of the deep seabed.

An International Seabed Authority is proposed. This body would control the Enterprise, an international mining body formed to recover mineral from the deep seabed.

What is called a "parallel system" is proposed whereby States and their nationals will be able to mine in areas of the deep seabed at the same time as Enterprise.

This proposal has been complicated by discussions relating to the financing of the authority and the need for a production control formula to give protection to the present land-based production of minerals.

Australia and Other Nations

Among the problems not yet resolved is the method of defining the maritime boundaries of neighbouring and opposite States.

At the South Pacific Forum in Port Moresby in August 1977, Australia joined her Pacific neighbours in the Port Moresby Declaration providing for the extension of the maritime jurisdiction of members to 200 miles. Pursuant to this agreement Australia established its 200 nautical mile fishing zone on the 1st November, 1979.

The expansion of the maritime boundaries of Australia and her neighbours has led to the need for a number of adjustments.

In March of this year Indonesia declared an exclusive economic zone of 200 miles adopting the wording of the text now being negotiated in the third United Nations Conference. Indonesia claims for that zone "sovereign rights for the purpose of exploring and exploiting, managing and conserving, living and non-living natural resources of the seabed and subsoil and the superjacent waters".

The Indonesian Declaration preserved existing international agreements and stated the Government's willingness to negotiate with any adjacent or opposite State for whom the declaration posed a problem of delimitation.

The seabed boundaries in the Arafura and Timor seas between Indonesia and Australia are already settled and negotiations regarding the remaining areas, principally the area directly south of East Timor are proceeding.

The negotiations also cover the delimitation of fisheries jurisdiction. Australia has proposed the median line as the limit whilst Indonesia contends that in determining that line too much significance has been attached to the Ashmore and Cartier Islands.

The Torres Strait Treaty between Papua New Guinea and Australia has put at rest problems which have existed for many years. Very briefly the Treaty has provided:

(a) a seabed resources delimitation line;

(b) a line delimiting swimming fisheries resources which follows the seabed resources line except that it runs to the north of the three inhabited Australian islands of Boigu, Danan and Saibai; and

(c) in the Torres Strait itself a protected zone is established in which traditional activities of fishing and movement of Torres Strait Islanders and Papua New Guineans who live in adjacent areas are preserved. There will be an embargo on the mining and oil drilling of the seabed of the protected zone for at least ten years.

The Treaty contains many other provisions to ensure the preservation of the marine environment, the management and conservation of fisheries resources, the protection of flora and fauna and the prevention and control of pollution.

Agreements in relation to the adjustment of 200 nautical mile limits are to be negotiated with the Solomon Islands, France and New Zealand.

Commonwealth-State Relations

The foregoing pages contain a brief survey of relevant developments in the international field and I turn now to consider developments in Australia.

The changes in international practices will be translated in a way which suits the Australian situation but in addition, there are three other factors which should be recognised.

Firstly, the competition and tensions arising from the division of powers in a federal system add a new dimension to the changes in that if a new right or obligation prescribed by international law is to be accepted at municipal level a further decision must be made whether that acceptance is to be by the States or by the Commonwealth or by both.

Secondly, the use of sophisticated techniques developed overseas and the importation of foreign risk capital permit fields of marine and submarine exploitation not previously practicable and not seriously contemplated by those who drafted the Australian Constitution.

Thirdly, quite apart from domestic changes needed to meet changes in international law, there has been since federation what appears as a substantial re-allocation as between the States and the Commonwealth of powers and jurisdiction relating to the sea, culminating in the decision of the High Court of *New South Wales* v. *The Commonwealth* (the *Submerged Lands* case).[7] This decision has been followed by legislation now before the Federal Parliament which will have even more profound effects on the division between States and Commonwealth of powers relating to the sea and seabed.

A convenient starting point for the review is the *Pearl Shell Fishing Acts* 1885 and 1886 of Queensland and Western Australia respectively. The Western Australian Act endeavoured to control the operations of foreign vessels in the pearl shell fisheries on the northern coast of Western Australia. At that time the prevailing view, concurred in by the Law Officers of the Crown, was that a colonial legislature could not pass legislation to operate beyond the 3 mile zone. Instructions were sent to the Governor that

7. (1975) 135 C.L.R. 337.

no attempt should be made "to enforce the law against any vessels which remain more than 3 miles from the coast and fish beyond that distance and do not come into colonial waters except to obtain supplies or for other purposes".

The instruction went on—"to state the position briefly this Act like any other colonial law cannot be applied more than 3 miles from the coast and if it is necessary to regulate the pearl shell fishery as carried on beyond that limit, it will be necessary to have recourse to the Federal Council".

This led to the introduction in 1889 in the Federal Council of the Western Australian Pearl Shell and Beche de Mer Fisheries (Extra-Territorial) Bill which proceeded on the assumption that the three mile zone was Western Australian territory.

The Act relating to Western Australia, for instance, recited that by certain Acts of the Legislative Council of Western Australia provision had been made for regulating the pearl shell fishing in the territorial waters of the Colony and that vessels employed in the fishing were sometimes within and sometimes beyond the territorial jurisdiction of Western Australia.

At the constitutional conventions leading to the drafting of the Australian Constitution, Sir Edmund Barton expressly accepted the view that "every State has the right to legislate as to its own fisheries within the territorial limits of three miles".

In 1891 the Judicial Committee in *McLeod* v. *Attorney-General (New South Wales)*[8] speaking of the jurisdiction of colonies such as New South Wales to enact laws having extra-territorial effect said "their jurisdiction is confined within their own territories . . . all crime is local. The jurisdiction over the crime belongs to the country where the crime is committed and except over her own subjects Her Majesty and the Imperial Legislature have no power whatever."

At the turn of the century Australian lawyers would have accepted, probably without question, that the 3 mile zone belonged to the Colony and marked the limit of the area within which colonial legislation could operate. In fact, in the years following Federation both these propositions have been shown to be wrong.

The effect of the majority decision in the *Submerged Lands* case is to declare that the boundaries of the Australian colonies ended at low-water mark and that they at no stage had what might be called a territorial sea. The Commonwealth's claim that the territorial sea was within the sovereignty of the Commonwealth which also had sovereign rights in the continental shelf was upheld.

The territorial restriction apparently placed on colonial legislation by *McLeod's* case was eased in *Croft* v. *Dunphy*[9] in which the Judicial Committee upheld the validity of a Canadian Act which provided for the seizure for breach of custom laws of a vessel found within 12 miles off the coast.

8. [1891] A.C. 455.
9. [1933] A.C. 1567.

The Committee said "It may be accepted as a general principle that States can legislate effectively only for their own territories. To what distance seaward the territory of a State is to be taken as extending is a question of international law upon which their Lordships do not deem it necessary or proper to pronounce. But whatever be the limits of territorial waters in the international sense, it has long been recognised that for certain purposes, notably those of police, revenue, public health and fisheries, a State may enact laws affecting the seas surrounding its coast to a distance seaward which exceeds the ordinary limits of its territory."[10] Where the legislation is to operate not within the boundaries of another State or Territory the test may be different.[11]

It is difficult to escape the logic of the argument of Gibbs J. in *Pearce's* case that no rational purpose is served by holding the law of a State cannot validly operate within its offshore waters. However for the purposes of this paper, it is sufficient to say that subject to the limits laid down by *Pearce's* case and *Robinson's* case, each State has power to pass legislation having extra-territorial effect in its own off-shore waters.

An account of the relevant constitutional developments would not be complete without mention of the existing legislation relating to the search for and winning of petroleum products in submerged lands.

This concurrent and complementary legislation of the Commonwealth and the States was designed not only to avoid the constitutional doubts which had by then arisen but also to provide a common mining code for the States for all offshore waters.

In effect authority to explore for and to exploit petroleum products is granted under both the Commonwealth and the relevant State Act which are said to "mirror" each other and were expressed to apply to the whole of the continental shelf as defined in the 1958 Convention on the continental shelf.

Australia was not the only federation in which differences arose regarding the respective rights of the central and State governments in the seabed and its contents under the territorial sea. In both the United States and Canada it was held that the States' interest ceased at low-water mark.[12] The political solution adopted in the United States was to transfer the territorial seabed to the seaboard States but to leave mining on the continental shelf in the hands of the Federal Government.

Following the passage of the *Seas and Submerged Lands Act* 1973 and the challenge to that legislation in *N.S.W.* v. *Commonwealth*[13] the High Court as previously mentioned, upheld that Act's assertion of sovereignty

10. Op. cit. See also *Trustees Executors and Agency Co. Ltd.* v. *Federated Commissioner of Taxation* (1933) 49 C.L.R. 220; *Broken Hill South Ltd.* v. *Commissioner of Taxation (N.S.W.)* (1936) 56 C.L.R. 337.
11. See *Pearce* v. *Florenca* (1975) 135 C.L.R. 507 and *Robinson* v. *Western Australian Museum* (1977) 138 C.L.R. 283.
12. *U.S.* v. *California* 332 U.S. 19; *U.S.* v. *Louisiana* 339 U.S. 699; *U.S.* v. *Texas* 339 U.S. 707 [1967] S.C.R. 792 and [1947] S.C.R. 792.
13. (1976) 135 C.L.R. 337.

on the part of the Crown in right of the Commonwealth over the territorial sea and its seabed and of sovereign rights over the continental shelf.

Notwithstanding that decision, the High Court in *Pearce* v. *Florenca*[14] upheld the validity of State legislation relating to fisheries in the territorial sea.

For many people this situation was unsatisfactory. Apart from the fact that it became the core of the political argument between centralists and State-righters there were some uncertainties.

Not the least was to determine exactly what was meant by the sovereignty and sovereign rights which had been established. Barwick C.J. in the *Submerged Lands* case said:[15]

> Sovereignty is a word, the meaning of which may vary according to context. The same may be said of "Sovereign rights".

The test of State legislative competence in relation to any offshore waters, including the territorial sea, is uncertain. It is generally accepted that there must be a nexus between the State and the subject matter of the legislation. To Gibbs J. in the *Submerged Lands* case[16] it was sufficient that the legislation was to operate in the offshore waters of the State, but this test would clearly be unacceptable to Barwick C.J.:

> [State] laws must first be seen to be laws which are for the peace order and good government of the State and thereafter when they answer that criterion they may operate extra-territorially so long as the extra-territorial operation is still something which can be said to be for the peace order and good government of the State.[17]

Even if the test of State competence were clarified, difficulties would still exist with State legislation intended or presumed to operate within State territory. If the boundary were the low water mark with wharves and other port installations, break-waters, sewerage and waste outlets and even bathers all beyond that boundary many uncertainties might arise which would not if the territorial sea was territory of the State, for there are few installations beyond the limit of the territorial sea.

At the same time doubts arose as to the extent to which Commonwealth legislation dealing with matters below low water mark might operate inshore from that mark. Murphy J. in the *Submerged Lands* case[18] said:

> External affairs may also be internal affairs; they are not mutually exclusive. For example, control of traffic in drugs of dependence, diplomatic immunity, preservation of endangered species and preservation of human rights may be external affairs as well as internal.

These doubts would not arise as often if they relate to the unoccupied area of the territorial sea.

14. (1976) 135 C.L.R. 507.
15. Ibid., at p. 364.
16. Ibid.
17. *Robinson's* case (1977) 138 C.L.R. 283, at pp. 294-5.
18. Ibid., at p. 503.

Negotiations between the Commonwealth and the States led ultimately to the agreement completed at the Premiers' Conference of th 29th June, 1979, for the settlement of the offshore constitutional issues.

The terms of the agreement as published by the Attorney-General's Department[19] are extensive. In addition to the subject matter of the proposed legislation referred to in this paper a number of agreements on other matters have been agreed. These include agreements regarding the offshore mining of minerals other than petroleum, the historic shipwrecks off the Western Australian coast, the continued application of the *Great Barrier Reef Marine Park Act* 1975 to the whole of the Great Barrier Reef Region, other marine parks, shipping and navigation and marine pollution caused by ships.

On the 23rd April, 1980, fourteen bills were introduced into the House of Representatives which it is said, with the *Crimes at Sea Act* 1979, which came into force on the 1st November, 1979, give effect to the agreement. It is to this and earlier State legislation which I now turn.

The legislation may conveniently be dealt with in five groups:

1. Preparatory State legislation;
2. Crimes at Sea;
3. *Petroleum (Submerged Lands) Act*;
4. State Powers, State titles; *Sea & Submerged Lands Act*;
5. Later State Legislation.

Preparatory State Legislation

The method selected to give effect to the Commonwealth & State agreement of June 1979 is one provided for in s. 51 (xxxviii) of the Constitution which reads:

> The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia.

Each State passed an Act, the *Constitutional Powers (Coastal Waters) Act*, requesting the enactment by the Parliament of the Commonwealth of an Act substantially in the terms of a Bill set out in the Schedule to each State Act. That Bill is in the form of a Coastal Waters (State Powers) Bill 1979 now proposed by the Commonwealth Parliament pursuant to the request of the States.

The State Powers legislation as requested by the States gives to the States the same legislative power with respect to the adjacent territorial sea and its seabed and air space as the State would have if those waters were within the limits of the State. There is an extension of the power to cover, beyond the three mile territorial sea, subterranean mining from land and also the construction of ports and harbours and other works.

19. Offshore Constitutional Settlement Australian Government Publishing Service, 1980.

There is also proposed a power to a State to make fishery laws for Australian waters beyond the territorial sea where the Commonwealth and that State have agreed that the fisheries concerned should be managed under State law.

There was no request for action unler s. 51 (xxxviii) of the Constitution in respect of any of the other amendments agreed to at the Conference.

Crimes at Sea

The *Crimes at Sea Act* 1979 which came into effect with the 200 nautical mile fishing zone on 1st November, 1979, represents the first step in implementing the Commonwealth-State agreement. It may well prove to be the least controversial of the enactments giving effect to the agreement.

R. v. *Bull*[20] and *R.* v. *Oteri*[21] demonstrated that the jurisdiction of an Australian court to try some extra-territorial offences depended on Imperial legislation. The *Crimes at Sea Act* changes this position and at the same time resolves a number of difficulties. It does not affect the extra-territorial effect of specific Commonwealth legislation such as the *Customs Act* in respect of offences under that Act.

The general scheme is that offences committed in the territorial sea or on intrastate voyages are covered by State criminal law. The Commonwealth legislation in the form of this Act covers the remaining cases, for example, offences committed on a ship beyond the territorial sea. Such offences are covered by applying the criminal law of the State with which the ship is connected by registration or otherwise and offences committed on oil rigs or similar places beyond the territorial sea by applying the criminal law of the adjacent State.

The Petroleum (Submerged Lands) Act

This has already been described briefly. The "mirror" legislation designed to avoid the constitutional doubts which existed in the 1960's has been replaced by a scheme whereby State legislation will apply within the territorial sea and Commonwealth legislation will apply beyond that limit.

All mining beyond the territorial sea will be under the jurisdiction of Joint Authorities consisting of the appropriate Commonwealth and State ministers. The views of the former will prevail in the case of disagreement. The use of common mining codes in all areas and the present sharing of royalties will continue.

Commonwealth action required by the agreement is embodied in the Petroleum (Submerged Lands) Amendment Bill 1980 and its five subsidiary Bills dealing respectively with royalties and fees relating to exploration permits, production licences, pipeline licences and registration.

Preambles are unusual in modern statutes. The amending Bill contains a preamble of about a page reciting inter alia that part of the agreement which relates to the *Petroleum (Submerged Lands) Act* 1967.

20. (1974) 131 C.L.R. 203.
21. (1977) 51 A.L.J.R. 122.

The Commonwealth-State agreement includes an obvious compromise relating to the breadth of the territorial sea the States will control.

For the purposes of both the State Powers Bill and the State Titles Bill the territorial sea is restricted to the three nautical mile limit notwithstanding any seaward extension, as appears likely, of the breadth of the Australian territorial sea.

However, this restriction has been appreciably balanced by the agreement that the base-lines of the territorial sea shall be the "straight base lines" and 24 mile closing lines of bays provided for in the 1958 Convention. This will increase the amount of landward waters the States will control.

A further point not previously noted is that to protect the validity of the Bill, cl. 7 provides inter alia that nothing in the Bill should be taken to extend the limits of any State. (See s. 123 of the Constitution.)

The Coastal Waters (State Title) Bill will no doubt prove to be controversial.

Clause 4 (i) of the Bill reads:

> By force of this Act, but subject to this Act, there are vested in each State, upon the date of commencement of this Act, the same right and title to the property in the seabed beneath the coastal waters of the State, as extending on that date, and the same rights in respect of the space (including space occupied by water) above that seabed, as would belong to the State if that seabed were the seabed beneath waters of the sea within the limits of the State.

The acting Attorney-General when introducing the Bill said "It is one of the major elements of the history-making off-shore constitutional settlement between the Commonwealth and all the States". He continued—"As the Prime Minister has already observed in dealing with the Bill extending State powers in the offshore area, the present Bill by conferring rights of ownership on the States will support the grant of legislative powers to the States in the offshore area and provide an assurance to the States that the settlement will have permanency and stability."

The Minister also made the point that Commonwealth sovereignty extends right into low water mark "and will continue to do so" but that one major problem thus created related to the States' power to grant proprietary rights in the territorial sea even for "such obvious matters as wharfs and jetties".

The Acting Attorney after referring to the reservations contained in cl. 4 (2) (b) said " I should add that the Commonwealth will continue to be able, by virtue of its subsisting sovereignty and its specific legislative powers, to acquire the seabed of the territorial sea for other national purposes as occasion requires in much the same way as it can acquire property at present on dry land within the limits of a State."

At least two aspects warrant further examination.

The first is the statement that by conferring "rights of ownership" on the States, the Bill will support the grant of legislative power to the States.

The grant by s. 4 (1) of the State Title Bill relates to:

(a) Right and title to the property in a defined part of the seabed below coastal waters.

(b) Rights in respect of the space occupied by water above that part of the seabed.

(c) Rights in respect of the space not occupied by water above that part of the seabed.

The grant by s. 5 of the State Powers Bill is of legislative power to make laws relating to:

(a) A defined part of coastal waters.

(b) The seabed and subsoil beneath that part of those waters.

(c) The airspace above that part of those waters.

There may be some good reason for this difference in approach but in any event it seems reasonably clear that, applying the tests discussed in *Pearce's* case and *Robinson's* case the grant of right and title to the property in the particular part of the seabed and of rights in respect of the space above that seabed occupied by water and air must go to reinforce the bare grant of legislative power in s. 5 of the State Powers Bill.

However, these provisions are equally effective in supporting the permanency and stability of which the Acting Attorney spoke. The right and title conferred might well be property the acquisition of which in the future pursuant to Federal legislation could only be effected "on just terms" (s. 51 (xxxi) Constitution). Indeed this seems to be the view of the Attorney-General of Victoria who when introducing that State's Constitutional Powers (Coastal Waters) Bill said of the Commonwealth State Titles Bill "that measure is regarded as a safeguard as any subsequent expropriation will be subject to the payment of compensation under the Constitution".

The remaining Bill under this heading is the Seas and Submerged Lands Amendment Bill. The effect of s. 16 (b) of the existing Act is to strike down any State law which is expressed to vest or make exercisable any sovereignty or sovereign rights otherwise than as provided in the Federal Act.

The legislation at present proposed extends a State's legislative power into the territorial sea. The proposal is to amend the *Seas and Submerged Lands Act* so that a State law concerning that part of a seabed within the sovereignty of the Commonwealth, but proprietary rights in respect of which have been vested in a State, is not struck down.

Later State Legislation

Finally, later State legislation has been or will be passed, pursuant to the Commonwealth-State Agreement, to supplement the Commonwealth legislation. This includes for instance legislation relating to crimes at sea within the territorial waters or on ships on intra-State voyages and relating to petroleum exploration and exploitation within territorial waters.

Australian Fisheries

Australia's offshore fisheries deserve a special mention. Australia has a coastline of approximately 20,000 km and a continental shelf of about 2 million sq. km, said to be the third biggest of such submarine areas in the world; but it is not in the first fifty fishing nations in terms of annual catch. Australian fisheries catch about one-thousandth of the world catch and employ only four per cent of the Australian workforce engaged in primary industry.

In considering the effect of the extension of the Australian fishing zone to 200 miles it should be borne in mind that no new resource is being opened up. Fish have been within the 200 mile zone all the time. It has not been economic for Australian fishermen to catch them and the proclaiming of the 200 mile zone does not affect that situation. In fact most important Australian fisheries are within 60 km of the coast. The immediate effect of extending the Australian Zone is to accept responsibilities for organisation and policing, the cost of which exceeds the fees paid by foreign fishermen.

Responsibility for fisheries in Australian waters has in the past been divided on the basis that the Commonwealth power in s. 51 (x) of the Constitution to legislate with respect to fisheries in Australian waters "beyond territorial limits" excluded the exercise of Federal powers in the territorial sea.

The Commonwealth *Fisheries Act* 1952 regulated fishing by Australians in the 200 mile zone and by foreigners within the 12 mile zone, in each case excluding the 3 mile territorial sea which remained under State control. At the same time the *Continental Shelf* (*Living Natural Resources*) *Act* 1968 (Cth.) covered the taking of living resources from the continental shelf beyond territorial limits by either nationals or foreigners.

In 1978 Australian jurisdiction over foreign fishermen was extended to the 200 nautical miles limit thus closing the Gulf of Carpentaria and the *Continental Shelf* (*Living Natural Resources*) *Act* was amended to prohibit the taking of sedentary organisms from the contental shelf by anyone for any purpose.

Under the Commonwealth-State agreement, the legislative powers of both Commonwealth and State will be applied to control a fishery by one set of laws and Fisheries Joint Authorities consisting of the Commonwealth Minister and the appropriate State Minister or Ministers will be established. It is suggested for instance that the northern prawn fishing might be managed by a Northern Australian Fisheries Joint Authority consisting of Ministers from the Commonwealth, Queensland and the Northern Territory. Foreign fishermen will continue to be subject to Commonwealth law.

New Zealand

The problems caused by recent changes in respect of the law of the sea have been more easily dealt with in New Zealand with its unitary system of government.

Under the *Territorial Sea and Exclusive Economic Zone Act* of New Zealand the territorial sea was extended to twelve miles and an exclusive economic zone of 200 nautical miles was proclaimed on 1st April, 1978.

The Scheme envisaged by the Act for fisheries came into operation without undue difficulty. The total allowable catch was calculated and apportioned between the New Zealand industry, joint ventures and those countries — U.S.S.R., South Korea and after some delay, Japan — who made agreements with New Zealand and recognised New Zealand's claim to the 200 mile exclusive economic zone. Surveillance was reasonably effective.

The experience of the first year's operations was summed up by an experienced fisheries consultant as follows:

> The first year of the 200 mile exclusive economic zone has brought an awareness that if there is too much fishing power released by New Zealand fishing vessels, joint venture projects and foreign licensed vessels, the resources may not provide catches that will sustain economic operation.
>
> By and large, the Government's decisions and requirements have been fair and reasonable, based on the amount of information available. Government officials have displayed a sense of responsibility in reappraising the position in the light of experience and new information, but it is hoped that satisfying the demands of foreign fishing nations for increased quotas will not over-rule the principles of economic fisheries management and the need for restrained fishing effort.[22]

Constitutional Problems

For the first time since Federation s. 51 (xxxviii) of the Constitution is being relied on to support Commonwealth legislation, namely the States Powers Bill.

The provision in full is:

> The Parliament shall, subject to this Constitution, have power to make laws for peace, order and good government of the Commonwealth with respect to: (xxxviii) the exercise within the Commonwealth, at the request or with the concurrence of the Parliament of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia.

Politically the important question regarding this provisions is whether a law passed by the Commonwealth pursuant to it may be repealed by the Commonwealth of its own motion or at the request of the States concerned or some of them.

A Commonwealth Act extending State legislative power over the territorial sea could presumably be supported by the external affairs power but any such Act could clearly be repealed by a later Parliament.

One might be excused for thinking that the reason placitum (xxxviii) has not been relied on before is because no one can be confident what it

22. J. Campbell "Australian Fisheries Bulletin", July 1979, p. 9.

means. Quick & Garran said it was difficult to see what power can be conferred on the Federal Parliament by the placitum.[23] Lumb and Ryan in a comment more extensive than that of most commentators adopt the view that the placitum is restricted to "that small class of matters excepted from State control or subject to manner and form requirements by force of Imperial legislation".[24]

Nettheim has suggested[25] that the effect of the Statute of Westminster and this placitum seems to be "that, on matters not otherwise within its legislative competence, the Commonwealth Parliament may now 'at the request or with the concurrence' of State Parliaments pass laws on matters which are also outside the competence of the State Parliaments. . .".

Quick & Garran took the view that this provision did not enable the Federal Parliament to pass laws with an extra-territorial operation, saying "the words 'the exercise within the Commonwealth' exclude such a construction".[26] Later commentators appear to have accepted that view.[27] But is this the proper view? The language of the placitum is far from clear; it concerns a power to make laws for the good government of the Commonwealth with respect to the exercise within the Commonwealth of a power which could have been exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia. It seems reasonable to suggest that "power" where twice occurring is a legislative power and that the words, as Nettheim suggests[28] means the same thing as power to make laws in exercise of any power. . . .

But the restricting words "within the Commonwealth" qualify the "exercise" of the power, not the operation of it. The Parliament of the United Kingdom sat at Westminster and could pass laws affecting any British Possession; the Federal Council of Australasia could have sat in New Zealand or Fiji and made laws affecting those places as well as the Australian colonies.

In view of the other liberties which it is suggested might be taken in construing this placitum, it may not be unreasonable to suggest that the phrase "within the Commonwealth" merely emphasised that these powers would in future be exercised in Australia and, by implication, would therefore be laws "for" Australia only and that the phrase is not aimed specifically at permitting only intra-territorial laws.

Another possibility is, of course, that the States' Powers Bill conferring as it proposes legislative authority in the area of the territorial sea with specified extensions in relation to harbour installation, mines and fisheries, might be held, at least without the extensions, to have no extra-territorial operation.

23. "The Annotated Constitution of the Australian Commonwealth", p. 651.
24. "The Constitution of the Commonwealth of Australia Annotated", 1974, p. 185.
25. 39 A.L.J. 39, at p. 45.
26. Quick & Garran, p. 651.
27. Wynes, p. 172; Lumb & Ryan, p. 184.
28. Ibid., at p. 44.

Prior to the repeal of the Federal Council of Australasia Act 1885 by s. 7 of the Commonwealth of Australia Constitution Act that Council had legislative authority in respect to several matters including "fisheries in Australasian waters beyond territorial limits" and a number of matters specified such as general defences and quarantine and "any other matter of general Australasian interest with respect to which the legislatures of the several colonies can legislate *within their own limits* . . ." (my italics).

It seems highly unlikely that at that time any legislature other than that of the United Kingdom could have legislated in respect to mining for example on what we now call the continental shelf beyond the territorial sea.

If one accepts the view of Barwick C.J. in the *Submerged Lands* case that at 1900 no Australian colony had any proprietary or legislative rights beyond its boundaries which coincided with low-water mark then again it would appear that legislation granting or affecting mining or other rights in the seabed of the three-mile territorial sea could have been passed only by the United Kingdom Parliament.

Some doubt exists as to the point in time at which the phrase "at the establishment of this Constitution" in placitum (xxxviii) is directed. Section 7 of the Commonwealth of Australia Constitution Act refers to laws in force *at* the establishment of the Commonwealth. Section 69 of the Constitution refers to a date to be proclaimed *after* the establishment while s. 121 provides that Parliament may establish new States and may *upon* such establishment make terms and conditions.

The Federal Council of Australia Act which constituted that Council was repealed by s. 7 of the Commonwealth of Australia Constitution Act and unless the words "or by the Federal Council of Australasia" are to be treated as surplusage "at" in the phrase being considered should, if such a refinement of meaning is not altogether too precious, be read as meaning "immediately before and at but not on or after". On this basis the legislative competence of the Commonwealth Parliament in respect of the States' Powers Bill may be supported.

It might also be supported on the ground that if the States' Title Bill is a valid exercise of power the proprietary title thus vested in the States provides a nexus sufficient to satisfy any test suggested in *Pearce's* case or *Robinson's* case as being for the peace order and good government of the State. On this basis the State Powers Legislation could be supported but only for so long as the State Titles Bill if passed remained in force.

For a final comment on this aspect, let it be assumed that the States' Powers Bill is supportable under placitum (xxxviii) and is passed, the question still remains whether a purported repeal by the Commonwealth would be effective. Can the passing of the Bill into law create a situation which no future Commonwealth Parliament can change? To answer this question it will be necessary to consider the same sort of arguments as arise in respect of matters referred under placitum (xxxvii).[29]

29. See Wynes, 5th ed., p. 171 and Anderson 2 Univ. W.A. L. Rev. 1.

Referring to the Commonwealth Parliament, Latham C.J. in *Wenn* v. *Attorney-General (Vic.)*[30] said:

> The Parliament cannot limit the legislative power of Parliament by providing that a Statute shall not be amendable or repealable or that it shall operate notwithstanding any subsequent legislation.

As mentioned earlier, the States Titles Bill giving the States title to the seabed of the territorial sea was not the subject of any request by the States under placitum (xxxviii). Apparently the protection for that legislation is thought to exist in the contention that a retaking of the seabed by the Commonwealth would be an acquisition which could only be made on just terms. Whether this is so or not raises interesting questions, including perhaps the question—what is the seabed and subsoil of the territorial sea worth?

The offshore constitutional settlement has been described by its supporters as a milestone in co-operative federalism. It remains to be seen how much of this land-mark will survive constitutional challenge.

30. (1948) 77 C.L.R. 84, at p. 107.