

AUSTRALIA'S OFFSHORE LEGAL JURISDICTION: PART 1 – HISTORY & DEVELOPMENT

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1 Introduction

Australia's offshore jurisdiction is comprised of a matrix of Commonwealth, State and Northern Territory areas and the laws in place offshore reflect this. They are jumbled, overlap geographically and by activity, and are generally complex and inefficient. This is the first of two related articles which set out the history and development of the Australian offshore jurisdiction and these laws and takes the reader chronologically from the start of their being exercised to a description of the current structure. Part 1 begins with regulation of the offshore petroleum industry by the *Offshore Petroleum Agreement 1967*, which was then modified and expanded after major constitutional tensions by the *Offshore Constitutional Settlement 1979*. It then develops the story of the legislation and the High Court cases up to the current situation. Part 2, which is published concurrently, is less detailed and sets out the international offshore zones that underpin the Australian offshore jurisdiction. It then sets out the offshore areas as described in the terminology used in the legislation and describes the wide-ranging ambit of the various areas and activities before drawing some conclusions. The articles aim to mention all of the relevant international conventions, Commonwealth-State agreements, High Court cases and legislation to give the reader an educated overview of their history and development.

Australia's present offshore jurisdiction has its origins in the British laws that were applied to the new colony of New South Wales (NSW) on establishment of the penal colony in 1788. The British government claimed a territorial sea off its shores of three nautical miles (in these articles 'miles') and these claims also applied to its colonies. Hence, NSW and the other British Australian colonies claimed, in turn as they were established, a territorial sea offshore for three miles.

When the colonies came to discuss federation, the Founding Fathers of the Australian Constitution (the *Constitution*) did not address the offshore issues,¹ so when federation occurred in 1901 no mention of the issues was included. This situation continued for over 50 years until, as will be seen shortly, a need for proper and coordinated regulation of the offshore petroleum industry arose.

The development of the offshore constitutional jurisdiction issues are best understood against their historical development, so this article sets out the history of their various aspects, commencing with the earlier offshore petroleum regulation and taking the story forward to the current situation. Numerous footnotes are included so that, if they wish, readers may take a deeper interest in the topics addressed in the text. As mentioned, since the topic is too long to address in the one article, it is divided into two.

2 *Offshore Petroleum Agreement 1967*

Oil and gas exploration in Australia started with a single oil bore on the Coorong in South Australia in 1892.² Development gradually occurred in various areas and then by the mid-1960s major finds in the Gippsland Basin off the Victorian coast and elsewhere heralded the importance and coming of age of the Australian offshore energy industry. Until the mid-1960s, general Commonwealth legislation existed which encouraged exploration and exploitation of minerals (including oil and gas) but there was no Commonwealth legislation exercising specific jurisdiction over offshore areas.³ This legislation instead came from the various States and the many differences in their regimes made efficient business difficult for the industry.

International law was also developing over offshore areas and it increasingly regulated the marine pollution aspects of offshore oil and gas exploitation. The 1958 *High Seas Convention* required states to control

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¹ The early drafts of the *Constitution* may be seen in M White and A Rahemtula, *Sir Samuel Griffith: The Law and the Constitution* (Lawbook, 2002) appendices 1-5, where it may be seen in the drafts that there is no mention of the issue.

² Government of Victoria, *Off Shore Oil and Natural Gas: Exploration and Legislation* (Statement, Government Printer, 1968).

³ See generally R Cullen, *Federalism in Action: The Australian and Canadian Offshore Disputes* (Federation Press, 1990) chs 3 and 4.

exploitation in general terms⁴ and the 1958 *Continental Shelf Convention* obliged states to take appropriate means to protect living resources of the sea from harmful agents around continental shelf installations.⁵ The *United Nations Convention on the Law of the Sea*⁶ later replaced these conventions and made similar provisions requiring states to adopt laws and regulations to prevent pollution from seabed activities and artificial islands in their offshore jurisdiction.⁷ So, as will be seen in more detail shortly, Australian domestic law and international law developed concurrently and became increasingly inter-related.

In 1962, the Commonwealth Minister for National Development and the various State Ministers for Mines decided to refer the matter of a cooperative approach on the subject of offshore petroleum regulation to the Standing Committee of Commonwealth and State Attorneys-General (SCAG). No government was confident as to the outcome of any litigation on the vexed question of jurisdiction over the territorial sea or further offshore. Advisory opinions from the High Court were not available⁸ so in true federal spirit the Commonwealth and States consulted and discussed the issue. The result was the Australian *Offshore Petroleum Agreement 1967* (the 1967 Agreement). This provided that the Commonwealth and the States would each introduce complementary legislation to establish a regime within which offshore petroleum exploration and exploitation could be undertaken and royalties would be shared.⁹

The 1967 Agreement summarised its terms in the heading and Preamble, which state in part:

AND WHEREAS the Governments of the Commonwealth and of the States have decided, in the national interest, that, without raising questions concerning, and without derogating from, their respective constitutional powers, they should co-operate for the purpose of ensuring the legal effectiveness of authorities to explore for or to exploit the petroleum resources of those submerged lands;

AND WHEREAS the Governments of the Commonwealth and of the States have accordingly agreed to submit to their respective Parliaments legislation relating both to the continental shelf and to the seabed and subsoil beneath territorial waters and have also agreed to co-operate in the administration of that legislation;

NOW IT IS HEREBY AGREED as follows...

The Agreement provided for a cooperative approach between the Commonwealth and the States with the one set of laws covering these activities. The detail was to be decided by joint committees on which all interested government entities were to have a say.

The second clause of the Recitations to the 1967 Agreement stated that 'Australia' had rights over the continental shelf beyond the territorial sea and the fifth clause recited that the Agreement was made without raising concerns about the parties' 'respective constitutional powers.' Hence, the fifth clause merely preserved their respective constitutional rights, which could be fought out later if the need should arise; as it did in due course.

The main premise of the 1967 Agreement required the Commonwealth, the States and the NT (collectively referred to as 'the States') to agree on a Common Mining Code, which would, by suitable legislation, be enacted by all parties.¹⁰ No changes would be allowed except by agreement.¹¹ Each State would administer

⁴ *Convention on the High Seas*, opened for signature 29 April 1958, 450 UNTS 11 (entered into force 30 September 1962). It came into force in Australia on 13 June 1963. Article 24 provides: 'Every State shall draw up regulations to prevent the discharge of oil from ships and pipelines or resulting from the exploitation and exploration of the seabed and its subsoil, taking account of existing treaty provisions on the subject.'

⁵ *Convention on the Continental Shelf*, opened for signature 29 April 1958, 499 UNTS 311 (entered into force 10 June 1964). Article 5(1) provides: 'The exploration of the continental shelf and the exploitation of its natural resources must not result in any unjustifiable interference with navigation, fishing or the conservation of the living resources of the sea, nor result in any interference with fundamental oceanographic or other scientific research carried out with the intention of open publication'.

⁶ *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 14 November 1994) ('UNCLOS 1982').

⁷ UNCLOS 1982 art 208(1) was the main provision, which stated: 'Coastal States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment arising from or in connection with seabed activities subject to their jurisdiction and from artificial islands, installations and structures under their jurisdiction, pursuant to articles 60 and 80'.

⁸ *Re Judiciary and Navigation Acts* (1921) 29 CLR 257.

⁹ For a fuller description of these events see Cullen, above n 3, ch 3.

¹⁰ For some discussion on the powers under the *Constitution* for the 'request and consent' in relation to offshore mining and petroleum laws, see M Crommellin, 'Offshore Mining and Petroleum: Constitutional Issues' (1981) 3 *Australian Mining and Petroleum Law Journal* 191. Both of Richard Cullen's two books are most helpful in setting out these matters in detail: Cullen, above n 3; R Cullen, *Australian Federalism Offshore* (University of Melbourne, 1985).

¹¹ *Off shore Petroleum Agreement 1967*, cl 25 ('1967 Agreement').

the petroleum activity offshore 'adjacent' to its coast through its 'Designated Authority'¹² and royalties would be shared but all other monies would remain with the States.¹³ The 1967 Agreement provided that the Commonwealth would have an overriding power when it came to matters especially related to its responsibilities under the *Constitution*, such as trade and commerce, external affairs, taxation, defence, lighthouses and other navigational aids, fisheries and post and telegraphic services.¹⁴ In these cases it would consider the interests of the States but the Commonwealth's decision would be final. In short, it was a cooperative arrangement involving close consultation but all parties were bound by the majority, except for the particular Commonwealth responsibilities, in regard to which it had been agreed that the Commonwealth's decision prevailed.

Under the 1967 Agreement the States only had jurisdiction 'in relation to the adjacent area of the [relevant] State'. This term 'adjacent area' was one of the main drafting tools used in the legislation to link any particular State only to the waters off its particular shores.

Also under the 1967 Agreement, as well as the *Offshore Constitutional Settlement 1979*, which will be discussed later, the States' jurisdiction extended seaward for three miles. Thus for the area inside the three-mile limit - the then limit of the territorial sea - the adjacent State was given sole jurisdiction and in this regard the *Offshore Constitutional Settlement 1979* provided:

Offshore Petroleum arrangements inside the outer limit of the 3 mile territorial sea: This will be regulated by State legislation alone, administered by State authorities, in recognition of the fact that local matters within the territorial sea are primarily matters for the States. However, the common mining code will be retained as far as practicable, and existing permits and licences, and appropriate arrangements will be made for "transitioning" existing permits to the extent that they fall within the outer limit of the territorial sea.¹⁵

Day-to-day administration would come under the Designated Authority, which was run by the States, but new Joint Authorities would be established (comprised of the relevant State and Commonwealth ministers) for each area offshore from each State. Royalties in the offshore area would be shared. For Western Australia (WA) a special arrangement was made.¹⁶

As mentioned, the States were granted sole jurisdiction out to three miles because it was the then width of the Australian territorial sea. This decision as to where the boundary between Commonwealth and State should lie has given rise to enormous legal complexity in the federal and State distribution of powers. It would be interesting to conjecture whether the Founding Fathers may have created a different structure had they addressed this offshore constitutional issue.

3 *Petroleum (Submerged Lands) Act 1967*

The main Commonwealth Act giving effect to the *Offshore Petroleum Agreement 1967* was the *Petroleum (Submerged Lands) Act 1967* (Cth) (PSLA 1967).¹⁷ Its Preamble admirably stated its purpose by repeating most of the Preamble to the 1967 Agreement. In short, it set out that the Commonwealth Act was limited to resources beyond the three mile limit of the territorial sea, that the legislation of the States and the NT should apply inside that limit and that they would share in the administration of petroleum resources. It also provided that all parties would endeavour to maintain common principles, rules and practices in the regulation and control of those petroleum resources.¹⁸ Petroleum was defined as naturally occurring hydrocarbons in a gaseous, liquid or solid state,¹⁹ so gas was always part of the petroleum regulatory regime.

In relation to the jurisdiction of the PSLA 1967, the Act applied in the 'adjacent area', set out in Schedule 2 of the Act as the area adjacent to the respective States and Territories. Readers should note, however, that the first three miles was termed the 'coastal area', which distinguished it from the 'adjacent area' which only began to

¹² 1967 Agreement cl 9.

¹³ 1967 Agreement cl 22.

¹⁴ These are the Commonwealth powers enumerated in s 51 of the *Constitution*.

¹⁵ *Offshore Constitutional Settlement 1979*, 8.

¹⁶ *Offshore Constitutional Settlement 1979*, 7-8.

¹⁷ For further details about the 1967 Agreement, readers are referred to Cullen, above n 3, 66. The Victorian government levied fees for the use of a pipeline to convey the oil and gas from Bass Strait under the *Pipelines Act 1967* (Vic) and the *Pipelines (Fees) Act 1967* (Vic), but when they raised the amount of the levy in 1981, it was challenged and the High Court held that it amounted to an excise (for which the State had no power) and was invalid: *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599.

¹⁸ PSLA 1967 Preamble [4].

¹⁹ PSLA 1967 s 5.

run from the three mile limit. In the 'coastal area' the State laws and courts had jurisdiction. In the 'adjacent area' the laws, written and unwritten, of the Commonwealth and the States were applicable and the Supreme Courts of the States were invested with, and the courts of the Territories had conferred on them, federal jurisdiction. The administration under this cooperative scheme involved a Joint Authority for each State comprised of the relevant mining ministers, and a Designated Authority, which was largely run by each State and the Northern Territory (NT) to administer to the details of petroleum activity in the area offshore that was adjacent to that State or the NT. It can be seen, therefore, that the PSLA 1967 accurately reflected what had been agreed in the 1967 Agreement.

The States and the NT for their part passed legislation²⁰ and the parties all established administrative and regulatory structures for dealing with the companies engaged in the important and complex business of exploring and exploiting offshore petroleum and constructing and running offshore rigs and pipelines. This then was the Australian national situation after 1967 and it is now appropriate to mention some international developments.

4 The Seas and Submerged Lands Act 1973 and its 1975 High Court Case

The first United Nations Conference on the Law of the Sea (UNCLOS I) was held at Geneva in 1958, following preliminary drafting done by the International Law Commission. The conference agreed on four conventions, which were the *Convention on the Continental Shelf*, the *Convention on the High Seas*, the *Convention on the Territorial Sea and the Contiguous Zone* and the *Convention on Fishing and the Conservation of the Living Resources of the High Seas*.²¹ All of these conventions reveal their purpose in their titles but the convention of immediate interest is the *Convention on the Territorial Sea and the Contiguous Zone*, as it dealt with the maritime zones adjacent to a coastal state: the internal waters, territorial sea and contiguous zone. It gave the coastal state rights and obligations in these zones but did not deal with the very contentious issue of the breadth of the territorial sea as the parties were unable to come to any agreement.

The UN organised a second conference to deal with this issue. UNCLOS II was held in 1960, but it was short and unsuccessful. The parties were still too far apart on the question of the width of the territorial sea for any consensus to emerge. The matter was dropped until the UN organised the third Law of the Sea Conference (UNCLOS III), which had its first session in 1973 and continued, sometimes desultorily, until a final agreement emerged in UNCLOS 1982.²² The effect of UNCLOS 1982 will be taken up later but for the Australian domestic legal developments, one needs to go back in time.

In 1969 a test case had occurred in the High Court, *Bonser v La Macchia* (1970) 122 CLR 177,²³ which concerned a fisherman who had been fishing some six miles offshore from Sydney and was charged with using unlawful nets: an offence under the *Fisheries Act 1952* (Cth). A defence to the charge was that the Commonwealth Act did not extend beyond the territorial sea, then only three miles wide, so the fisherman's location some six miles offshore did not meet the necessary criterion under the *Constitution* as being 'Australian waters'.²⁴ The court held against this argument and the Commonwealth fisheries law was held valid beyond the then outer limit of the territorial sea. In the judgments there was some discussion of the question of the *inner* limits of the territorial sea and whether the Commonwealth or the States had jurisdiction over it but this was not part of the ratio of the case.²⁵

In another development, the Senate Select Committee that was established to follow on from the Offshore Petroleum Agreement 1967²⁶ had included in its report a recommendation that the Commonwealth Parliament

²⁰ Each of the States and the NT passed an act called the *Petroleum (Submerged Lands) Act 1982*.

²¹ *Convention on the High Seas*, opened for signature 29 April 1958, 450 UNTS 11 (entered into force 30 September 1962); *Convention on the Continental Shelf*, opened for signature 29 April 1958, 499 UNTS 311 (entered into force 10 June 1964); *Convention on the Territorial Sea and Contiguous Zone*, opened for signature 29 April 1958, 516 UNTS 205 (entered into force 10 September 1964); *Convention on Fishing and the Conservation of the Living Resources of the High Seas*, opened for signature 29 April 1958, 559 UNTS 285 (entered into force 20 March 1966). These four 1958 conventions and their effect on Australian law were the subject of the excellent book by the late Professor RD Lumb: R D Lumb, *The Law of the Sea and Australian Off-Shore Areas* (University of Queensland Press, 2nd ed, 1978).

²² *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 14 November 1994) ('UNCLOS 1982').

²³ The earlier case of *R v Keyn* (1876) 2 Ex D 63 had raised some of the basic issues about when the British laws extended offshore but had not definitively settled it for present purposes.

²⁴ The *Constitution* gives power to the Commonwealth with respect to '51(x) ... fisheries in Australian waters beyond territorial limits'.

²⁵ The Solicitor-General for NSW had expressly submitted that it was undesirable for the Court to decide what was the inner margin of Australian waters: *Bonser v La Macchia* (1970) 122 CLR 177, 180.

²⁶ By Resolution passed on 8 November 1967 the Senate established the Select Committee to inquire and report on a number of matters, including on aspects of the legislation, administration, royalties etc arising from the 1967 Agreement.

deal with the offshore jurisdiction issue more generally.²⁷ A Bill was introduced by the Gorton government in 1970 and, after some stops and starts, the *Seas and Submerged Lands Act 1973* (Cth) was finally passed under the later Whitlam government.²⁸ This Act asserted Commonwealth sovereignty from, in effect, the low-water mark or recognised historic closing lines in reliance on the terms of the *Convention on the Territorial Sea and the Contiguous Zone*, to which Australia had become a party.²⁹ This claim from the low-water mark directly challenged the traditional understanding of the States that it was *they* who had jurisdiction from the low-water mark. The States had some justification, as the former Colonies had claimed their respective territorial seas through their Colonial master the United Kingdom and the Australian *Constitution* had not expressly changed this position. Thus, the States all challenged the Commonwealth in a major constitutional case in 1975 in the High Court in *New South Wales v The Commonwealth* ('*Seas and Submerged Lands Act Case*').³⁰

The result of the High Court challenge was that the claims of the Commonwealth were upheld and the Commonwealth was granted jurisdiction over the sea offshore from the low-water mark or the States' historic boundaries. The court unanimously held that the provisions of the Act relating to the continental shelf were within the legislative power of the Commonwealth under s 51(xxix) of the *Constitution* (the external affairs power),³¹ and a majority held that the provisions relating to matters other than the continental shelf were also within this power because they gave effect to the *Convention on the Territorial Sea and the Contiguous Zone*. Three justices further held that the external affairs power was not limited to authorising laws with respect to Australia's relationships with foreign countries but extended to any matter, thing, person or activity external to Australia. A majority also held that the boundaries of the former Australian colonies had ended at the low-water mark and that the States had no sovereign or proprietary rights in respect of the territorial sea.

The *Seas and Submerged Lands Act Case* settled the major point for present purposes, which was that the Commonwealth had jurisdiction seaward from the low water mark or historic boundaries and not from the outer edge of the territorial sea (three miles from the coast, as it then stood). The court's reliance on the extent of the Commonwealth external affairs power was one of the major issues that was decided in favour of the Commonwealth, a topic that will be addressed further shortly.

6 Subsequent High Court Cases 1975-1979

In the years after the 1975 *Seas and Submerged Lands Act Case* there was a series of High Court cases that dealt with the offshore jurisdiction. The first was decided the following year, *Pearce v Florenca*.³² To the surprise of many, this case upheld the States' claims to an offshore fisheries jurisdiction. At issue was whether the *Fisheries Act 1905* (WA) applied to unlawful taking of fish some two miles offshore. The magistrate applied the *Seas and Submerged Lands Act Case* and dismissed the prosecution case on the grounds that WA legislation had no force offshore as it was the Commonwealth that had jurisdiction from the low-water mark or historic boundaries. No doubt to the surprise of the WA fisherman, this minor fishing case was removed from the Magistrates Court in WA into the full panoply of the High Court in Canberra. There the court held, in a unanimous decision, that the WA Act did apply offshore. This was because it was within the plenary power of the WA Parliament to make laws for the 'peace, order and good government' of the State and that the exercise of this power was not inconsistent with the *Seas and Submerged Lands Act 1975* (Cth). This is the 'nexus provision', which is still good law. The point of this provision is that, provided a State law is not inconsistent with a Commonwealth law,³³ it can have effect

²⁷ For the history of the legislation, see Cullen, above n 3, ch 4. See also M Haward, 'The Australian Offshore Constitutional Settlement' (1989) 13 *Marine Policy* 334; D Rothwell and S Kaye 'Australia's Legal Framework for Integrated Oceans and Coastal Management', in M Haward (ed), *Integrated Oceans Management: Issues in Implementing Australia's Ocean Policy* (Research Report, CRC for Antarctica and the Southern Ocean, 26 May 2001) 11.

²⁸ The intriguing background story of the petitions by States about their offshore jurisdiction over the territorial sea to the Privy Council, to thwart the Whitlam government's attempts to sideline their constitutional position, is fully set out in A Twomey, *The Chameleon Crown: The Queen and Her Australian Governors* (Federation Press, 2006) ch 10.

²⁹ *Convention on the Territorial Sea and the Contiguous Zone* arts 1 and 2, which gave this jurisdiction to party States to the convention. Article 3 provides: 'Except where otherwise provided in these articles, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State'.

³⁰ (1975) 135 CLR 337.

³¹ *Constitution* s 51: 'The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:- ... (xxix) External affairs; ...'

³² (1976) 135 CLR 507.

³³ If the Commonwealth law covers the field and the State law is inconsistent with it then the State law is invalid to the extent of its inconsistency: *Constitution* s 109.

offshore where sufficient nexus is shown between the Act, the activities and people complained of and the relevant coastal State.

In 1976, in *Bisticic v Rokov*,³⁴ an issue before the High Court was the upper limit of liability which could be claimed by a ship owner. Mr Bisticic claimed damages for personal injuries suffered while on a ship. For about two centuries, the British law had allowed ship owners to claim an upper limit on the monetary amount of the claims against them as a policy to encourage investment in shipping and this policy was contained in the British *Merchant Shipping Act*. In this case the defendant claimed the limit under the British *Merchant Shipping Act 1894* (Imp) which provided for a fairly low limit and which also applied in Australia. However, the British Act had been amended by the *Merchant Shipping (Liability of Shipowners and Others) Act 1958* (UK), considerably raising the upper amount. The issue was whether the British amending Act applied in Australia as well as in the UK. The court held that it did not because the 1958 UK amending Act was not expressed to apply in Australia and neither did it apply by reasonable inference. So the result was that the lower limit applied under the unamended Act. This case illustrated the continuing interaction of the British and Australian laws applying offshore.

The following year, in *Robinson v Western Australian Museum*,³⁵ the *Museum Act 1959-64* (WA), the *Museum Act 1969* (WA) and the *Maritime Archaeology Act 1973* (WA) were held invalid where they purported to vest possession of offshore historic shipwrecks in the WA Maritime Museum. The *Gilt Dragon*, an old Dutch wreck, was just under three miles offshore and its finder, Mr Robinson, denied the validity of the WA legislation, which required him to give up ownership of the wreck to the WA Museum. The High Court judges' reasons were divided but the majority held, in effect, that the WA law did not operate over this wreck. Some held that this was because there was no sufficient nexus and thus there was no State jurisdiction offshore. Others held that the WA legislation was inconsistent with the *Navigation Act 1912* (Cth) and was invalid on that ground. Still others dissented, so that the outcome was that there was hardly any clear ratio from the case. It is worth noting on this question of jurisdiction over historic shipwrecks that jurisdiction was subsequently restored to the States, if they chose to exercise it, for the first three miles offshore in the Offshore Constitutional Settlement 1979, which will be discussed shortly. The *Historic Shipwrecks Act 1976* (Cth) now covers this topic.³⁶

In *Raptis v South Australia*,³⁷ another 1977 decision, a fisherman thought he was properly licensed under his Commonwealth fishing licence to catch prawns off the South Australian (SA) coast. He had no need, so he and others thought, also to obtain a licence from the SA government. When his catch was seized by the SA fisheries inspectors, at issue was just where the SA State boundary lay in the several gulfs and bays off SA. In the High Court, the arguments ranged far and wide over the common law, international law, historic bays and the history of the early legislation proclaiming the limits of the Colony of SA (as the colonial boundary became the limits of the State of SA). In the result, the majority of the court held that the SA boundaries did not include the relevant bays and other waters claimed to be covered by the SA legislation and, further, that the SA legislation was inconsistent with the Commonwealth legislation (in contravention of s 109 of the *Constitution*); hence the fisherman succeeded.

This completes the recitation of the major High Court cases that touch on the extent and shape of the offshore maritime jurisdiction up and until the *Offshore Constitutional Settlement in 1979*, on which attention will now be focused.

7 Offshore Constitutional Settlement 1979

The 1975 *Seas and Submerged Lands Act Case* established that the Commonwealth's jurisdiction ran from the low-water mark or historic boundaries. However, this was administratively inconvenient for the Commonwealth, so it pressed for the States to reclaim this jurisdiction. The Commonwealth did not wish to administer the many thousands of small vessels and moorings and the numerous recreational boating activities that came under its jurisdiction as a result of the High Court decision, as they were, as the States had argued, best administered by the States.

³⁴ (1976) 135 CLR 552.

³⁵ (1977) 138 CLR 283.

³⁶ See also M White 'Salvage, Towage, Wreck and Pilotage', in M White (ed), *Australian Maritime Law* (Federation Press, 2nd ed, 2000) M White, 'Australian Laws-Commonwealth', in M White, *Australasian Marine Pollution Laws* (Federation Press, 2007), ch 7, especially section 7.8.

³⁷ (1977) 138 CLR 346.

The Standing Committee of the Attorneys-General (SCAG) met in Hobart on 5 March 1976 and formed three sub-committees, which constructed a proposed legal framework. Much negotiation followed and their work culminated in the Premiers' Conference of 29 June 1979 where the *Offshore Constitutional Settlement 1979* (the OCS 1979) was finalised.³⁸ The agreement, published under the title of "Agreed Arrangements", covered a long list of matters which are somewhat lengthy, but important to the whole thrust of these two articles, so they are worth setting out. The major points agreed are:

- (a) The Commonwealth was to give each State the same powers with respect to the territorial sea adjacent to its coast as it would have if the waters were within the limits of the State.
- (b) The Commonwealth would pass legislation to vest in each State proprietary rights and title in respect of the seabed of the adjacent territorial sea, with reservations for national purposes such as defence, etc.
- (c) These powers were limited to three miles' breadth. This State jurisdiction was to stay at three miles if, as subsequently occurred, the Commonwealth extended the territorial sea to 12 miles.
- (d) The *Offshore Petroleum Agreement 1967* was confirmed in that the States would regulate the area within three miles of the low water mark or historic boundaries and the Commonwealth outside that area, but with a statutory Joint Authority for each State's adjacent waters and special conditions were agreed for WA because of some complexities unique to it.
- (e) Offshore mining for minerals other than petroleum were to be under a similar arrangement to that for offshore petroleum.
- (f) Offshore fisheries would give legislative responsibilities to the States out to three miles and to the Commonwealth beyond that, but this was to be flexible and could be varied by agreement in particular circumstances.
- (g) Historic shipwrecks would come under the Commonwealth Act for the first three miles only for those States that agreed to it, but the Commonwealth Act would apply for all waters beyond the State jurisdiction of three miles.³⁹
- (h) The *Great Barrier Reef Marine Park Act 1975* (Cth) would continue to apply and govern the Great Barrier Reef rights and title in the seabed, with the Commonwealth and Queensland governments agreeing on joint consultative arrangements, including for those parts of it that were internal Queensland waters.
- (i) Other marine parks in the State waters jurisdiction of three miles would be controlled by the States, and the Commonwealth would establish and control marine park areas beyond that.
- (j) In relation to criminal law, State laws of their own force would apply to offences committed in the three-mile limit and also for intra-State shipping. Otherwise, Commonwealth laws were to apply, but the Commonwealth would pass legislation to apply the criminal laws of the adjacent States or Territory i.e. applied laws.⁴⁰
- (k) In relation to shipping and navigation, which broadly covered regulation of safety, construction, surveys, certification, ship's crewing and qualifications, the States would be responsible for intra-State trading vessels and the Commonwealth for interstate and overseas ones. The States would also be responsible for commercial fishing vessels (except overseas voyaging ones), for vessels on internal and inland waterways, and for pleasure craft. The Commonwealth would take responsibility for the petroleum offshore drilling rigs whilst they were in their mobile mode (i.e. were vessels) and offshore industry vessels.

³⁸ See Attorney-General's Office, 'Offshore Settlement. A Milestone in Co-operative Federalism' (AGPS, 1980). A further useful document is Attorney-General's Office, *Offshore Constitutional Settlement: Selected statements and documents 1978-79* (AGPS, 1980). For discussion and greater detail see Cullen, above n 3, [4.3]. For copies of these two documents see M White, *Australian Offshore Laws* (Federation Press, 2009) annexes 1 and 2.

³⁹ As mentioned above, see *Historic Shipwrecks Act 1976* (Cth); see also *Robinson v WA Museum* (1977) 138 CLR 283.

⁴⁰ The application of the *Crimes at Sea Act 1979* (Cth) and how the offshore criminal jurisdiction developed, is discussed in the second article.

(l) In relation to ship-sourced marine pollution, it was agreed that the arrangements that existed before the High Court decision in the *Seas and Submerged Lands Case* should be continued, with the Commonwealth legislation having a savings clause to allow the States to legislate to implement certain aspects of marine pollution conventions if they should wish to do so.

(m) The Northern Territory, which was just entering into self-government, was to be treated as a State for the purposes of offshore jurisdiction.

(n) In relation to Jervis Bay, the southern part of which was Commonwealth territory, the Commonwealth and NSW were to enter into an agreement concerning it.⁴¹

(o) Finally, in the last part of the document it was agreed that there would be continuing discussions on land-based marine pollution, marine pollution through dumping, and protection of whales.

The concluding paragraph of the OCS 1979 stated that the Commonwealth and the States should henceforth cooperate as past attitudes of confrontation and of centralising Commonwealth power had resulted in polarisations and all interests suffering. The very last sentence provided: 'The offshore arrangements have laid the basis for a permanent workable and beneficial solution of problems that have beset the nation for a decade or more'. Sadly, this noble sentiment has not come to pass.

The OCS 1979 was given effect in a number of Acts passed by the States under the Constitutional power for States to request and consent to Commonwealth legislation.⁴² The Commonwealth Parliament then responded by passing two substantive acts, one of which related to the States' powers and the other to States' titles over the three mile area and it also amended a number of other related acts.⁴³

The first of the two substantive Commonwealth Acts, the *Coastal Waters (State Powers) Act 1980* (Cth) (the *State Powers Act*), under s 5, gave the States legislative powers over adjacent waters as if the 'coastal waters of the State ... were within the limits of the State, including laws applying in or in relation to the sea-bed and subsoil beneath, and the airspace above'. Beyond the coastal waters (three miles), the States were given powers over adjacent subterranean mining i.e. mines driven under the seabed from the land, and also over ports, harbours, shipping facilities, installations and dredging.⁴⁴ Finally, the Act granted them such powers relating to fisheries beyond the coastal waters as may be agreed with the Commonwealth.⁴⁵

The drafting technique used for delineating the relevant waters was to refer to the 'adjacent waters' of the State, following the provisions and terminology of the PSLA 1967. The waters to the landward side of the baseline of the territorial sea, which are the 'internal waters' were also in State jurisdiction as coastal waters. There was no need to deal with 'inland waters', such as ports, rivers and dams, as they were clearly within State power and were never the subject of a claim by the Commonwealth. The *State Powers Act* had various savings provisions which confirmed: (a) the continuing status of the territorial sea under international law, including the right to innocent passage for foreign ships; (b) that the Act did not affect the situation about the outer limits of the State; (c) that the Act did not derogate from the existing power to make laws having extra-territorial effect; or (d) that the Act did not give force to a law to the extent of its being inconsistent with any Commonwealth laws.⁴⁶

⁴¹ The southern part of Jervis Bay land and some of the southern bay were Commonwealth territory. It had been contemplated at the time of the formation of the Commonwealth that Jervis Bay would become a port for the ACT and, for this reason, Jervis Bay land and its waters were established, along with the ACT, as part of Commonwealth territory.

⁴² The 'request and consent' power in s 51(xxxviii) of the *Constitution* provides:

The Parliament shall, subject to this Constitution, have the power to make laws for the 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 Parliaments of all the States directly concerned ...

The State Acts requesting this were the *Constitutional Powers (Coastal Waters) Act 1979* (NSW), *Constitutional Powers (Coastal Waters) Act 1980* (Qld), *Constitutional Powers (Coastal Waters) Act 1980* (Vic), *Constitutional Powers (Coastal Waters) Act 1979* (Tas), *Constitutional Powers (Coastal Waters) Act 1979* (SA) and the *Constitutional Powers (Coastal Waters) Act 1979* (WA). There was no need for a similar request by the NT as it was a territory and the Commonwealth had the power to pass legislation affecting it anyway.

⁴³ These Commonwealth Acts were the *Seas and Submerged Lands Amendment Act 1980*; *Petroleum (Submerged Lands) Amendment Act 1980*; *Petroleum (Submerged Lands) (Royalty) Amendment Act 1980*; *Petroleum (Submerged Lands) (Exploration Permit Fees) Amendment Act 1980*; *Petroleum (Submerged Lands) (Pipeline Licence Fees)*; *Crimes at Sea Act 1979*.

⁴⁴ *Coastal Waters (State Powers) Act 1980* (Cth) s 5 ('*State Powers Act*').

⁴⁵ *State Powers Act* s 5(c).

⁴⁶ *State Powers Act* ss 6, 7.

The other substantive Commonwealth Act was the *Coastal Waters (State Title) Act 1980* (the *State Title Act*). It covered the same waters as the *State Powers Act* and its main provision, under s 4, was that the States were vested with the same rights and title to the seabed beneath the coastal waters and the water column and air space above it as if they were within the limits of the States. This vesting of title in the States was to give way to any pre-existing title in another person and also to the right of the Commonwealth to use the area for communications, safety of navigation, quarantine or defence, or to authorise the construction and use of undersea pipelines. Finally, the title granted to the States was subject to the operation of the *Great Barrier Reef Marine Park Act 1975* (Cth).⁴⁷

To deal with the fact that future marine surveys may make changes to the baselines from which the territorial sea was measured, the Act provided that if the baselines were to change, the title vested in the State would move with that change, either in or out.⁴⁸ The *State Title Act* had certain other provisions, which included that the seabed on which Commonwealth installations were then placed were not affected except where the Commonwealth later so gazetted; that innocent passage for ships passing through the territorial sea was retained, and that the *Commonwealth Places (Application of Laws) Act 1970* (Cth) was still applicable in these new areas. A savings clause confirmed that the Act was not to be taken as extending the limits of any State or derogating from any other right or title otherwise lying with the States.⁴⁹

The States passed mirror legislation to that of the Commonwealth.⁵⁰ The Northern Territory, not being a State, was covered by separate Commonwealth legislation. The *Coastal Waters (Northern Territory Powers) Act 1980* (Cth) was similar to the *State Powers Act* but with some variations. Its main provision was that the legislative powers of the Legislative Assembly of the Territory extended to making laws as if the coastal waters were within the limits of the Territory, including the relevant seabed, subsoil and airspace. However, the NT was given powers to make laws concerning mining from the land, ports, harbours and other shipping facilities beyond the outer limits of these coastal waters. The Act also provided for the NT to make laws relating to fisheries beyond the coastal waters where there was an arrangement with the Commonwealth.⁵¹ The Act had the same savings about innocent passage etc as the *States Powers Act*. The second Commonwealth Act for the NT, the *Coastal Waters (Northern Territory Title) Act 1980*, was in similar terms to the *State Title Act*.

As mentioned above, the OCS 1979 made provision for offshore mining other than petroleum (for what was termed 'minerals' in the legislation) under which the basic cooperative structure for the 1967 Agreement was kept i.e. that the States regulated it out to three miles and the Commonwealth beyond that. To give effect to this, the Commonwealth Parliament passed a different group of Acts.⁵²

The OCS 1979 also made provision for agreement over fisheries to be reached between one or more States and the Commonwealth. By agreement between the Commonwealth and SA, regulating powers over the SA rock lobster fisheries in some southern Commonwealth waters was passed to SA. This led to an attack in the High Court in *Port MacDonnell Professional Fishermen's Association Inc v South Australia*,⁵³ which will be discussed shortly.

It should be mentioned at this stage that the power of the States to legislate extra-territorially was confirmed and strengthened when the last colonial legislative links with the Imperial Parliament were

⁴⁷ *Coastal Waters (State Title) Act 1980* (Cth) s 4 ('*State Title Act*'). Similar provision was made for the Northern Territory in the *Coastal Waters (Northern Territory Powers) Act 1980* (Cth) and the *Coastal Waters (Northern Territory Title) Act 1980* (Cth).

⁴⁸ *State Title Act* s 4(4). Revision of the baselines does occur from time to time, usually with minor changes being made.

⁴⁹ *State Title Act* s 7.

⁵⁰ *Constitutional Powers (Coastal Waters) Act 1979* (NSW); *Constitutional Powers (Coastal Waters) Act 1980* (Qld); *Constitutional Powers (Coastal Waters) Act 1979* (SA); *Constitutional Powers (Coastal Waters) Act 1979* (Tas); *Constitutional Powers (Coastal Waters) Act 1980* (Vic); *Constitutional Powers (Coastal Waters) Act 1979* (WA). The Acts mentioned above are those directly related to the OCS 1979 and the other Acts giving effect to the States' laws offshore are: *Application of Laws (Coastal Sea) Act 1980* (NSW), *Off-shore Waters (Application of Laws) Act 1976* (SA), which was amended after 1976 to give effect to subsequent changes; *Off-shore Waters Jurisdiction 1976* (Tas), *Off-shore (Application of Laws) Act 1982* (Vic) and *Off-Shore Waters (Application of Territory Laws) Act 1985* (NT). These Acts gave effect to all laws, civil and criminal, except where some other legislation was to the contrary effect. They are each slightly different so readers should refer to each separate Act as may be appropriate.

⁵¹ *Coastal Powers (Northern Territory Powers) Act 1980* (Cth) s 5.

⁵² These were the *Minerals (Submerged Lands) Act 1981* (Cth), *Minerals (Submerged Lands) Exploration Fees Act 1981* (Cth), *Minerals (Submerged Lands) (Production Licence Fees) Act 1981* (Cth), *Minerals (Submerged Lands) (Registration Fees) Act 1981* (Cth), *Minerals (Submerged Lands) (Royalty) Act 1981* (Cth) and the *Minerals (Submerged Lands) (Works Authority Fees) Act 1981* (Cth).

⁵³ (1989) 168 CLR 340. The Acts under attack were the *Fisheries Act 1952* (Cth), the *Fisheries Act 1982* (SA), the *Petroleum (Submerged Lands) Act 1967* (Cth) and the *Coastal Waters (State Powers) Act 1980* (Cth).

removed with the *Australia Act 1986* (Cth) and the *Australia Act 1986* (UK).⁵⁴ By s 2 of the Commonwealth Act, the States were given full power to make laws having extraterritorial effect for their own peace, order and good government - a power that the High Court had previously upheld but which was now expressly provided for in legislation.

The width of the territorial sea was important as it governed the offshore jurisdiction of the coastal state. It had been the cause of much international disagreement but during the many years of discussion in UNCLOS III, a consensus emerged that 12 miles was acceptable and this was reflected in UNCLOS 1982. Under the *Seas and Submerged Lands Act 1973* (Cth)⁵⁵ the Governor-General had been given power to declare the outer limits of the whole or any part of the territorial sea and in 1990 the outer limit of the territorial sea was extended to 12 miles⁵⁶ (but this did not extend the jurisdiction of the States). In 1994 the Commonwealth established an Exclusive Economic Zone (EEZ) offshore of 200 miles, adopting UNCLOS 1982 provisions in this regard.⁵⁷ In relation to fisheries jurisdiction, back in 1967, the Commonwealth had extended its fisheries claim out from the three mile territorial sea zone to a 12 mile fishing zone and then it later extended the fisheries zone to 200 nautical miles (i.e. the same zone as the EEZ). The importance of these zones and of the fisheries jurisdiction is mentioned in the second article.

The earlier claims by Australia to the zones around its coastline were based on the four 1958 conventions previously mentioned, but after UNCLOS 1982 came into force generally and for Australia on 16 November 1994, the new convention suited Australia, with its enormous coastline, very well because it greatly extended its offshore jurisdiction. The *Seas and Submerged Lands Act 1973* (Cth) was amended to give the UNCLOS 1982 provisions full effect. These zones are described in the second article.

8 Roll-Back Provision relating to Marine Pollution

The OCS 1979 included that the Commonwealth would prepare legislation giving effect to the ship-sourced oil pollution conventions and 'a saving clause is to be inserted to allow the States to legislate to implement certain aspects of the (Civil Liability Convention) if they wish to do so'.⁵⁸ This aspect has come to be known as the 'roll back' provision and the Commonwealth included roll back provisions in its relevant legislation with the result that the Commonwealth jurisdiction initially applies from the baselines but rolls back to the three mile limit if the States or the Northern Territory pass similar legislation. The conventions to which it is applied have been extended from the initial *International Convention on Civil Liability for Oil Pollution Damage*, opened for signature 29 November 1969, 973 UNTS 3 (entered into force 19 June 1975), to the whole suite of conventions regulating protection of the marine environment from pollution from ships.⁵⁹

Giving legislative effect to the roll back provision was simple in the early years after the OCS 1979, but the Commonwealth legislation has since changed and become quite complex. There is insufficient space for an exhaustive examination of this issue, so a number of examples will have to suffice.⁶⁰

One example of this roll back provision is contained in the *Environment Protection (Sea Dumping) Act 1981* (Cth),⁶¹ which provides:

If the Minister is satisfied that the law of a State makes provision for giving effect to the Protocol in relation to the coastal waters of that State, the Minister may, by notice published in the *Gazette*, make a declaration that limits the operation of this Act in relation to that State and the coastal waters of that State. A declaration may be made in relation to a State whether or not the Protocol extends to the whole of the coastal waters of that State.⁶²

⁵⁴ The Commonwealth Act requesting and consenting to the UK Parliament passing the *Australia Act 1986* was the *Australia (Request and Consent) Act 1985*; Act No 143 of 1985, assented to on 4 December 1985.

⁵⁵ *Seas and Submerged Lands Act 1973* (Cth) s 7.

⁵⁶ Statement by the Minister for Foreign Affairs and Trade and the Attorney-General, [1991] *Australian International Law News* 168.

⁵⁷ See Note 2 to the Commonwealth print of the *Seas and Submerged Lands Act 1973* (Cth).

⁵⁸ OCS 1979, inserted under the heading "Ship-sourced marine pollution", reprinted in Michael White, *Australian Offshore Laws*, (Federation Press, 2009), 425.

⁵⁹ For a full discussion of the many marine pollution conventions and Australian laws about pollution from ships see M White, *Australasian Marine Pollution Laws* (Federation Press, 2nd ed, 2007).

⁶⁰ The author is indebted to Mr John Gillies of the Australian Maritime Safety Authority, for assistance in identifying some of the 'roll back' legislative provisions in the various Commonwealth Acts.

⁶¹ This Act gives effect to the *Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter*, opened for signature 29 December 1972, 1046 UNTS 120 (entered into force 30 August 1975) (*London Convention*) as to which see White, above n 58.

⁶² *Environmental Protection (Sea Dumping) Act 1981* (Cth) s 9(1). Under s 9(4) 'State' is defined for this section as including the Northern Territory.

There is a qualification to this roll back where the incident relates to seriously harmful material, in section 9(2):

However, this Act continues to apply in relation to the State and its coastal waters in relation to the following activities where they involve seriously harmful material:

- (a) dumping or incineration at sea;
- (b) loading for dumping or incineration at sea;
- (c) export for dumping or incineration at sea;
- (d) artificial reef placements.

It may be seen from this that the simple assertion in the OCS 1979 about the Commonwealth laws rolling back in the three mile area when dealing with marine pollution has been complicated by some exceptions to it. Thus, the Commonwealth has exercised its jurisdiction in otherwise 'State' waters where the activities involve 'seriously harmful material'.

If one takes another example, this time from the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (Cth), an important Act that gives effect to MARPOL (*Protocol of 1978 relating to the International Convention for the Prevention of Pollution by Ships*, opened for signature 17 February 1978, 1340 UNTS 61 (entered into force 2 October 1983)), one finds the following in s 5(2):

This Act, other than sections 9, 11, 21, 22, 26AB, 26D, 26F, 26FEG, 26 FEN, 26FEO and 26FEP, shall be read and construed as being in addition to and not in derogation of or in substitution for any law of a State or of an external Territory.

The sections that are selected are the very sections that give regulatory effect to MARPOL, so the subsection seems to read as if those sections of the Commonwealth Act do not apply in 'substitution' for a similar provision in a State Act. This is not simple statutory drafting.

Moving to examples of two more recently enacted Commonwealth marine pollution Acts, one finds a quite different drafting technique again. In the *Protection of the Sea (Harmful Anti-Fouling Systems) Act 2006* (Cth), s 13(4) provides:

If: (a) apart from this subsection, particular conduct would constitute an offence against this section; and (b) the conduct constitutes an offence against a law of a State or Territory; then the conduct does not constitute an offence against this section.⁶³

It may be seen that it is not entirely clear that there has been a 'roll back' of jurisdiction at all, which is what the OCS 1979 agreed. Here something that 'constitutes an offence' against a State or Territory law is deemed no longer to be an 'offence' under this Commonwealth law, which seems to give effect to the OCS 1979, but perhaps could be more simply expressed.

As a final example, one may take the most recent Act dealing with marine pollution, the *Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008* (Cth). This Act gives effect to the international convention that covers insurance for bunker oil spills and section 10 states:

(1) This Part does not apply in relation to a domestic voyage ship if a law of a State or a Territory gives effect to Articles 3, 5 and 6, paragraph 10 of Article 7, and Article 8, of the Bunker Oil Convention in relation to the ship.

(2) However, subsection (1) does not apply in respect of an incident to which Article 5 of the Bunker Oil Convention applies involving: (a) one or more ships that are domestic voyage ships; and (b) one or more ships that are not domestic voyage ships.⁶⁴

There is yet one further complication in this 2008 Act in that when it comes to the obligation for ships to hold 'Insurance Certificates' certifying they have a prescribed amount and type of insurance for bunker oil spills, s 14 provides:

This Part is not intended to exclude or limit the concurrent operation of a law of a State or Territory that gives effect to paragraphs 1, 2 and 4 of Article 7 of the Bunker Oil Convention in relation to a domestic voyage ship.

⁶³ Similar provisions are made in other parts of the Act, following a provision that some particular act or omission is an offence. E.g. *Protection of the Sea (Harmful Anti-Fouling Systems) Act 2006* (Cth) s 9(11).

⁶⁴ A 'domestic voyage ship' is defined as a trading ship proceeding other than overseas or inter-State and a fishing vessel proceeding other than overseas: *Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008* (Cth) s 1(93).

Here the meaning seems to be that both the State and the Commonwealth laws apply. The provisions are unclear, but it may be that this 2008 Act has departed completely from the provisions of the OCS 1979 that State laws would apply in a stated geographical area i.e. the first three miles offshore. In this section, the Act makes provision for the Commonwealth legislation not to apply if a ship is performing a particular function (trading or fishing) and it is engaged in a particular voyage (domestic). Even so, there is an exception to the exception, which relates to the Commonwealth law not applying where it gives effect to a particular part of the Convention (Article 5). Finally, in a different part of the Act, where it relates to the obligation for a ship to have an insurance certificate, it is not 'intended' (whatever force that has in legislation) to 'exclude or limit the concurrent operation' of a State or Territory law. These are not easy legislative provisions and they have moved a long way from the simple provisions of the OCS 1979.

All the States and the Northern Territory have legislation relating to oil spills and other marine environmental matters and the validity of these laws has never been challenged directly. However, some points worthy of note concern doubts about the application of these laws. For one, if the version of the convention given force by the State Act is out of date, or has been superseded, or if the State Act is unclear because its drafting departs from the standard wording, what is the situation then? This is often the case as State Parliaments sometimes do not implement changes to the conventions. Another difficult area is where an oil pollution spill overlaps both State and Commonwealth jurisdictions at the three mile limit. That may well bring into operation section 109 of the *Constitution*⁶⁵ making State legislation invalid. However, this would probably occur only after lengthy and expensive litigation has established whether both Commonwealth and State acts apply in the first place.

Finally, there is still the unsettled area between the high and low water mark, and this inter-tidal area always comes into play when an oil spill reaches the shore. What laws apply in this inter-tidal zone is a good question. These and other similar issues all call for clarification. Pollution spills usually extend over a wide area and the complexities of having, for instance, an oil spill spread over areas outside the three mile area, inside that area, over the inter-tidal area and into inland waters give rise to infinite legal problems with this legislative arrangement.

9 High Court Cases since 1979

The development of the current laws has been much influenced by a series of High Court cases since 1979. The first of these is *Wacando v Commonwealth*,⁶⁶ where the issue was whether Darnley and other Torres Strait Islands were within the State of Queensland. The plaintiffs wished to establish certain fishing and other commercial activities in the offshore waters in the Torres Strait and maintained they were not bound by Queensland laws as the adjacent islands that gave rise to the jurisdiction over the sea were not part of Queensland. The argument mainly turned on details about the effectiveness of certain colonial laws and letters patent to incorporate these islands into the Queensland colony. The High Court held that the islands were part of the State of Queensland and so the fishermen were bound by its laws. It is worth mentioning that, in the course of his judgment, Gibbs CJ set out a brilliant, authoritative and clear history of the colonial laws relating to the outer maritime boundaries for this part of Australia.

The external affairs power under s 51(xxix) of the *Constitution* has already been mentioned. It is desirable, however, to develop the discussion about these cases, not because they directly tested any aspect of Australia's offshore laws, but to show how the external affairs power developed to a position where it currently supports the validity of Commonwealth laws over almost any offshore activity.

In 1982, in *Koowarta v Bjelke-Petersen*,⁶⁷ the purchase of a crown lease of land for a pastoral property by the Aboriginal Land Fund Commission was denied a transfer of title by the Queensland Minister because the purchaser was an Aboriginal group. The refusal by the Minister, pursuant to then Queensland State government policy, was claimed to be discriminatory and in contravention of the *Racial Discrimination Act 1975* (Cth). In the resulting High Court case, Queensland submitted that this Act was beyond the Commonwealth's legislative powers under the *Constitution*. The majority of the Court held that the relevant terms of the Act were valid as they were passed in support of the *International Convention on the Elimination*

⁶⁵ *Constitution* s 109, which provides that when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

⁶⁶ (1981) 148 CLR 1.

⁶⁷ (1982) 153 CLR 168.

of *All Forms of Racial Discrimination*,⁶⁸ to which Australia was a party. Therefore it was supported by the external affairs power. The judgments are long and do not warrant detailed analysis here, but the key issue that divided the court related to the outer limit of the external affairs power. The decision generated some concern as, in the majority judgments, no clear criteria were stated to fix the outer limits of this power which was, of course, to the detriment of the Australian federal structure.

The external affairs power in the *Constitution* next came to prominence in 1983 in the highly politically-charged case of *Commonwealth v Tasmania* (*Tasmanian Dam case*).⁶⁹ The case concerned the Tasmanian government's legislation and regulations to allow construction of a dam for hydro-electric generation of electricity. Construction of this dam would have resulted in flooding of part of the pristine wilderness of the Gordon River in Tasmania, an area declared as a World Heritage Area under the *Convention Concerning the Protection of the World Cultural and Natural Heritage*.⁷⁰ Commonwealth legislation and regulations prohibited flooding this river. There were many issues before the court but on the application of the external affairs power, the High Court split 4:3, with the majority upholding the power of the Commonwealth legislation in support of an international convention. The powerful dissenters, Gibbs CJ, Wilson and Dawson JJ, were concerned that the Australian federal structure should not be undermined by the over-extension of the external affairs power.

Only five years later Tasmania was again battling the Commonwealth in the High Court over the application of the same heritage convention, but this time over the preservation of important forests in *Richardson v Forestry Commission* (*Lemonthyme and Southern Forests case*).⁷¹ However, the main fight had been lost by the States in the *Tasmanian Dam Case* and the whole of the court applied that case in holding that the external affairs power supported the Commonwealth legislation.

In the 1991 case of *Polyukovich v Commonwealth*,⁷² the accused, who had migrated from Europe to Australia, had been charged with serious war crimes alleged to have been committed in Europe during World War II. He was charged under the then new, and controversial, Commonwealth amendment to the *War Crimes Act 1945* (Cth). The amendment had not only extended Commonwealth jurisdiction to acts carried out in foreign countries by persons who were then foreign nationals, but it also legislated retrospectively to criminalise past actions. Declarations were sought on Mr Polyukovich's behalf in the High Court to strike down certain provisions of the Act as being beyond the legislative power of the Commonwealth. In its argument the Commonwealth relied upon the defence power and the external affairs power.

In his judgment, Mason CJ gave a wide view of the power. He said that he had previously expressed the view that the power with respect to 'external affairs should be construed with all the generality that the words admit and that, so construed, the power extends to matters and things, as well as relationships, outside Australia' and that this view had prevailed in the court since 1975.⁷³ Brennan J, who was one of the dissenting judges in that particular case, but only on its facts, also gave a wide interpretation of the external affairs power.⁷⁴ The court held, by majority, that the legislation was valid and similar views to those of Mason CJ and Brennan J were expressed by the other members of the court. The concerns over the case were considerable as the amendments had been used to attack two respected aspects of legal jurisdiction: namely, that a country's laws usually did not extend to actions taken in another country by non-nationals and that criminal offences should not be created retrospectively.

Other and more recent cases dealing with the external affairs power need to be mentioned, some of them involving maritime issues.

In 1994 in *Horta v The Commonwealth* (*Horta's Case*),⁷⁵ the issue was the validity of legislation that gave effect to the Australian and Indonesian agreement over exploration for and exploitation of petroleum in the Timor Gap,⁷⁶ which is the area in the Timor Sea to the south of Timor island. Those who fought for

⁶⁸ Opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

⁶⁹ (1983) 158 CLR 1.

⁷⁰ Opened for signature 23 November 1972, 1037 UNTS 151 (entered into force 15 December 1975).

⁷¹ (1988) 164 CLR 261.

⁷² (1991) 172 CLR 501.

⁷³ *Ibid* 528.

⁷⁴ *Ibid* 551-552.

⁷⁵ (1994) 181 CLR 183.

⁷⁶ *Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia*, signed 11 December 1989, [1991] ATS 9 (entered into force 9 February 1991). The legislation was the *Petroleum (Australia-Indonesian Zone of Cooperation) Act 1990* (Cth).

independence for East Timor after it was occupied by Indonesia in 1975 included Mr Ramos Horta, later the East Timorese Prime Minister. He and others sought a declaration from the High Court that the Timor Gap agreement was invalid. The basis of the applicants' argument was that East Timor had been occupied unlawfully, by force of arms, and so the agreement Australia made with Indonesia over what are lawfully East Timorese waters and sea bed is invalid and hence the Australian legislation is invalid. Most of the grounds of argument attacked the executive power⁷⁷ and the external affairs power of the Commonwealth.

In a unanimous judgment, the court held in *Horta's Case* that the legislation was valid under the external affairs power as being characterised as a law with respect to a treaty with a foreign country. The court applied *Polyukovich v Commonwealth* and held that even if the Australian government breached obligations under international law that did not necessarily deprive the domestic law of its validity under the external affairs power. Further, the court held that, unless it was a sham to attract legislative power, the recognition of foreign powers in international law was an issue for the Commonwealth Executive and that it was not justiciable before Australian domestic courts.

In 1996, the *Victoria v Commonwealth ('Industrial Relations Act Case')*⁷⁸ came before the High Court. It concerned the validity of Commonwealth amendments in the *Industrial Relations Act 1988* (Cth) that bound the States in relation to workplace conditions and industrial relations. As the amended Act gave effect to some International Labour Organisation conventions and recommendations, the argument in the High Court included submissions on the external affairs power. The court held unanimously that the power extended to places, persons, matters or things physically external to Australia and that it was not confined to treaty obligations. In doing so, it applied and confirmed the major earlier cases such as *The Tasmanian Dams Case* and *Polyukovich v Commonwealth* and extended the test in that for such laws to be categorised as not relating to a treaty the enacting legislation had to be substantially inconsistent with the treaty. This case settled the law and made it clear that the external affairs power applied offshore, as well as onshore, to its widest extent. As most offshore laws have some international connection or relate to one or more of the numerous international conventions, it was clear that the Commonwealth Parliament has, when combined with its other powers, a very wide jurisdiction indeed.⁷⁹

Having taken the High Court cases up to 1996 in dealing with the external affairs power, it is now convenient to go back in time to pick up on the High Court cases on other aspects that were more directly connected with offshore laws.

In 1988, in *Union Steamship Company of Australia Ltd v King*,⁸⁰ State workers' compensation provisions extending to an interstate ship were upheld. The issue was whether the NSW Act should cover the workers compensation claim by Mr King, or whether the Commonwealth Act should apply, where the ship was registered on the NSW shipping register. There were two main issues: the first was whether there was a sufficient nexus for the peace, order and good government of the State for the NSW Act to apply. Of course, *Pearce v Florenca* had confirmed the principle that it could, but that case did not decide what was a sufficient connection for the nexus to apply. The second main issue was whether the Commonwealth Act covered the field so that it left no room for the State legislation to operate without it being inconsistent and so struck down. On both issues the High Court unanimously found for NSW, so the State legislation was held to apply to a ship operating at sea offshore but registered in that State. The court held that the test of the relevant connection, the nexus, between the circumstances of the legislation and the State should be liberally applied so that even a remote and general connection would suffice.

In 1989, in *Port MacDonnell PFA Inc v South Australia ('Port MacDonnell Fisheries Case')*,⁸¹ an issue arose over the sea boundaries of an offshore area arising from the agreement between the Commonwealth and the State of South Australia that the SA fisheries laws on rock lobsters would apply to this area. The relevant area extended out to the limits of the Australian Fisheries Zone, which was 200 miles (i.e. the same as the EEZ), so it was well beyond the usual three mile limit for the States. One issue was whether the agreement made between the Commonwealth and the SA government could include a wedge of offshore waters that was adjacent to Victoria and not to SA. These relevant waters were beyond Victoria's three mile limit but were

⁷⁷ This was relevant because, under the Australian system of government, as derived from the British ancient system, it is the executive that decides to enter or not enter into international conventions and agreements with foreign sovereign States.

⁷⁸ (1996) 187 CLR 416.

⁷⁹ The next case actually was *Newcrest Mining (WA) Ltd v Cth* (1997) 190 CLR 513 which concerned the validity of mining in the Kakadu National Park in the Northern Territory and the argument and decision of the court merely confirmed the existing law on the external affairs power.

⁸⁰ (1988) 166 CLR 1.

⁸¹ (1989) 168 CLR 340.

otherwise adjacent to the Victorian coast. The court had to consider a number of issues, but for immediate purposes, it held the laws applying to the waters adjacent to the Victorian coast were not valid as the legislation only authorised an agreement to be made over waters 'adjacent' to a State, and this wedge of water was adjacent to Victoria. As to the waters off the SA coast, however, the court held that the Commonwealth legislation was valid and that the SA laws applying in this area were also valid as being for the peace, order and good government of that State.

The *Port MacDonnell Fisheries Case* also confirmed the arrangement in the OCS 1979 that the Commonwealth could make an agreement with the States over fisheries if both parties so wished. This, one may observe, is cooperative federalism that is to be commended.

The decision in the 2003 case of *Re Maritime Union of Australia; ex parte CSL Pacific Shipping Inc*,⁸² was important in the shipping world in that the High Court was called on to decide what regime regulating workplace conditions, such as pay and general working conditions, should be applied to foreign registered vessels that were operating off the Australian coast and in its ports from time to time. The *Navigation Act 1912* (Cth) prohibited ships from operating between two or more Australian ports (the coasting trade) unless they were licenced and the terms of the licence, in effect, meant that they had to be Australian registered ships and these ships were required to apply Australian pay and working conditions to their crews. Unlicensed ships, which meant in effect, foreign registered ships, could carry cargo in the coasting trade only with a special government permit to do so. Foreign registered ships applied the International Labour Organization's lower pay and working conditions, which were less expensive for ship owners or operators than the Australian regime.

The CSL Pacific ships had been Australian-flagged and crewed and employed in the coasting trade but the profit margin dropped and in order to reduce costs, the owners re-flagged them in Panama and returned them to work on the Australian coast with foreign crews, with lower pay and conditions. Not surprisingly, three unions, including the Maritime Union of Australia (MUA), brought an application in the Industrial Relations Commission seeking an order that Australian award conditions be applied to these ships. This resulted in considerable litigation, including a test case to the High Court. For present purposes, the High Court made three major decisions:

- (i) The Australian legislation did not interfere with the right of 'innocent passage' of foreign ships through Australian waters under public international law;
- (ii) The 'internal economy' rule, that the law on board a ship was usually that of the flag state and not of the coastal state, did not mean that Australian laws could not be applied, so the Australian Industrial Relations Commission did have jurisdiction to hear the matter; and
- (iii) Whether the Australian law actually did apply in this case was a matter of individual circumstance and legislation and this was for the Commission to decide.

It can be seen from the *CSL Pacific Case* that Australian laws *could* apply to foreign vessels in its jurisdiction, but only if the legislation expressed that it *did* apply to them. This principle of the coastal state having jurisdiction to apply its laws to foreign ships in its ports or internal waters if it so chose was fairly well established in international law and this case settled the issue for Australia.

In the 2006 case of *Vasiljkovic v Commonwealth*,⁸³ the issue was whether extradition was valid in the *absence* of a treaty with that country, which was different from the many cases relying on the *presence* of a treaty. The court held that a regulation, declaring Croatia to be a country to which Australian extradition procedure applied even though there was no Australian-Croatian treaty to this effect, was still a valid exercise of the external affairs power. The two new aspects in this case were an absence of any treaty and the law was applied by a mere regulation and not an Act.

A second case in 2006 was *XYZ v Cth*,⁸⁴ which concerned the validity of Australian legislation prohibiting an Australian citizen or resident from engaging in sexual intercourse with a minor in a foreign country. The majority held that the legislation was valid on the ground that the legislation was justified by the external affairs power, and confirmed that matters or things geographically external to Australia came within those

⁸² [2003] HCA 43.

⁸³ [2006] HCA 40.

⁸⁴ [2006] HCA 25.

powers. The dissenting judgments, however, held that the geographical externality principle did not apply where that was the sole basis for the connection. It may be seen from this case that, although there were powerful dissents, the external geographical connection was sufficient for legislation to be valid under the external affairs power to regulate the conduct of Australian citizens or residents when in foreign lands.

This series of cases in the High Court has settled to a large extent the jurisprudence that is relevant to which Commonwealth laws may validly apply offshore. The limits of the external affairs power is very wide and legislation by the Commonwealth Parliament is valid if it relates to any international agreement, to foreign countries in any manner or to any matter or thing geographically external to Australia provided there is some geographical connection. When one combines the external affairs power with the other grants of power under the *Constitution*, the range of Commonwealth laws that can be validly passed to apply to offshore activities is almost unlimited.⁸⁵

9 Concluding Remarks

This article has described the development of the Australian offshore laws from their genesis until the end of 1979. The first Commonwealth offshore law arose from the need to regulate offshore petroleum exploration and exploitation. The OCS 1979, however, was the major event of this period. It attempted to settle the basis of the conflict between the States and the Commonwealth by a geographical limiting line based on the earlier Colonial territorial sea width of three miles. Events have since moved on and the recognised territorial sea limit is now 12 miles, removing the basis for this aspect of the OCS 1979. Further, the legislative drafting has moved on and it can be seen that it has departed from the simple geographical separation of Commonwealth and State laws. Apart from legislation, there have been numerous important High Court cases which developed the offshore jurisdiction to the current situation. In the result, the offshore matrix of laws has become very complex.

The second of these two articles will address quite different issues as it is more a description of the current situation rather than one of the history and development of these laws.

⁸⁵ Reference is made to the discussion as to the possible heads of power in the *Constitution* on which the Commonwealth could rely in M White and H Zelling, 'Constitutional Background and Jurisdiction of Courts' in M White (ed), *Australian Maritime Law* (Federation Press, 2nd ed, 2000).