

Attorney-General's Department

**Offshore
constitutional
settlement
Selected statements
and documents
1978-79**

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Selected statements and documents

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Crimes at Sea Bill 1978

*Second Reading Speech by the Commonwealth Attorney-General,
Senator the Hon. Peter Durack, Q.C.*

Motion (by **Senator Durack**) agreed to:

That leave be given to introduce a Bill for an Act relating to offences committed at sea or in foreign ports or harbours, and matters connected therewith.

Bill presented, and read a first time.

Standing orders suspended.

Second Reading

Senator DURACK (Western Australia—Attorney-General) (3.14)—
I move:

That the Bill be now read a second time.

The desirability of reviewing the existing law relating to offences at sea was referred to by the Chief Justice of the High Court, Sir Garfield Barwick, in 1974 in the case of *The Queen v. Bull* (131 CLR 203, at page 235). He observed that it is inappropriate today that the power of a court in Australia to try extra-territorial offences should be derived from and be limited by Imperial legislation. In 1977 in the subsequent case of *Oteri v. The Queen* (51 ALJR 122) the Privy Council drew attention to a feature of the existing law in the following terms:

It may at first sight seem surprising that despite the passing of the Statute of Westminster, 1931, and the creation of separate Australian citizenship by the British Nationality Act 1948 (Imp.) . . . Parliament in the United Kingdom when it passes a statute which creates a new criminal offence in English law is also legislating for those Australian passengers who cross the Bass Strait by ship from Melbourne to Launceston.

The present Bill will correct that position, in situations coming within the Commonwealth's constitutional powers. Its purpose is to apply Australian criminal laws in those situations, the laws applied being those of a relevant State or Territory. To avoid misunderstanding I should add that the extra-territorial application of specific federal criminal laws, such as those relating to customs offences, will continue to be dealt with as now under the specific Commonwealth legislation in question, for example the Customs Act, and are not embraced by the present proposal.

The objective of the Bill deserves, and, I believe, will receive wide support. There is, however, an additional important reason why this legislation should go forward and to which I should draw attention.

The Bill now before the Senate represents the first fruits of the consultations and agreements between the Commonwealth and the States initiated by this Government to deal with the situation it faced following upon the decision of the High Court in the Seas and Submerged Lands case in late 1975 (135 CLR 337). Certain agreements in principle were reached at the Premiers Conference of 21 October 1977. At the Premiers Conference on 22 June this year a major step forward was taken to implement the principles agreed upon. In particular it was agreed that the powers of the States should be extended to the territorial sea including the seabed. Other matters dealt with included the establishment of joint Commonwealth-State authorities for offshore mining and fishing in which the Commonwealth has a proper role perhaps not fully recognised under existing arrangements.

I had occasion to observe at the time of the Premiers Conference that in the Seas and Submerged Lands case, the complete sovereign power and rights of the Commonwealth Parliament over offshore areas of Australia, that is from low-water mark outwards, was affirmed. The result of that was that the Commonwealth Parliament has the power to override all State legislation in the area. The object of this exercise which we have been engaged in since last year has been to endeavour, on the basis of federalism, to restore to the States powers, many of which were thrown in great doubt as a result of the High Court decision. What the States have been seeking is some permanent solution of the problem so that they will not be concerned all the time that—

- (a) their own laws will not be effective if they are applying offshore, and
- (b) probably more importantly, that the Commonwealth will not come in above them and pass laws which would as a result of section 109 of the Constitution override the exercise of State laws.

Legislation to implement these other decisions is being prepared. I believe that it is very important that the Bill now before the Senate, which represents the first item of the package, should be supported and passed as soon as possible.

It has been prepared in close consultation with the States and the Northern Territory, in the Standing Committee of Commonwealth and State Attorneys-General, as part of a complementary scheme of Commonwealth and State legislation on offences at sea. A model complementary State Bill has also been prepared for introduction into State parliaments and a similar Bill is to be introduced into the Northern Territory Legislative Assembly. For the purpose of the complementary scheme, the Northern Territory, which of course now has self-government, has been treated as a State.

I turn now to the Bill itself. Very briefly its effect is to apply the criminal laws of an appropriate State or Territory to offences on or from Australian ships on overseas, inter-State and Territory voyages, and in certain carefully circumscribed cases to offences on or from

foreign ships beyond the territorial sea. Also, the Commonwealth Bill will apply the criminal laws of the adjacent State or Territory to offences in offshore areas beyond the territorial sea that come under Australian jurisdiction, for example, on offshore installations better known as oil rigs. The complementary State Bill deals with offences on intra-State voyages and offences within the territorial sea.

For these purposes sub-clause 3 (1) of the Commonwealth Bill defines 'criminal laws' so as to include all laws that make provision for or in relation to offences. However, there are important qualifications to this general application of criminal laws. Clause 12 excludes from the criminal laws applied by the Bill laws incapable of applying at sea or laws expressly worded so as not to extend or apply at sea. Nevertheless this may leave some offences applicable which, it would be readily agreed, should not be so applied. It is proposed therefore by sub-clause 18 (2) that the regulation-making power in the Bill should authorise regulations providing that provisions or classes or provisions of the criminal laws in force in a State or Territory are not to apply by virtue of the Bill. A precedent for such an excepting power is contained in sub-section 4 (6) of the *Commonwealth Places (Application of Laws) Act 1970*.

Honourable senators will appreciate that, by reason of the requirements of international law, it is necessary, outside the territorial sea in particular, to observe a distinction between Australian ships and ships coming within the jurisdiction of other countries. For this purpose, a definition included in sub-clause 3 (1) refers to ships registered in Australia or an external Territory under the Imperial Merchant Shipping Act or under any Commonwealth Act replacing that Act. Paragraph (b) of the definition refers to any other ship that is Australia-based or owned or Territory-based or owned, not being a ship registered in a foreign country. The definition of 'foreign country' in sub-clause 3 (1) therefore refers to any country other than Australia or an external Territory. The distinction made in the Bill is, as mentioned, between Australian ships and other ships and so no special reference is needed to ships of other Commonwealth countries.

A particular provision that may intrigue honourable senators is contained in sub-clause 3 (4), which defines when a person ceases to be a 'survivor' for purposes of the application of criminal laws under the Bill under paragraphs 6 (1) (b), 7 (1) (b) and 8 (1) (b). A feature of the Bill is that it expressly covers the situation of shipwreck survivors. Those of us who have studied criminal law will well remember the case of *Dudley and Stephens*—(1884) 14 QBD 253—the harrowing facts of which related to the killing and eating of a cabin boy by the survivors of a wreck in order to survive. While such cases are thankfully very exceptional, the point is that situations of enormous stress can occur following a shipwreck and there should be no room for doubt about the applicability of criminal law in such situations.

Clause 4, which follows in part section 6 of the *Commonwealth*

Places (Application of Laws) Act 1970, authorises an arrangement with a State for the exercise or performance of a power, duty or function by an authority of the State under the provisions of the criminal laws in force in any State or Territory as applying by virtue of the Bill. This provision, along with clauses 5, 13 and 14, is designed to facilitate to the maximum the implementation of the Bill by the law enforcement authorities of the States.

The main substantive provisions of the Bill are to be found in clauses 6 to 11. Clauses 6 and 8 relate to offences on or from ships, including Australian ships wherever they might be at the time, even in a foreign port, while clauses 9 to 11 deal with offences in the offshore area and are directed to offences in which ships need not be involved, for example, offences on offshore installations. In view of the current trend in the Law of the Sea pointing to an increase in offshore jurisdiction both in area and content, particular care has been taken to prepare legislation that will be adequate to meet future developments when they occur.

I shall deal first with offences on or from ships. Clause 6 applies State or Territory criminal laws to acts committed by a person on or from an Australian ship in the course of a 'prescribed voyage' and to acts committed on or from Australian ships in foreign ports. The criminal laws so applied are those of a State or Territory with which the ship is connected by registration. If the ship is not so registered, other kinds of connection with a State or Territory are to be recognised under sub-clause 6 (2). A 'prescribed voyage' is defined in sub-clause 6 (3) so as to include—(a) a voyage from a State to a place in a foreign country, in another State, or in a Territory; (b) a voyage from the Northern Territory to a place in a foreign country, in a State, or in another Territory; and (c) any voyage from a Territory other than the Northern Territory or from a foreign country.

Clauses 7 and 8 deal with foreign ships. It is convenient to refer to clause 8 first. It applies State or Territory criminal laws to acts on or from foreign ships beyond the territorial sea of Australia or an external Territory by an Australian citizen who was not a member of the crew of the ship. The criminal laws applied are those of the State or Territory in which the person was domiciled at the time or he had his last place of residence in Australia or the external Territories. Section 381 of the *Navigation Act 1912* already claims jurisdiction in such cases, and the Bill in this regard is therefore following a well-worn path.

Clause 7 is not limited to Australian citizens and applies in relation to acts committed on the high seas on or from a foreign ship in the course of a voyage to a place in Australia or an external Territory, or which is fishing or is licensed to fish in the Australian fishing zone. As will appear, the jurisdiction is carefully circumscribed, and I should add, is likely to be seldom used. Thus, the effect of sub-clause 7 (2) is that only the last leg of a voyage from overseas to Australia is included for purposes of the clause—for example, in a voyage Tokyo–Manila–Sydney, only the Manila–Sydney leg would be included—plus any leg of the

voyage around Australia, for example, Sydney-Melbourne. While sub-clause 7 (3) has the effect of applying to such acts the criminal laws of the State or Territory which the offender enters or to which he is brought, sub-clause 7 (4) makes it a defence that the act constituting the offence would not have constituted an offence under the law of the country of which the offender is a national.

In addition, the consent of the Attorney-General is required by sub-clause 7 (5), and under sub-clause 7 (6) this is to be given only if he is satisfied that the government of the foreign country under whose jurisdiction the ship comes—the flag state—has given its consent. However, the requirement of consent does not apply to piratical acts, since all countries have jurisdiction to try piratical acts on any ship.

The Government regards the carefully confined jurisdiction conferred by clause 7 as reasonable. It views it as a subordinate and seldom needed means of ensuring, as far as practicable, that crimes do not remain unpunished. The ability to extend local criminal laws to offences on foreign ships arriving in Australia follows a precedent set by New Zealand in 1961 and is justified by the need, having regard to the remoteness of Australia from other places, to be able to deal with situations of acute distress that can occur and that do, I might add, occur from time to time. The jurisdiction would apply, as I have already indicated, only if the offender enters or is brought into a State or Territory.

As I have mentioned, clauses 9, 10 and 11 of the Bill constitute a second group of provisions dealing with offences outside the territorial sea in offshore areas that are within Australian jurisdiction or may come within Australian jurisdiction in the future. They cover acts arising out of the exploration or exploitation of the resources of the Australian continental shelf and, looking to the future, arising out of other activities coming under Australian jurisdiction in any 200 mile economic zone that may be proclaimed by Australia. Clause 11 enables the application of criminal laws to other acts by Australian citizens or residents in offshore areas outside the territorial sea, for example, within the 200 mile zone. In all cases the criminal laws of the adjacent State or Territory are to be applied.

Clause 12 has already been mentioned. Clauses 13 to 16 deal with certain procedural and technical matters which are also referred to in the explanatory memorandum that is being circulated. Clause 17 provides in effect for a change in venue if the Judge of a Supreme Court of the State or Territory in question is satisfied that other proceedings have been instituted or are proposed, and that it is expedient that the proceedings be stayed. Matters to be taken into account include whether the continuation of the proceedings would impose any special hardship on the accused.

Mr President, the Government proposes that the Bill should not be proceeded with until there has been time for full examination and discussion. On the other hand, there is obviously a need to reorder the position on offences at sea as soon as possible, and in that regard for

this Parliament to deal with those cases that come under the Commonwealth's constitutional powers. I therefore commend the Bill to the Senate.

Debate (on motion by Senator Georges) adjourned.
22 August 1978

Great Barrier Reef

Statement by the Prime Minister, the Rt Hon. Malcolm Fraser, C.H.

The Prime Minister, Mr Malcolm Fraser, and the Premier, Mr Joh Bjelke-Petersen, conferred today on the future consultative arrangements for joint consideration of recommendations of the Great Barrier Reef Marine Park Authority. This Authority is established by the Commonwealth Great Barrier Reef Marine Park Act, which will continue unchanged.

The Great Barrier Reef Marine Park Authority is designed to provide for the progressive declarations and oversight of Marine Parks in the Region of the Great Barrier Reef. The boundaries of this Region will remain as defined in the Commonwealth legislation.

No provision has to date been made for both governments to co-ordinate policy at the ministerial level. Accordingly, it was agreed at today's meeting to establish a Ministerial Council comprising Commonwealth and State Ministers particularly representing marine park, conservation, science and tourism.

The Commonwealth Ministers will be Phillip Lynch, the Minister for Industry and Commerce, whose portfolio responsibilities include tourism—a major activity in the area of the Great Barrier Reef—and Senator Webster, the Minister for Science and the Environment, who is directly responsible for the Great Barrier Reef Marine Park Authority.

The Queensland Ministers will be Mr Newberry, the Minister for Culture, National Parks and Recreation, and Mr Hodges, the Minister for Maritime Services and Tourism.

Mr Fraser and Mr Bjelke-Petersen agreed that the first section of the Great Barrier Reef Marine Park—the Capricornia section—should be processed by the Ministerial Council as an immediate task to enable early proclamation to take place.

They also agreed that as the sections of the Great Barrier Reef Marine Park are proclaimed, the day-to-day management should be undertaken by officers of the Queensland National Parks and Wildlife Service, who, in discharging these responsibilities, will be subject to the Great Barrier Reef Marine Park Authority. The Authority will continue to have the responsibility for:

- recommending the declaration of Parks;
- developing zoning plans and plans of management of Parks; and
- arranging for research and investigation relevant to Marine Parks.

In relation to the Territorial sea, the Premier and the Prime Minister agreed that the arrangements with Queensland which will flow from the agreements of the June 1978 Premiers Conference will be on the same basis as arrangements to be entered into in respect of other States, but with full regard to the Great Barrier Reef Marine Park Act and to the Prime Minister's Parliamentary Statement of 4 June on Petroleum Exploration in the Great Barrier Reef.

Both the Premier and the Prime Minister confirmed that it was the policies of their respective governments to prohibit any drilling on the Reef or any drilling or mining which could damage the Reef.

Mr Bjelke-Petersen and Mr Fraser agreed that the program of short and longer term research into the Great Barrier Reef eco-system referred to in that Statement will be monitored by the Ministerial Council, and will be closely supervised by the Marine Park Authority.

By creating an appropriate consultative mechanism these arrangements will serve to ensure that the Authority functions within the framework of the joint policies of the Commonwealth and Queensland Governments as they further develop.

The two Governments will be consulting forthwith on implementation of these arrangements.

Both the Premier and the Prime Minister affirmed that the basic policy intention of both governments was to ensure that the Great Barrier Reef area be recognised and preserved as an important feature of Queensland's and Australia's heritage.

14 June 1979

Commonwealth offshore constitutional responsibilities and the Great Barrier Reef

*Statement by the Commonwealth Attorney-General,
Senator the Hon. Peter Durack, Q.C.*

With the agreement reached between the Commonwealth and Queensland last week, the issue of the control and management of the Great Barrier Reef which has clouded the whole topic of present and proposed offshore constitutional arrangements has now been resolved.

The Commonwealth and Queensland will now have a joint consultative mechanism for the management and preservation of the Great Barrier Reef Region, which extends right into low-water mark along the Queensland coast and around Queensland islands in the area.

It is important that the constitutional basis for these arrangements should be properly understood.

There is a practical need for the Commonwealth and a State, when they are each concerned with a matter, to channel that concern into the paths of co-operation rather than of confrontation. However, it is a fundamental rule of our Constitution that, where Commonwealth power extends to a matter that is also of interest to the States, the Commonwealth has the ultimate power.

The Commonwealth Government's position on the need to protect the Barrier Reef is clear. On 4 June the Prime Minister announced a number of decisions, including the preparation of a research program. Those decisions give an unequivocal commitment not to permit any drilling or mining anywhere that could possibly damage the Reef.

The Commonwealth's decisions announced on 4 June adopt the stricter restrictions on drilling proposed by Sir Gordon Wallace, the Chairman of the Royal Commissions into petroleum drilling in the area of the Reef. That inquiry was jointly initiated by the Commonwealth and Queensland and reported in November 1974.

The Commonwealth's interest in preserving the Reef was confirmed in 1975 when the Parliament passed the Great Barrier Reef Marine Park Act with the support of all parties. The national Parliament took the view that the Reef did not simply belong to one State but to the people of Australia who had an obligation to see that it was preserved for the future generations of all nations.

In the complex negotiations between the Commonwealth and the States to find solutions of the vexed questions of offshore jurisdiction,

the Great Barrier Reef Region presented an obviously difficult problem. Both the Commonwealth and Queensland Governments recognised this, and the need to make special arrangements. The consultations with Queensland culminated in the agreement reached between the Prime Minister and Mr Bjelke-Petersen at Emerald last week.

Commonwealth Act unchanged

Those arrangements involve acceptance that the Great Barrier Reef Marine Park Act will continue unchanged. The Great Barrier Reef Region as defined by it will continue unchanged, as will the Great Barrier Reef Marine Park Authority established by it.

The Great Barrier Reef Marine Park Authority is designed to provide for the progressive declarations and oversight of Marine Parks in the Region of the Great Barrier Reef. The Authority is concerned therefore not only with specific areas that have been actually declared to be part of the Marine Park. In addition the Authority has a statutory responsibility, in effect, to oversee the well-being of the whole Reef.

Co-operation

The Commonwealth Act gives recognition to the practical necessity for co-operation with the Queensland Government. One of the members of the Authority is to be nominated by the Queensland Government. The other two are Commonwealth nominees. The Act specifically states that the Authority can perform any of its functions in co-operation with Queensland, and also provides that the Commonwealth Government may make arrangements with the Queensland Government for the performance of functions by Queensland officers.

The joint arrangements the Prime Minister has now secured with Queensland, under which day-to-day management will be by Queensland officials, will utilise these provisions of the Act.

These provisions are now to be reinforced by a consultative Ministerial Council comprising Commonwealth and State Ministers representing marine parks, conservation, science and tourism. The first section of the Great Barrier Reef Marine Park recommended by the Authority—the Capricornia Section—is to be processed by the Ministerial Council as an immediate task to enable early proclamation to take place. The ultimate power to declare areas to be part of the Marine Park is with, and will remain with, the Commonwealth.

In the debates in the Senate four years ago on the Great Barrier Reef Marine Park Act, I said: 'It is perfectly obvious that it is not a practical proposition for the Commonwealth Government or an authority of that Government to exercise powers within an area of this kind without having to co-operate at almost every point with the Government of the State which is adjacent to the area and which controls a large number of islands which are within the area'.

The joint arrangements with Queensland can only enhance the development and protection of the Great Barrier Reef.

Constitutional questions

In federations such as ours, there are difficult and intricate problems in matters of offshore jurisdiction. After a decade of Commonwealth-State disputes on the matter involving major litigation in the High Court, the point needs little elaboration.

Australia's experience in this is by no means unique. Similar questions arose in the United States and subsequently in Canada. In their cases, as in the case of Australia, the ruling of the highest constitutional tribunal was in favour of the central government. In their cases, as in our own case, it was found that the constitutional ruling was not the end of the matter.

Thus the High Court's decision in the *Seas and Submerged Lands* case in late 1975 in the event confirmed full jurisdiction on the part of the Commonwealth Parliament right up to low-water mark. However the decision also threw doubts on the adequacy of existing State extra-territorial powers in the territorial sea on a number of topics which history, common sense and the sheer practicalities of the matter mark out for State administration rather than Commonwealth administration, in the absence of overriding national or international considerations.

Port facilities are one example. The enforcement of the general criminal law in the territorial sea is another. The Commonwealth Crimes at Sea Act, which will come into operation in the near future, recognises that generally it is for the States to deal with crimes in the territorial sea.

Agreement in principle was reached at the Premiers Conference in 1977 with all States that the territorial sea should therefore be the responsibility of the States. The Conference stipulated that this was not to affect the Commonwealth's international responsibilities and marine parks were not dealt with. Implementation of the 1977 Agreement was considered at the 1978 Premiers Conference which agreed to an extension of State powers to the territorial sea, supported by appropriate amendments of the Seas and Submerged Lands Act and the vesting of appropriate rights in the States in respect of the seabed in the territorial sea.

Commonwealth responsibility

It would be a mistake however to see the proposed implementation of these arrangements as representing an abdication by the Commonwealth Government of its own national and international responsibilities in relation to the territorial sea. Thus, the arrangements agreed with Queensland recognise that the implementation of the 1978 Premiers Conference with respect to the territorial sea will be subject to the Great Barrier Reef Marine Park Act and the decisions on the Reef announced by the Prime Minister on 4 June.

There may be some who would prefer an abdication by the Commonwealth of these responsibilities. However that is no part of our proposals. I repeat what I have said in the Senate:

The discussions with the States are on the basis of the exercise by this Parliament—not anybody else—of its constitutional power. We are not talking about giving away the ultimate constitutional power of this Parliament.

23 June 1979

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Commonwealth-Western Australian Offshore Petroleum Joint Authority

Special Agreement relating to its establishment, Premiers Conference

1. Present Commonwealth legislation would be amended to provide for the establishment of a Joint Authority consisting of the State Minister and the Commonwealth Minister. Under these arrangements applications will be made to the State Minister. The day-to-day administration will remain with the State.

2. Having regard to the special position of Western Australia, special provisions are agreed in the case of the Western Australian Joint Authority as follows:

- (a) Headquarters of the Joint Authority will be located at Perth.
- (b) In the event of disagreement, the Commonwealth has power to veto decisions proposed by the State where the decision would endanger or prejudice the national interest.
- (c) If the Commonwealth Minister proposes to recommend the exercise of the power of veto, he shall communicate this proposal to the State Minister as soon as practicable but within 30 days and he shall specify in what respect the national interest would be endangered or prejudiced.
- (d) Should the State Premier wish to do so, he may make representations to the Prime Minister who after consideration by the Cabinet shall be responsible for resolution of the issue.
- (e) Distribution of functions would be the same as for other States but subject to the above.

29 June 1979

Offshore powers a milestone

*Statement by the Commonwealth Attorney-General,
Senator the Hon. Peter Durack, Q.C.*

The Attorney-General, Senator Peter Durack, Q.C., issued the following statement today to the *Australian*.

Your newspaper and its legal writer, Trish Evans, are to be congratulated on focusing attention on the important decisions made at the Premiers Conference on a new offshore settlement between the Commonwealth and the States (the *Australian*, 16 July).

As I pointed out in a recent statement from which your legal writer quoted, in federations such as ours there are difficult and intricate problems in matters of offshore jurisdiction. Australia's experience in this is by no means unique as similar questions arose in the United States and subsequently in Canada. In their cases, as in the case of Australia, the constitutional ruling by the courts was that full jurisdiction on the part of the central government extended right up to low-water mark.

The offshore constitutional settlement that has now been agreed upon aims to balance this decision. It will ensure that the States will have adequate powers to deal with matters in the territorial sea. History, common sense and the sheer practicalities make these matters for State administration rather than central control, in the absence of overriding national or international considerations.

As part of the constitutional settlement the Commonwealth Parliament on the request of all the States is to pass a Powers Bill extending State powers in the 3 mile territorial sea. As your legal writer correctly observes this legislation will be passed under a previously unused power contained in section 51 (38) of the Australian Constitution. This section enables Commonwealth and State Parliaments if they concur to produce legislative results that could only have been accomplished by the United Kingdom Parliament at the time of the establishment of the Australian Constitution.

Your legal writer finds this proposal 'fraught with problems'. I think that a little reflection on the alternatives and the difficulties they would present—a national referendum or an approach to the United Kingdom Parliament—indicates that resort to section 51 (38) is the most practicable course.

It is certainly true that section 51 (38) has never been used before and therefore the outcome of any challenge cannot be known with

certainty. Sir Robert Megarry at the recent Australian Legal Convention quoted some words of Lord Denning on doing things for the first time:

What is the argument on the other side? Only this, that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before, we shall never get anywhere. The law will stand still whilst the rest of the world goes on: and that will be bad for both.

Be that as it may, the legal basis for the implementation of the constitutional settlement, so far as the territorial sea is concerned, will also rest on other foundations. The full extent of existing State extra-territorial powers is perhaps unclear, but the High Court has made it abundantly clear that the States do possess significant extra-territorial powers in their own right. In 1976 in *Pearce v. Florenca* the Court specifically upheld Western Australian laws regulating fishing in the territorial sea.

In addition, however, the Commonwealth proposes under the constitutional settlement to give the States title to the seabed in the 3 mile territorial sea, while preserving Commonwealth use of the seabed for certain specified national purposes.

The important step of conferring seabed title on the States, which was taken also in the United States, will not only assist the implementation of the settlement but will also provide a reasonable guarantee that the settlement will not lightly or ever be overturned.

The offshore settlement is a practical and workable solution of a problem which has bedevilled Commonwealth-State relations for a decade. This solution, including the proposed use of section 51 (38) which has been agreed on by all State Premiers, constitutes a milestone in Commonwealth-State co-operation under our Federation.

Canberra
19 July 1979

Constitutional Powers (Coastal Waters) Bill 1979—Victoria

*Second Reading Speech by the Victorian Attorney-General,
the Hon. Haddon Storey, Q.C., M.L.C.*

The Bill stems from a High Court case in which all States challenged the validity of the Commonwealth Seas and Submerged Lands Act. The High Court decided by a majority that the boundaries of the States stopped at the low-water mark and that the territorial sea was not part of the State.

Before the seas and submerged lands case there had been what the High Court called 'a common misconception' that the territorial sea adjacent to each State was part of the State territory. Upon this basis there was Colonial and, after Federation, State legislation governing activities in the territorial sea as, until the High Court's decision, it had been considered to be the property of and under the control of the States. The States had previously believed that such resources as there were in the territorial seas belonged to the States.

The High Court held that this was not the position and furthermore that the Commonwealth has legislative power in respect of what lay beyond the low-water mark under its external affairs power, excluding internal waters. The States and the Commonwealth considered the decision to be very inconvenient—for example, the Commonwealth did not have the facilities or the wish to exercise responsibility over the territorial sea.

Accordingly the Commonwealth agreed that the States should be put, so far as possible, in the position they believed they were in before the High Court case.

At the October 1977 Premiers Conference, it was agreed that the territorial sea should be the responsibility of the States and that, in order to overcome problems caused by the High Court's decision on the validity of the Seas and Submerged Lands Act, the limits of the powers of the States should be extended to embrace the territorial sea.

These problems are:

- (i) The uncertainty of operation of State laws in the territorial sea—As a consequence of the High Court's ruling that the coastal boundaries of the States end at low-water mark, there arose the necessity for the legislature to ensure that the civil

and criminal law applies in the territorial sea by clearly evincing an intention that it should so operate. There is a presumption, however, that the legislature intends laws to operate within the territorial limits of the State.

- (ii) Uncertainty as to State extra-territorial legislative competence in the territorial sea—Only those State laws which satisfy the necessary criterion of being for the peace, order and good government of the State may validly operate in the offshore area. This requirement of nexus does not exist in relation to State laws which operate within State territory.
- (iii) Possible invalidity of State laws with respect to such matters as seabed mining, marine parks, marine pollution and ports and harbours and sea protection works beyond State limits and so on—These laws may be invalid for inconsistency with the Seas and Submerged Lands Act and/or lack of nexus with the State. Doubts as to the validity of these laws would be removed if State territory included the territorial sea.
- (iv) Practical legal problems which arise from the difficulty in determining the precise location of State maritime limits—It is difficult, if not impossible, to determine the closing lines of State internal waters in some parts of the coastline, for example Portland and Port Fairy, because the High Court has not yet seen fit to expound the relevant legal principles. Elucidation is likely to be on a case-by-case basis. Furthermore, the location of low-water mark on the coast is also a matter of difficulty and uncertainty. By taking the State boundary to the outer limit of the territorial sea, these legal problems will be considerably reduced.
- (v) The potential problems arising from the Commonwealth's new found legislative power beyond low-water mark—The High Court decision confirmed to the Commonwealth an external affairs power which is larger than had been previously thought. The Commonwealth may now have the potential to pass laws to operate beyond low-water mark on any subject. If this potential were realised the valid operation of many State laws would be excluded by virtue of section 109 of the Constitution. An extension of State limits to embrace the territorial sea would result in the Commonwealth being precluded from enacting legislation under the external affairs power in the relevant area, except for the purpose of implementing a convention.

Various methods were considered to give effect to the Premiers Conference decision, but the one that seemed to have general acceptance was an exercise under section 51 (xxxviii) of the Constitution whereby the States could request the Commonwealth to pass legislation giving to the States the same legislative powers in respect of the territorial sea

as they have on the land mass. Section 51 (xxxviii) authorises the Commonwealth to make laws with respect to '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 Australia'. This means, of course, that the territorial sea would be still subject to the possible exercise of Commonwealth legislation under section 51 of the Constitution as is the land mass at present.

The Bill has been drawn under the auspices of the Standing Committee of Attorneys-General at the request of the Premiers Conference and has been endorsed by both those bodies.

The Bill is to be coupled with the Commonwealth titles legislation under which the Commonwealth, in exercise of its external affairs power and its sovereignty over the territorial sea, is to grant title to the States over the territorial sea. That measure is regarded as a safeguard as any subsequent expropriation will be subject to the payment of compensation under the Constitution.

The Prime Minister is most anxious to introduce Commonwealth legislation during this spring sessional period of the Commonwealth Parliament and can do so only when all States have passed the necessary request and consent legislation. The Standing Committee of Attorneys-General, at its July 1979 meeting, agreed that the Bill should be presented to State Parliaments as soon as possible.

The opportunity is also taken in the Bill to confirm the extra-territorial legislative competence of the States beyond coastal waters in respect of subterranean mining from land within the limits of a State, port type facilities and fisheries. This measure represents a milestone in Commonwealth State co-operation. For the benefit of honorable members, I have circulated some clause notes with the Bill. I commend the Bill to the House.

19 September 1979

Constitutional Powers (Coastal Waters) Bill 1979—Victoria

A BILL

for

An Act to request the Parliament of the
Commonwealth to enact an Act to extend the
legislative Powers of the States in and in relation
to Coastal Waters.

WHEREAS it has been agreed between the Government of the Commonwealth and the Governments of the States of Australia that the legislative powers of the States in and in relation to Coastal Waters should be extended by an Act of the Parliament of the Commonwealth enacted at the request of the Parliaments of the States in pursuance of paragraph (xxxviii.) of section 51 of the Constitution of the Commonwealth of Australia:

Preamble.

Be it therefore enacted by the Queen's Most Excellent Majesty by and with the advice and consent of the Legislative Council and the Legislative Assembly of Victoria in this present Parliament assembled and by the authority of the same as follows (that is to say):

1. (1) This Act may be cited as the *Constitutional Powers (Coastal Waters) Act 1979*.

Short title.

(2) This Act shall come into operation on the day upon which it receives the Royal Assent.

Commencement.

2. The Parliament requests the enactment by the Parliament of the Commonwealth of an Act in, or substantially in, the terms set out in the Schedule.

Request for enactment of Commonwealth Act.

1—[13]—850/9.10.1979—2413/79

SCHEDULE

SCHEDULE

AN ACT

To extend the legislative powers of the States in and in relation to coastal waters.

Preamble.	<p>WHEREAS, in pursuance of paragraph (xxxviii.) of section 51 of the Constitution of the Commonwealth, the Parliaments of all the States have requested the Parliament of the Commonwealth to enact an Act in, or substantially in, the terms of this Act:</p> <p>Be it therefore enacted by the Queen, and the Senate and House of Representatives of the Commonwealth of Australia, as follows:</p>
Short title.	1. This Act may be cited as the <i>Coastal Waters (State Powers) Act 1979</i> .
Commencement.	2. This Act shall come into operation on a date to be fixed by Proclamation.
Interpretation.	<p>3. (1) In this Act—</p> <p>“adjacent area in respect of the State” means, in relation to each State, the area the boundary of which is described under the heading referring to that State in Schedule 2 to the <i>Petroleum (Submerged Lands) Act 1967</i> as in force immediately before the commencement of this Act;</p> <p>“coastal waters of the State” means, in relation to each State—</p> <p>(a) the part or parts of the territorial sea of Australia that is or are within the adjacent area in respect of the State, other than any part referred to in sub-section 4 (2); and</p> <p>(b) any sea that is on the landward side of any part of the territorial sea of Australia and is within the adjacent area in respect of the State but is not within the limits of the State or of a Territory.</p> <p>(2) The <i>Acts Interpretation Act 1901</i>, in the form in which it was in force, as amended, immediately before the day on which this Act received the Royal Assent, applies to the interpretation of this Act.</p>
Extent of territorial sea and coastal waters.	<p>4. (1) For the purposes of this Act, the limits of the territorial sea of Australia shall be the limits existing from time to time, ascertained consistently with the <i>Seas and Submerged Lands Act 1973</i> and instruments under that Act and with any agreement (whether made before or after the commencement of this Act) for the time being in force between Australia and another country with respect to the outer limit of a particular part of that territorial sea.</p> <p>(2) If at any time the breadth of the territorial sea of Australia is determined or declared to be greater than 3 nautical miles, references in this Act to the coastal waters of the State do not include, in relation to any State, any part of the territorial sea of Australia that would not be within the limits of that territorial sea if the breadth of that territorial sea had continued to be 3 nautical miles.</p>
Legislative powers of States.	<p>5. The legislative powers exercisable from time to time under the constitution of each State extend to the making of—</p> <p>(a) all such laws of the State as could be made by virtue of those powers if the coastal waters of the State, as extending from time to time, 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, the coastal waters of the State;</p>

SCHEDULE

SCHEDULE—continued

- (b) laws of the State having effect in or in relation to waters within the adjacent area in respect of the State but beyond the outer limits of the coastal waters of the State, including laws applying in or in relation to the sea-bed and subsoil beneath, and the airspace above, the first-mentioned waters, being laws with respect to—
- (i) subterranean mining from land within the limits of the State; or
 - (ii) ports, harbours and other shipping facilities, including installations, and dredging and other works, relating thereto, and other coastal works; and
- (c) laws of the State with respect to fisheries in Australian waters beyond the outer limits of the coastal waters of the State, being laws applying to or in relation to those fisheries only to the extent to which those fisheries are, under an arrangement to which the Commonwealth and the State are parties, to be managed in accordance with the laws of the State.
6. Nothing in this Act affects the status of the territorial sea of Australia under international law or the rights and duties of the Commonwealth in relation to ensuring the observance of international law, including the provisions of international agreements binding on the Commonwealth and, in particular, the provisions of the Convention on the Territorial Sea and the Contiguous Zone relating to the right of innocent passage of ships.
7. Nothing in this Act shall be taken to—
- (a) extend the limits of any State;
 - (b) derogate from any power existing, apart from this Act, to make laws of a State having extra-territorial effect; or
 - (c) give any force or effect to a provision of a law of a State to the extent of any inconsistency with a law of the Commonwealth or with the Constitution of the Commonwealth of Australia or the Commonwealth of Australia Constitution Act.

International
status of
territorial sea.

Savings.

Capricornia Section of the Great Barrier Reef Marine Park

Commonwealth of Australia Gazette, No. S 212, 21 October 1979.

PROCLAMATION

Commonwealth of
Australia
ZELMAN COWEN
Governor-General

By His Excellency the
Governor-General of
the Commonwealth of
Australia

WHEREAS it is provided by sub-section (1) of section 31 of the *Great Barrier Reef Marine Park Act 1975* that, subject to sub-section (5) of that section, the Governor-General may, by Proclamation, declare an area specified in the Proclamation, being an area within the Great Barrier Reef Region, to be a part of the Great Barrier Reef Marine Park and assign a name or other designation to that area:

AND WHEREAS it is provided by sub-section (5) of that section that the Governor-General shall not make a Proclamation under that section except after consideration by the Federal Executive Council of a report by the Great Barrier Reef Marine Park Authority in relation to the matter dealt with by the Proclamation:

AND WHEREAS the Federal Executive Council has considered a report by the Great Barrier Reef Marine Park Authority in relation to the declaration of so much of the area specified in the Schedule as is within the Great Barrier Reef Region to be a part of the Great Barrier Reef Marine Park:

NOW THEREFORE I, Sir Zelman Cowen, the Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, hereby—

- (a) declare so much of the area specified in the Schedule as is within the Great Barrier Reef Region to be a part of the Great Barrier Reef Marine Park;
- (b) assign the name 'Great Barrier Reef Marine Park—Capricornia Section' to the area so declared (hereinafter referred to as the 'declared area');
- (c) specify the depth of 1000 metres below the seabed beneath any sea within the declared area as the depth below that seabed to which the sub-soil beneath that seabed shall be taken to be in the Great Barrier Reef Marine Park;

- (d) specify the depth of 1000 metres below the surface of any land within the declared area as the depth below that surface to which the sub-soil beneath that land shall be taken to be in the Great Barrier Reef Marine Park; and
- (e) specify the height of 915 metres above the surface of the declared area as the height above that surface to which the airspace above that area shall be taken to be in the Great Barrier Reef Marine Park.

SCHEDULE

Description of Declared Area

The boundary of which-

- (a) commences at a point of Latitude 22° 30' South, Longitude 151° 30' East;
 - (b) runs thence south-easterly along the geodesic to a point of Latitude 23° 10' South, Longitude 152° 10' East;
 - (c) runs thence south-easterly along the geodesic to a point of Latitude 24° 15' South, Longitude 153° 05' East;
 - (d) runs thence west along the parallel of Latitude 24° 15' South to its intersection with meridian of Longitude 152° 40' East;
 - (e) runs thence north-westerly along the geodesic to a point of Latitude 23° 45' South, Longitude 151° 55' East;
 - (f) runs thence west along the parallel of Latitude 23° 45' South to its intersection with meridian of Longitude 151° 30' East; and
 - (g) runs thence north along the last-mentioned meridian to the point of commencement.
- (L.S.) GIVEN under my Hand and the Great Seal of Australia on the seventeenth day of October 1979.

By His Excellency's Command,

J. J. WEBSTER

Minister of State for Science and the Environment

GOD SAVE THE QUEEN!

Australian laws to apply to offences at sea

*Statement by the Commonwealth Attorney-General,
Senator the Hon. Peter Durack, Q.C.*

The Attorney-General, Senator Peter Durack, Q.C., announced in Townsville today that the Federal Crimes at Sea Act would come into operation next Thursday, 1 November.

Its application will coincide with the commencement of the 200 mile offshore fishing zone around Australia.

Senator Durack said the Crimes at Sea Act would ensure that Australian criminal laws—mainly State laws—would apply to Australian ships and to offshore areas coming within Federal authority on a sound and up-to-date legal footing.

The new Act would correct a position that had required attention for some time. The Privy Council pointed out in 1977 that Australian passengers who crossed the Bass Strait by ship from Melbourne to Launceston were still governed by English criminal law. This was a relic of the Admiralty jurisdiction inherited from England, he said.

The Crimes at Sea Act resulted from consultations with the States in the Standing Committee of Attorneys-General. The approach adopted was a 'federal' one under which the law of an appropriate State or Territory would be applied to offences at sea coming under Australian jurisdiction.

The Attorney-General said that under the scheme arrived at with the States, it was primarily a matter for the States to legislate for offences committed on voyages between two ports in one State, or where a particular voyage began and ended at the same port in a State.

An Australian ship engaged in an interstate voyage would be subject to the law of the State where the ship was registered. The Attorney-General said this should facilitate law enforcement and would resolve in a practical way the uncertainties and doubts that had existed. He said: 'It is a practical solution that fits in with our federal system'.

The Act did affect the application of existing specific federal criminal laws. 'Specific federal offences will continue to be dealt with, as now, under the special Commonwealth legislation in question, for example the Customs Act. However, the application of State criminal laws by the Act will help law enforcement generally on matters such as drug offences', he said.

Explaining the overall scope of the Act, Senator Durack said that from 1 November it would apply to offences committed on or from Australian

ships which were on overseas, interstate or on Territory voyages. For these purposes the Northern Territory was treated as if it were a State.

The Act would also apply to offences on Australian ships in foreign ports and to offences by Australian citizens on foreign ships where they are not members of the crew.

The Attorney-General said that in certain limited cases the Act could also be supplied to offences committed on or from foreign ships. The consent of the Commonwealth Attorney-General was required and was only to be given if the consent of the foreign State was obtained. This special jurisdiction would only be resorted to where necessary to ensure that serious criminal offences did not go scot-free for lack of an applicable law.

Provision was also made in the Act for the applications of the criminal laws of an appropriate State or Territory in relation to other activities coming under Australian jurisdiction outside the territorial sea. For example, activities on petroleum rigs of the Australian Continental Shelf would, as at present, continue to be subject to the law of the adjacent State or Territory.

Provision could also be made in relation to any offences by Australian citizens or residents in adjacent areas outside the territorial sea, but it was not proposed to use this power at present.

Senator Durack said the Act contained innovative provisions which allowed for the removal of proceedings from a Court in one part of Australia to a Court in another part of Australia where that would be expedient to avoid hardship on the accused or to promote a speedy trial.

'Care has been taken to fashion a system of criminal administration that will function smoothly, fairly and expeditiously.' He said that it was a significant example of corporative federalism and acknowledged the co-operation of the States in the matter.

Townsville

26 October 1979

Offshore Constitutional Responsibilities— Historic Shipwrecks and the proposed use of section 51 (38) of the Constitution

*Letter by the Commonwealth Attorney-General,
Senator the Hon. Peter Durack, Q.C.*
(published in 54 ALJ 49)

Dear Sir,

Your September number (53 ALJ 605) drew attention to the important decisions made at the Premiers' Conference on 29 June 1979 for a practicable and workable distribution of offshore constitutional responsibilities between the Commonwealth and the States. The note gives an excellent summary of the decisions (now in the course of being implemented), and I want to comment on only two things.

The reference to the *Historic Shipwrecks Act* 1976 is possibly capable of giving a misleading impression of what is proposed in that regard. To understand the proposal, it is necessary to appreciate the present position. The *Historic Shipwrecks Act* as presently drafted does not apply in relation to waters adjacent to the coast of any State until a proclamation has been made declaring that the Act so applies. In practice, proclamations have only been made where the adjacent State requested it. The result to date is that the Act applies to the waters adjacent to Western Australia, Queensland and New South Wales. The Act applies automatically to waters adjacent to the Territories. The present position is therefore that the Act is applicable to historic shipwrecks in the waters around most, but not all, of the Australian coast.

Under the offshore settlement agreed to at the Premiers' Conference the Act is to be amended so that it will expressly state that it will only be applied, or continue to be applied, to the waters adjacent to a State with the consent of that State. However, this general principal, now to be spelt out in the Act, is qualified in relation to old Dutch shipwrecks off Western Australia. These shipwrecks are the subject of a special agreement between the Commonwealth and the Netherlands. They are covered by the *Historic Shipwrecks Act* at the moment, and are to continue to remain under the Commonwealth Act until satisfactory alternative arrangements are made with Western Australia. Western Australia has already proposed discussions for such arrangements. Its State authorities of course have a fine record in taking steps to protect

these shipwrecks and the relics from them, notwithstanding the legal difficulties illustrated by *Robinson v. Western Australia Museum* (1977) 51 ALJR 806 referred to in your note.

'Reservations' are expressed in your note concerning the proposed use of section 51 (38) of the Constitution to extend State powers in the 3 mile territorial sea and to give the States powers, in addition, in respect of port-type facilities, underground mining and fisheries outside the territorial sea limits. (The proposed extra-territorial power with respect to fisheries, it should be noted, applies only to those fisheries that are, under an arrangement to which the Commonwealth and the States are parties, to be managed in accordance with the laws of the State concerned.)

It is true that section 51 (38) is an untested power. However, it appears to enable Commonwealth and State Parliaments, acting in unison, to exercise all the powers that at the establishment of the Constitution could be exercised only by the British Parliament. Sir Samuel Griffith had this to say at the 1891 Convention (*Debates*, p. 524) on the provision that now appears as section 51 (38):

We are aware, sir, that there are many things now upon which the legislatures and governments of the several Australian colonies may agree, and upon which they may desire to see a law established; but we are obliged, if we want that law made, to go to the Parliament of the United Kingdom, and ask them to be good enough to make the law for us; and when it is made we will obey it. I contend, for myself, as I have had an opportunity of saying before, that after the federal parliament is established anything which the legislatures of Australia want done in the way of legislation should be done within Australia, and the Parliament of the Commonwealth should have that power.

Yours sincerely,
PETER DURACK

General Editor
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