



Offshore constitutional settlement

A milestone in
co-operative
federalism

Attorney-General's Department

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The offshore constitutional settlement between the Commonwealth and the States

At the Premiers Conference on 29 June 1979, the Commonwealth and the States completed an agreement of great importance for the settlement of contentious and complex offshore constitutional issues. The agreement marked the solution of a fundamental problem that has bedevilled Commonwealth-State relations, and represents a major achievement of the policy of co-operative federalism.

International background

Particularly since the Proclamation by President Truman in 1945 of jurisdiction and control over the continental shelf adjacent to the United States, the international law of the sea, as it relates to offshore areas, has been one of the great growing points—one of the areas of major change—in the law of nations.

The factors inducing change in the substantive law were basically technological in character: rapid technological developments in the means of communication, in the methods of fishing and in the techniques of seabed mining and drilling. The technological revolutions of the 20th century brought under the influence of man's new capabilities great areas of the high seas and of the seabed beneath them. These developments have been spurred on by a sharp increase in the demand for resources, both biological and mineral, of the sea and the seabed.

Australian continental shelf

Australia's major national interests in the law of the sea are based on its geographical and economic position as a great island continent, relatively, though not completely, remote from other countries. In 1953 Australia by Proclamation declared its sovereign rights over the continental shelf contiguous to its coast, thus distinctly enlarging its asserted sovereign authority in the offshore area. This jurisdiction was in effect confirmed by the First United Nations Conference on the Law of the Sea held at Geneva in 1958, which drew up four Conventions including the Convention on the Continental Shelf, to which Australia is now a party.

The Second United Nations Conference in 1960 failed to secure agreement on two major issues left unsettled in 1958—the extent of

fisheries jurisdiction and the related question of the breadth of the territorial sea.

Australian 200 nautical mile fishing zone

The Third United Nations Conference on the Law of the Sea began in 1973 what has turned out to be a lengthy consideration of a broad range of related issues. The Ninth Session of the Conference began on 3 March 1980. An informal composite negotiating text has been drawn up and revised. It provides, among other things, for fisheries jurisdiction in a zone extending up to 200 nautical miles from the coastline. Consistently with this text, and relying on the emerging international law on this matter as evidenced by the practice of nations, Australia, with effect as from 1 November 1979, established its 200 nautical mile fishing zone, in which all fisheries activities must be licensed under Australian law.

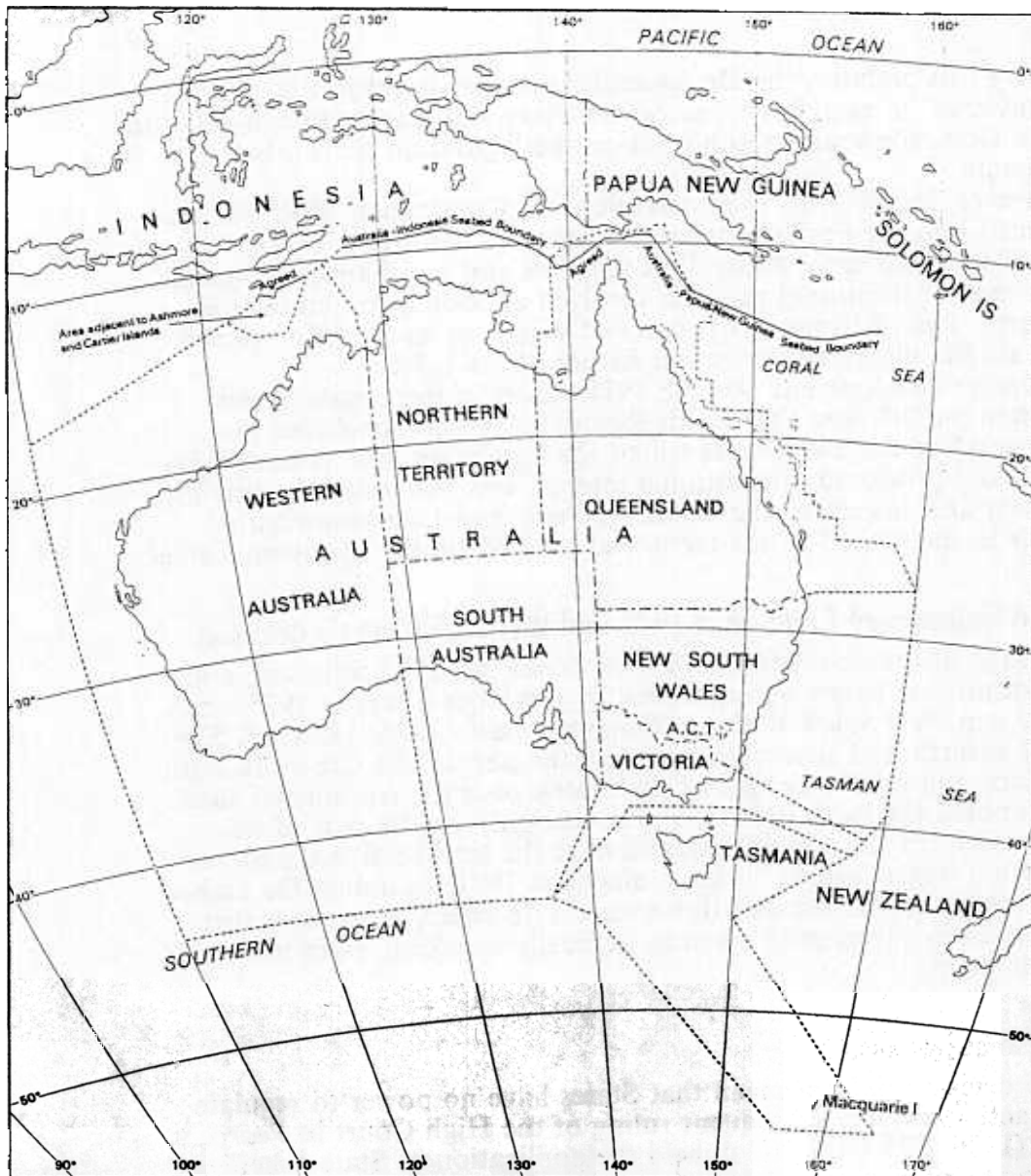
The enlargement of offshore rights also involves responsibilities on the part of the coastal nations concerned—one of the important matters that has concerned the Third United Nations Conference is the balance of these rights and responsibilities, including the issue of freedom of passage and transit through international straits. However, it will be amply evident, even from this brief survey, that the overall trend has been to enlarge the jurisdiction of nations in offshore areas over both the sea and the seabed.

Use of straight baselines and bay closing lines

Also, the 1958 Convention of the Territorial Sea and the Contiguous Zone, to which Australia is a party, permits substantial enlargement of 'internal waters' by the use on deeply indented or island-fringed coasts of 'straight baselines' for measuring the breadth of the territorial sea, and by the adoption of a 24-mile closing line for bays. The effect in particular areas can be to move some parts of the external boundary of Australia's territorial sea some tens of miles seawards.

Commonwealth State issues—Petroleum (Submerged Lands) Acts 1967

The international developments have raised acute issues in a number of federations as to the appropriate division of responsibilities in the offshore area. For Australia these issues crystallised first of all in the Commonwealth-State negotiations in the sixties in relation to the legislative basis for offshore petroleum mining. The course finally chosen was to seek to avoid raising questions concerning the respective constitutional powers of the Commonwealth and the States by agreeing in the 1967 Offshore Petroleum Agreement to the enactment by the Commonwealth and each State of a common petroleum mining code for the 'adjacent area' of each State (see the map opposite) to be administered by a 'Designated



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PETROLEUM (SUBMERGED LANDS) ACT 1967 (as amended) ADJACENT AREAS

NOTE:

1. The Act applies only in relation to exploration for, and exploitation of, the petroleum resources of such submerged lands included in the adjacent area as have the character either—
 - (a) of seabed or subsoil beneath territorial waters, or
 - (b) of continental shelf within the meaning of the Convention on the Continental Shelf signed at Geneva on 29 April 1958.
2. Adjustment of the Adjacent Area in the Torres Strait area will be necessary when the Torres Strait Treaty enters into force.

Authority'. In practice, the Designated Authority in respect of the 'adjacent area' of each State has been a State Minister, with consultation with the Commonwealth resting not on the legislation but on the Agreement.

However, in 1970 the Territorial Sea and Continental Shelf Bill was introduced into the Parliament in pursuance of the then Government's view that it would serve Australia's national and international interests to have the constitutional position resolved as soon as practicable by the Courts. That Bill was not proceeded with, but its reception served to indicate the highly controversial nature of the subject.

A further development was the 1971 report of the Senate Select Committee on Offshore Petroleum Resources, which concluded that, notwithstanding the advantages which the legislation and its underlying concepts had produced, the national interest was not served by leaving unresolved and uncertain the extent of State and Commonwealth authority in the seabed of the territorial sea and on the continental shelf.

Seas and Submerged Lands Act 1973 and the High Court's decision

The passage of the *Seas and Submerged Lands Act* 1973 followed, and the constitutional issues were resolved by the High Court in 1975 when it upheld—in *New South Wales v. Commonwealth* (1976) 135 CLR 337—the Act's assertion of sovereign rights on the part of the Crown in right of the Commonwealth, as against the States, over the continental shelf. Also, it upheld the Act's assertion of sovereignty on the part of the Crown in right of the Commonwealth over the territorial sea, and also over internal waters outside State limits as at 1901, including the seabed beneath the territorial sea and those waters. In effect, this meant that Commonwealth sovereignty extends, generally speaking, right into low-water mark.

Need for readjustment

The 1975 decision did not mean that States have no power to regulate offshore activities. The subsequent ruling of the High Court in *Pearce v. Florenca* (1976) 135 CLR 507 upheld the application of State fisheries laws in the territorial sea. However, a reordering and readjustment of powers and responsibilities—as between the Commonwealth and the States—were clearly required to take account of the 1975 decision.

History, common sense and the sheer practicalities of life mark out the territorial sea, in particular, as a matter for local jurisdiction—that is to say, State jurisdiction—except on matters of overriding national or international importance. On the other hand, revision of existing petroleum mining arrangements is required to properly reflect the Commonwealth's paramount rights over the continental shelf.

Australia's experience in this regard is by no means unique. Similar questions arose earlier in the United States, and subsequently in Canada.

In their case—as in the case of Australia—the ruling by the Courts was that jurisdiction on the part of the central government extended to low-water mark. In the cases of these other federations, as in the case of our own, it has been found that the constitutional ruling is not the end of the matter and that adjustment is necessary.

A practical and co-operative solution

The resulting discussions with the States have now produced a solution agreed to by all States. The talks at both Ministerial and adviser level have focused in a practical way—and in a spirit of co-operative federalism that has taken full account of international, national and State interests—on what matters are appropriate for Commonwealth or, on the other hand, State administration, what matters are appropriate for joint administration, and how the various agreed arrangements should be implemented.

The appropriate Commonwealth–State consultative bodies have been fully involved, including the Australian Minerals and Energy Council, the Australian Fisheries Council, the Australian Environment Council and the Council of Nature Conservation Ministers.

Standing Committee of Commonwealth and State Attorneys-General

The legal aspects of the exercise have been the responsibility of the Standing Committee of Attorneys-General. It has devised innovative and flexible legislative measures to carry out the arrangements that have been agreed. These are now described.

Agreed arrangements

Extension of the legislative powers of the States in and in relation to coastal waters

The Commonwealth Parliament will pass legislation, based on section 51 (38) of the Constitution, to give each State the same powers with respect to the adjacent territorial sea (including the seabed) as it would have if the waters were within the limits of the State.

The legislation will also give each State powers outside the territorial sea in respect of port-type facilities, underground mining extending from land within a State, and fisheries. The power with respect to fisheries will apply to fisheries that, under an arrangement to which the Commonwealth is a party, are to be managed in accordance with the laws of the State concerned, under the offshore fisheries scheme described below.

The status of the territorial sea under international law is to be expressly preserved. Also, savings provisions are to be included:

- to safeguard existing State extra-territorial powers in the offshore area;
- to ensure that laws of the Commonwealth that apply in the territorial sea prevail over any inconsistent State law in accordance with the paramountcy given to Commonwealth laws under section 109 of the Constitution.

The intended use, for the first time since federation, of section 51 (38) of the Constitution is of considerable significance for federal relations as its exercise requires the request or concurrence of the Parliaments of the States concerned. All States have agreed to pass Acts requesting the Commonwealth legislation. A copy of the Victorian Bill is in the accompanying booklet, *Offshore Constitutional Settlement—Selected Statements and Documents 1978–79*.

Vesting in the States of the title to seabed beneath the territorial sea

The Commonwealth Parliament will pass legislation to vest in each State proprietary rights and title in respect of the seabed of the adjacent territorial sea.

This grant of proprietary rights and title will both support the extension of the powers of the States in the territorial sea and provide an assurance to the States that the arrangements relating to the territorial sea will have permanency and stability.

The area involved

The above legislation—and also the petroleum and fisheries arrangements referred to below—will be limited to a territorial sea of 3 miles breadth, irrespective of whether Australia subsequently moves to a territorial sea of 12 miles.

On the other hand, the baselines from which the territorial sea will be measured will be drawn in a way that takes advantage of the international principles authorising the drawing of 'straight baselines' where the coast is deeply indented or fringed by islands, and of closing lines where bays are not more than 24 miles wide. Thus 'straight baselines' will be used to enclose the waters of Investigator Strait adjacent to South Australia. The 'internal waters' on the landward side of these lines will be included in the grants made by the legislation. The result will be to enlarge the area in which the States will enjoy the benefits of the legislation.

The baselines to be adopted are being prepared in close consultation with the States and will be promulgated in due course under the *Seas and Submerged Lands Act 1973*.

Offshore petroleum arrangements outside the 3 mile territorial sea

These will be regulated by Commonwealth legislation alone, consisting of an amended Commonwealth Petroleum (Submerged Lands) Act. Day-to-day administration will continue to be in the hands of the 'Designated Authority' appointed for the 'adjacent area' of each State—that is, the State Minister—and State officials. The existing mining code will be retained and existing permits and licences will not be affected.

However, the legislation will establish for the first time a statutory Joint Authority for each adjacent area consisting of the Commonwealth Minister and the State Minister (Commonwealth-Victoria Offshore Petroleum Joint Authority, and so on). The Joint Authorities will be concerned only with major matters arising under the legislation including:

- determination of the areas to be open for applications for permits;
- the grant and renewal of exploration permits and production licences;
- approval of instruments creating interests in permits or licences;
- determination of permit or licence conditions governing the level of work or expenditure.

In the event of disagreement within a Joint Authority the view of the Commonwealth Minister is to prevail.

Having regard to the remoteness of Western Australia and its other special circumstances, special conditions were agreed in its case. A copy of the agreement is in the accompanying booklet, *Offshore Constitutional Settlement—Selected Statements and Other Documents 1978–1979*. However, Commonwealth views based on the national interest are still to prevail in the Joint Authority, as in the case of other States.

Summing up, the new arrangements will ensure that:

- the national interest in offshore petroleum activities can be asserted;
- the valuable role of the States is continued;
- dislocation of ongoing projects is avoided.

The present arrangements for the sharing of royalties between the States and the Commonwealth will be retained.

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.

Offshore mining for other minerals

Arrangements for the mining of offshore minerals other than petroleum will be the same as for offshore petroleum.

Commonwealth and State legislation embodying a common mining code will be needed to implement the arrangements. Arrangements will also be made for sharing royalties.