

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

# Commonwealth–Western Australian Offshore Petroleum Joint Authority

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*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

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*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

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*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.

## SCHEDULE

## AN ACT

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

Preamble.

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:

Be it therefore enacted by the Queen, and the Senate and House of Representatives of the Commonwealth of Australia, as follows:

Short title.

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

Commencement.

2. This Act shall come into operation on a date to be fixed by Proclamation.

Interpretation.

3. (1) In this Act—

“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 *Petroleum (Submerged Lands) Act 1967* as in force immediately before the commencement of this Act;

“coastal waters of the State” means, in relation to each State—

(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

(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.

(2) The *Acts Interpretation Act 1901*, 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.

Extent of territorial sea and coastal waters.

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 *Seas and Submerged Lands Act 1973* 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.

(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.

Legislative powers of States.

5. The legislative powers exercisable from time to time under the constitution of each State extend to the making of—

(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;

SCHEDULE