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**OFFSHORE CONSTITUTIONAL
SETTLEMENT 1980:
A CASE STUDY IN FEDERALISM**

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Introduction

The main specific reference to powers over offshore matters in the Australian Constitution was in Section 51(x) giving the Commonwealth Parliament power to legislate for 'fisheries in Australian waters beyond territorial limits'. It was held that this meant that the Commonwealth had no power to legislate with respect to fisheries within three nautical miles of the coast of a State.¹

First exercise in Commonwealth – State offshore cooperation

However two years before the decision in *Bonsor v La Macchia*² the need to explore and exploit the petroleum resources of the Australian continental shelf produced the first offshore agreement between the Commonwealth and the States. Mirror Petroleum (Submerged Lands) Acts³ were enacted, with an agreed preamble as follows:

WHEREAS in accordance with international law Australia as a coastal state has sovereign rights over the continental shelf beyond the limits of Australian territorial waters for the purpose of exploring it and exploiting its natural resources:

AND WHEREAS Australia is a party to the Convention on the Continental Shelf signed at Geneva on 29th April, 1958, in which those rights are defined:

AND WHEREAS the exploration for and the exploration of the petroleum resources of submerged lands adjacent to the Australian coast would be encouraged by the adoption of legislative measures applying uniformly to the continental shelf and to the sea-bed and subsoil beneath territorial waters:

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

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

BE IT THEREFORE enacted ...

This exercise in co-operation enabled the development of the Bass Strait oil field, but it also came under increasing criticism on the Commonwealth side, particularly whenever the Senate was asked to rubber-stamp amendments dictated by and under the joint mirror legislation arrangements, leading to Prime Minister Gorton's proposal in 1970 to assert Commonwealth hegemony over all offshore resources, and leading in turn to his losing his Prime Ministership (for this 'sin of centralism') on the casting vote of himself (after a tied vote in the party room).

¹ *Bonsor v La Macchia* (1969) 122 CLR 177.

² *Ibid.*

³ Petroleum (Submerged Lands) Act 1982 (NSW, Vic, Qld, WA, SA, Tas) (emphasis added).

Another casualty was the then Commonwealth Attorney-General, Tom Hughes QC, who subsequently left politics to devote himself to legal practice.

Seas and Submerged Lands Act 1973

The next chapter of the story was the passage under Prime Minister Whitlam of the Seas and Submerged Lands Act 1973 asserting Commonwealth sovereignty and sovereign rights over the Australian territorial sea and continental shelf respectively. This was promptly challenged in High Court proceedings in which judgment⁴ was given in December 1975 (after the dismissal of Whitlam as Prime Minister on 11 November of that year).

All judges held that sovereign rights in relation to the continental shelf outside the territorial sea vested in the Commonwealth. As to the territorial sea, Gibbs and Stephen JJ dissented vigorously from the majority ruling that sovereignty even here was vested in the Commonwealth. It was an outstanding forensic victory for the Commonwealth. The array of Counsel was formidable. It included William Deane QC (now Governor-General) and Murray Gleeson QC (now Chief Justice of the High Court) for the State of New South Wales, and the legendary Maurice Byers QC and Tom Hughes QC for the Commonwealth.

The States were denied any property rights at all in the sea and seabed of the three-mile territorial sea. Their territory ended at low-water mark except for the 'bays and gulfs' of South Australia (because of its unique constating document expressly referring to bays and gulfs).⁵

The Standing Committee of Attorneys – General Meeting, Tanunda 1976

The next chapter began at Tanunda in 1976 in the Barossa Valley. The Commonwealth delegation was headed by the new Attorney-General, Bob Ellicott QC (the architect of the game-plan for Whitlam's dismissal). Accommodation-wise we on the Commonwealth delegation were relegated to a motel in a vineyard on the outskirts of nearby Angaston. If that was payback (for the dismissal), we officers noted wryly that many of us had been advising Whitlam at the time. But more seriously Attorney-General Ellicott indicated to the meeting the Commonwealth's willingness to modify the effects of the High Court's decision, but he sought and got a kind of *quid pro quo*, and that was for the States to agree to an exercise to abolish residual colonial relics linking Australia to the United Kingdom, which was ultimately achieved, apart from the monarchical connection, by the Australia Act 1986.

The Offshore Constitutional Settlement

Following intense and lengthy negotiations the terms of the resulting Offshore Constitutional Settlement were finally approved at the Premiers Conference in June 1979. There is no single document that encompasses the Settlement. Its most important terms are to be found in the legislation, including amendments to existing legislation, that implemented it. Also, the Commonwealth issued an information kit entitled 'Offshore Australia' which included a descriptive booklet, 'A Milestone in Co-operative Federalism', containing a summary of the agreed arrangements, and also key second-reading speeches and other materials.

State powers in coastal waters

The following (with subheadings added) are key extracts from the speech of Prime Minister Malcolm Fraser in the House of Representatives on 23 April 1980 in introducing the first of the package of Bills, namely The Coastal Waters (State Powers) Bill:

⁴ *NSW v Commonwealth* (1975) 8 ALR 1.

⁵ *A Raptis and Son v South Australia* (1976) 15 ALR 223.

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The Commonwealth could have denied the States any share at all in the resources lying within the off-shore area and any say at all in the regulation of activities that take place in that area. But we did not. We adopted instead a course of restraint, a course consistent with our notions of the appropriate allocation of rights and responsibilities among governments in Australia, and of the benefits of decentralisation of authority and of decision making.

The Coastal Waters (State Powers) Bill – the Bill before the House – is as I have indicated the cornerstone of the package. It is also a Bill of historic significance in its own right. It represents the use, for the first time since Federation, of the power conferred upon this Parliament by section 51 (xxxviii) of the Constitution. The exercise of that power required the request of concurrence of the parliaments of the States concerned. It enabled 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.

The Bill provides for the legislative power of each State to be extended in the adjacent offshore area. State legislative powers will be extended over a territorial sea of 3 miles breadth. The baselines from which the 3 miles will be measured will be drawn in a way which takes advantage of the international principles authorising the drawing of what are known as 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.

The powers granted by the Bill will also apply to internal waters on the landward side of the baselines. For drafting purposes, the whole of the area involved, that is to say the territorial sea and internal waters, is described as the coastal waters of the State. The result will be an enlargement of the area in which the States will enjoy the benefits of the legislation in areas far beyond the area that would be covered if a line were simply drawn 3 miles out from low water mark.

The Bill also provides that a State's legislative powers extend to fisheries in Australian waters beyond the outer limits of the coastal waters of the State, but only where there is an arrangement between the Commonwealth and the State that the fisheries will to be managed in accordance with the laws of the State. This will greatly simplify and facilitate the fisheries arrangements to which I shall refer shortly.

The Commonwealth will itself retain powers over the territorial sea – these will be used where national or international interests or concerns justify their exercise. The Commonwealth recognises its international responsibilities for the Great Barrier Reef and so the *Great Barrier Reef Act 1975* will continue to apply to the whole of the Reef region as defined.

Petroleum resources outside the territorial sea

Perhaps the most important of (the remaining Bills) is the Petroleum (Submerged Lands) Amendment Bill, which is designed to give effect to revised arrangements for the administration of off-shore petroleum mining outside the territorial sea. 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. But, as a new step, a statutory Joint Authority is to be established for each adjacent area consisting of the Commonwealth Minister and the State Minister, to deal with major matters arising under the legislation. In the event of disagreement, the views of the Commonwealth are to prevail. Off-shore petroleum mining inside the outer limits of the territorial sea is to be the responsibility of the States alone. However, the existing sharing of royalties both inside and outside the territorial sea is to continue and the common mining code is to be retained. There will be no dislocation of ongoing projects – existing permits and licences will not be prejudiced.

Offshore fisheries

The Fisheries Amendment Bill 1980, in keeping with the overall approach of the off-shore settlement, will establish new and more flexible arrangements between the Commonwealth and the States in regard to off-shore fisheries. Generally speaking, existing under arrangements, State laws apply out to the limits of the 3 mile territorial sea and Commonwealth legislation beyond. These arrangements inhibit a flexible, functional approach under which

responsibilities can be adjusted by reference to the requirements of particular fisheries.

The Fisheries Amendment Bill provides for joint authorities to be established for off-shore fisheries, with complementary State legislation providing for their operation right in to low water mark if that is agreed. Flexibility is the keynote of the proposed legislation. The measures have a practical objective – to provide a sound legal and administrative basis for a practical approach under which a particular authority can be regulated by one authority under one set of laws, without regard to artificial jurisdictional lines. (The Commonwealth legislation on this is now contained in the *Fisheries Management Act 1991*).

Shipping and navigation

The Navigation Amendment Bill 1980 establishes arrangements which lay the basis for a complete resolution (*sic*) of shipping and navigation problems that have existed in Australia since Federation. The arrangements provide for an appropriate distribution of responsibility between the Commonwealth and the States and the Northern Territory in regard to such matters as the survey and issue of certificates to ships, the regulation of ships' crews, and the number and qualification of those on board.

The States will be responsible for the regulation of trading vessels except those proceeding on an interstate or an overseas voyage, which will be the responsibility of the Commonwealth.

The States will be responsible for all Australian commercial fishing vessels except those going on an overseas voyage, for all vessels operating in inland waterways and for pleasure craft.

The Commonwealth will, broadly speaking, be responsible for navigation and marine aspects of off-shore industry mobile units and off-shore industry vessels not confined to operations in one State or the area adjacent to it.

Historic shipwrecks

The Prime Minister also referred to the amendments to be made to the Historic Shipwrecks Act 1976, so that it only applied to waters adjacent to a State or the Northern Territory by consent, with the exception of the old Dutch wrecks off Western Australia which were the subject of a 1972 agreement between the Commonwealth and the Netherlands. He also referred to the Crimes at Sea Act 1979, as part of a complementary Commonwealth– State scheme of legislation on offences committed offshore.

Prime Minister Fraser's concluding comments that the package had the support of all State governments, including the two Labor governments in New South Wales and Tasmania drew the following comments from the opposition (Paul Keating): 'Shame on them ... A great sellout of the Commonwealth'.

State title in coastal waters

The second major element in the Settlement was vesting each of the States with proprietary rights and title in respect of the land beneath the coastal waters adjacent to the State and within the sovereignty of the Commonwealth, this being done by the Coastal Waters (State Title) Bill introduced by Bob Ellicott who had resigned in 1977 as Attorney-General, but was pleased to be able to note that he was involved in the early discussions in the Standing Committee of Attorneys-General which had 'led to measures that in every sense of the word are a great milestone in cooperative federalism'. He also acknowledged the work of Parliamentary Counsel, Charles Comans in drafting the history-making legislation and also the officers of the Attorney-General's Department who were involved.

He said that, by conferring rights of ownership to the States, subject to important qualifications and reservations, the Bill supported the grant of legislative power to the States in the offshore area and provided an assurance that the settlement would have permanence and stability, as well as addressing the previous legal problems the High Court decision created even for such obvious matters as wharves and jetties.

He noted that special provisions were included to ensure that the Great Barrier Reef Act 1975 would continue to the whole of the Reef as defined. The status of the territorial sea under international law was preserved including the right of innocent passage.

Assent to the package of Bills

The various Bills referred to by Prime Minister Fraser received assent in 1980, and are listed in the Attachment to this paper along with the earlier related provision inserted in 1976 as section 15B of the Acts Interpretation Act 1901, dealing with the application of Commonwealth Acts in the territorial sea and giving a definition of the 'coastal sea' in relation to Australia in that regard.

Summation

It was right at the time – *pace* Paul Keating – to describe the settlement as a milestone in cooperative federalism. In more recent times, one might refer also to the principle of 'subsidiarity' referred to in Article 3 of the Maastricht Treaty of European Union. The talks at both Ministerial and advisor level considered in a practical way what matters were appropriate for Commonwealth or, on the other hand, State administration and how the various agreed arrangements should be implemented.

This is not to suggest that the solutions of 1980 are immutable. It was recognised at the time that similar discussions among the Commonwealth and the States would continue into the future and that the stimulus for change might take different forms, obvious ones being new international obligations by way of treaties, and increasing concern with environmental matters. On the other hand, although the Commonwealth has since moved to a 12-mile territorial sea, State powers and title have remained within the three-mile limit; that this would be the case was spelt out in the Coastal Waters (State Powers) Act 1980 and the Coastal Waters (State Title) Act 1980.

A comprehensive survey of developments since 1980 would be a large exercise requiring another paper or papers. In conclusion, illustrative reference is made briefly to two diverse areas. One is the very new Crimes at Sea Act 2000, which replaces the 1979 Act and expressly ratifies a new cooperative scheme agreed with the States and the Northern Territory in this regard.

A less satisfactory example is the current efforts to effect a more rational and efficient set of jurisdictional arrangements between the States and the Commonwealth for ship survey and inspection. The arrangements require amendment of the Navigation Act and complementary amendments to State legislation. Despite agreement between the governments, amendment of the Navigation Act has to date been frustrated in the Senate over the unrelated issue of cabotage. Also, attempts by the marine administrations of the States and the Commonwealth to give effect to mutual recognition of ship safety certification and marine qualifications for sea-going personnel have been similarly frustrated. Despite the *Intergovernmental Agreement for a National Marine Safety Regulatory Regime*, development of arrangements has become mired in the National Marine Safety Committee. The framework for progress is in place and requires only a willingness to produce an outcome.

Appendix

List of Main Commonwealth Acts implementing the offshore constitutional settlement, 1980

Coastal Waters (State Powers) Act 1980
Coastal Waters (State Title) Act 1980
Coastal Waters (Northern Territory Powers) Act 1980
Coastal Waters (Northern Territory Title) Act 1980
Petroleum (Submerged Lands) Amendment Act 1980
Fisheries Amendment Act 1980

Navigation Amendment Act 1980
Historic Shipwrecks Amendment Act 1980
Crimes at Sea Act 1979

Earlier related legislation

Section 15B (application of the Act in coastal sea) of the *Act Interpretation Act 1901* (inserted by the Acts Interpretation Amendment Act 1976)