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The offshore jurisdiction of the Australian states

Stuart Kaye*

Abstract

Australian offshore jurisdiction is among the most complex in the world, not least in part because of the division in jurisdiction between the Commonwealth Government in Canberra, and the Australian state governments. State jurisdiction is increasingly important in Australia, with increases in maritime capabilities for state police forces, the proliferation of state marine parks as part of the suite of national parks and the relevance of state jurisdiction to native title. This article provides an introduction to the determination of maritime jurisdiction vested in the Australian states, an area of law generally poorly understood and seldom considered by publicists.

Introduction

In order to understand the contemporary jurisdiction of the Australian states, there is a need for an understanding of the historical development of their jurisdiction, and to some extent, the jurisdiction of the Commonwealth Government. This is in part because the jurisdiction of the Australian states offshore has historically been very limited, and these limitations have flowed through into contemporary practice. For the most part, the states have been reluctant to apply their laws to their adjacent maritime areas, and understanding the reasons for this is important.

Historical background

Going back to the origins of the states as colonies within the British Empire, there was a dearth of colonial practice with regard to the law of the sea. The latter half of the 19th Century saw the growth of the doctrine of colonial extraterritorial legislative incompetence.¹ This doctrine prevented colonial legislatures from making laws that applied beyond the limits of the colony, which included ocean areas. When combined with the English decision of *R v Keyn (The Franconia)*² which indicated that the common law jurisdiction of the courts ended at the sea shore in the absence of legislation specifically extending jurisdiction offshore, the result was to

severely limit the ability of the colonies to make laws for their offshore areas.³

The doctrine of colonial extraterritorial incompetence was formally removed for the Australian states with the *Australia Act* 1986 (Imp). This Act explicitly gave the states power to legislate with extraterritorial effect. However, while section 2 of the *Australia Act* 1986 expressly states each state has the power to make law with extraterritorial operation, the High Court appears to have maintained the pre-*Australia Act* restriction of establishing a nexus between the state and the activity being regulated. The test for a sufficient connection has been liberally applied.⁴

Another reason for the virtual absence of national legislation relating to offshore areas through this period can be found in the Constitutional division of state and Commonwealth power in Australia. The Constitution does give the power to regulate both external affairs (s 51(xxix)) and fisheries beyond territorial limits (s 51(x)) to the Commonwealth.⁵ However, prior to Federation and for many years afterward, it was believed that the former power had no application to fisheries, and that the latter

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¹ The doctrine reached what might be described as its 'zenith' in limiting the competency of colonial legislatures in *MacLeod v Attorney-General (NSW)* [1891] AC 455; see the discussion in D P O'Connell, 'The Doctrine of Colonial Extra-territorial Incompetence' (1959) 75 *Law Quarterly Review* 318 especially 323-327.

² (1876) 2 Ex D 63.

³ This is discussed in D P O'Connell, 'Problems of Australian Coastal Jurisdiction' (1958) 35 *British Yearbook of International Law* 199, 226-229.

⁴ *Port Macdonnell Professional Fishermen's Association Inc v South Australia* (1989) 168 CLR 340; *Union Steamship v King* (1988) 166 CLR 1; see also *Welker v Hewitt* (1969) 120 CLR 503; *Millar v Commissioner of Stamp Duties* (1932) 48 CLR 618; *Pearce v Florenca* (1976) 135 CLR 507 for background to the nexus test.

⁵ The latter was the same power given to the Federal Council of Australasia: *Federal Council of Australasia Act* 1885 (Imp) s 15(c).

pertained only to waters beyond the territorial sea.⁶ It was believed that the state Parliaments had jurisdiction over the territorial sea.⁷ As such, the Commonwealth took little action in relation to offshore areas believing (erroneously, as the High Court was later to point out) that the extent of its powers were circumscribed by the constitutional arrangements for territorial waters, and international law for those waters beyond.

The accommodation between the Commonwealth and states over offshore jurisdiction began to come under stress in the late 1960s and early 1970s. Two judges of the High Court in *Bonser v La Macchia*⁸ had expressed the view that state jurisdiction effectively ended at the low water mark, and that all waters (save state internal waters) were within the Commonwealth's sphere of control.⁹ With the installation in late 1972 of the Whitlam Government in Canberra, with its centralist platform, confrontation on control of Australia's offshore areas seemed inevitable.¹⁰

Conflict did take place with the passing of the *Seas and Submerged Lands Act 1973* (Cth). This vested all of the territorial sea, save internal waters of the states such that existed immediately prior to Federation, in the Commonwealth.¹¹ The Act also sought to give effect to the provisions of the 1958 Territorial Sea and Continental Shelf Conventions, and provided for the making of Proclamations for territorial sea baselines, the breadth of the territorial sea, the closing of historic bays, the limits of the continental shelf and the making of the limits of both territorial sea and the continental shelf charts.

⁶ The proposition that the Commonwealth would have no power over the territorial sea is evident from the Constitutional Convention debates over the precursor to s 51(x) in 1898: see *Debates of the Australasian Constitutional Convention*, Vol V, (1898) 1855-1865 and 1872-1874.

⁷ *Ibid*; O'Connell, above n 3, 225-226.

⁸ (1969) 122 CLR 177.

⁹ See the judgments of Barwick CJ: (1969) 122 CLR 177 at 191; Windeyer J at 223; although both these judges also supported some state extra-territorial competence: Barwick CJ at 189 and Windeyer J at 224-226.

¹⁰ It is certainly arguable that confrontation would have occurred even if the Coalition had retained government in 1972. A Bill had been introduced in 1970 which purported to vest all of the territorial sea in the Commonwealth Crown. In May 1972, Tasmania had already commenced an action before the Privy Council to explore Australia's offshore arrangements, six months before the Whitlam Government was elected: see Richard Cullen, *Federalism in Action: The Australian and Canadian Offshore Disputes* (1990) 75-76.

¹¹ *Seas and Submerged Lands Act 1973* (Cth) s 6. The exception of waters within state limits at Federation is found in s 14 of the Act. Note: the present content of the *Seas and Submerged Lands Act 1973* is substantially different from its content in 1973.

The states responded by referring the legislation to the High Court, leading to the *New South Wales v Commonwealth (Seas and Submerged Lands Case)*.¹² The Court determined that the Commonwealth's position was in fact correct, and that it was responsible for all waters and seabed beyond the low water mark.¹³

The core of the analysis of the High Court was the discussion of the limits of the Australian colonies immediately prior to Federation. The majority judges, Barwick CJ, McTiernan, Mason, Jacobs and Murphy JJ, were of the view that the colonies' sovereignty ended at the low water mark, and each of these judgments relied on *R v Keyn* to substantiate that conclusion. Their judgments also indicated, although for a variety of reasons,¹⁴ that the Commonwealth Parliament had the power to legislate with respect to these offshore areas, and had sovereignty over them, consistent with international law. Thus the Commonwealth had the power to deal with all maritime areas that were not part of a state, and according to the court, all waters, save certain internal waters, fell into this category.

The decision in the *Seas and Submerged Lands Case* caused much disquiet among the states, and a change of government in Canberra saw the Commonwealth and state governments commence negotiations on jurisdiction in offshore areas. In 1979, the negotiations concluded in the Offshore Constitutional Settlement (OCS).¹⁵

¹² (1975) 135 CLR 337.

¹³ For detailed discussions of the case, see Cullen, above n 10, 86-90; see also D Lumb, *The Law of the Sea and Australian Offshore Areas* (1978) 69-76.

¹⁴ The external affairs power, s 51(xxix) of the Constitution, was used by the judges to justify this conclusion, but in differing ways. Chief Justice Barwick and Mason J utilised the placitum saying that offshore areas were 'geographically external' and so within the ambit of the power: per Barwick CJ at 360 and Mason J at 471 (This view of s 51(xxix) was confirmed by the High Court in *R v Polyukovich* (1991) 172 CLR 501 and in *XYZ v Commonwealth* (2006) 227 CLR 532). Justice Jacobs appeared to take the same view, although he did so in the context of a discussion of the 1958 Territorial Sea Convention: per Jacobs J at 497. Barwick CJ, McTiernan, Mason and Murphy JJ also indicated the Act was the implementation of various international agreements, namely the 1958 Territorial Sea Convention and the 1958 Continental Shelf Convention: per Barwick CJ at 365-6; McTiernan J at 377-82; Mason J at 470; and Murphy J at 502-3.

¹⁵ For more detailed discussions of the OCS see Marcus Haward, 'The Australian Offshore Constitutional Settlement' (1989) 13 *Marine Policy* 334; Cullen, above n 10, 104-129; Michael Crommelin, 'Offshore Mining and Petroleum: Constitutional Issues' (1981) 3 *Australian Mining and Petroleum Law Journal* 191; Brian R Opeskin and Donald R Rothwell, 'Australia's Territorial Sea: International and Federal Implications of Its Extension to 12 Miles' (1991) 22 *Ocean Development and International Law* 395, 408-410;

The OCS proceeded from the High Court and the *Seas and Submerged Lands Act* position that sovereignty over all offshore areas (aside from those that were part of a state at Federation) was vested in the Commonwealth. However, the OCS surrendered to the states jurisdiction over the sea and seabed within three miles of the baselines of the territorial sea. This allowed the states to maintain the traditional control they had enjoyed over the territorial sea prior to the *Seas and Submerged Lands Act*, without the necessity of altering state boundaries.

The OCS was achieved by means of conjoint state and Commonwealth legislation, and came into effect in 1983.¹⁶ Any nagging doubts over the validity of the OCS or its enacting legislation were finally put to rest in 1989 in *Port MacDonnell Professional Fishermens' Association v South Australia*.¹⁷ There, the High Court confirmed the valid application of state fisheries legislation to a large offshore area, based on a Commonwealth-state agreement over jurisdiction based on the OCS. The High Court took the opportunity to expressly indicate the OCS's legislative framework was a valid exercise of power under section 51(xxxviii) of the Constitution.¹⁸

It would be a mistake to believe that the OCS had the effect of 'freezing' Australia into a three mile territorial sea for all time. The OCS did permit the extension of the territorial sea to 12 miles, to make Australian practice consistent with what even in 1979 was perceived to be the acceptable international standard. However, the extension envisaged was not one of state jurisdiction to 12 miles, but rather of Commonwealth jurisdiction. The states would retain jurisdictional control over a three mile belt of territorial sea, while the Commonwealth would have jurisdiction and sovereignty over a nine mile belt of territorial sea completely enclosing the state waters.

Although anticipated in 1979, the Proclamation extending the territorial sea to 12 miles was not

made until 1990.¹⁹ At international law, the extension did not have a significant impact on other States. No State except Papua New Guinea (PNG) had territory that lay within 24 miles of any Australian territory. Arrangements under the Torres Strait Treaty²⁰ completely delimited territorial seas of the Australian islands that could affect the PNG territorial sea.

Common law extent of the Australian states

As noted above, *R v Keyn* and the doctrine of colonial extraterritorial incompetence combined to limit the ability of the Australian states to extend their jurisdiction seawards.²¹ The former limited their jurisdiction to the low water mark,²² and the latter prevented them from legislating their boundaries out to sea. However, the common law, and the constitutive instruments of at least one of the colonies, did provide some scope for gaining control over the waters of various bays, historic and otherwise.

The common law rule in *R v Keyn* applied to the waters around Britain generally, and by analogy to the waters off British possessions around the world,²³ although it could be abrogated by statute.²⁴ However, a different line of cases dealt with more specific situations. As early as 1308 in England, there was recognised that those with authority within a county, such as a coroner, could extend that authority to an arm of the sea extending inland, where the opposite shore was visible.²⁵ While the test of using visibility (sometimes called 'land-kennening' or 'headland theory'²⁶) to determine which

Richard Cullen, 'Canada and Australia: A Federal Parting of the Ways' (1989) 18 *Federal Law Review* 53, 75-77; see also the discussions in the *Australian Law Journal*: (1979) 53 ALJ 605; (1976) 50 ALJ 206; (1980) 54 ALJ 517.

¹⁶ The Commonwealth, on the request of the states, enacted the *Coastal Waters (State Title) Act* 1980 (Cth) and the *Coastal Waters (State Powers) Act* 1980 (Cth).

¹⁷ (1989) 168 CLR 340.

¹⁸ See the discussions in Cullen, above n 10, 114-118; see also Richard Cullen, 'Case Note: *Port MacDonnell PFA Inc v South Australia*' (1990) 16 *Monash University Law Review* 128.

¹⁹ Commonwealth of Australia, *Gazette*, No S297, 13 November 1990 (with effect from 20 November 1990).

²⁰ Treaty between Australia and the Independent State of Papua New Guinea concerning Sovereignty and Maritime Boundaries in the area between the two Countries, including the area known as Torres Strait, and Related Matters, [1985] *Australian Treaty Series* 4.

²¹ William R Edeson, 'Australian Bays' (1968-69) 5 *Australian Yearbook of International Law* 10; O'Connell, above n 3, 201-202.

²² Certainly this was the view of the Law Officers in the opinions they provided to the Colonial Office on the ability of the colonies to legislate: See D P O'Connell and Ann Riordan, *Opinions on Imperial Constitutional Law* (1971) 128-139.

²³ This was certainly the view of Barwick CJ and Windeyer J in *Bonser v La Macchia* (1969) 122 CLR 177; and of Windeyer J in *Ferguson v Union Steamship Company of New Zealand* (1968) 42 ALJR 33, 36-37: see Edeson, above n 21, 19; see also O'Connell, above n 3, 211-217.

²⁴ As was the case following *R v Keyn* with the passing of the *Territorial Waters Jurisdiction Act* 1873 (Imp).

²⁵ O'Connell, above n 3, 234; Edeson, above n 21, 19-20.

²⁶ C John Colombos, *The International Law of the Sea* (1967) 182; Edeson, above n 21, 19.

waters could be subject to the jurisdiction of the land was later criticised, the basic principle was sustained, and applied in a number of cases.²⁷ Most of these related to rejection of Admiralty jurisdiction in rivers or ports, but some dealt with waters in quite large bays, and so are worthy of consideration in the current situation.

The most famous of these cases was the *Conception Bay Case*.²⁸ It involved consideration of whether the Government of Newfoundland could grant an exclusive right to lease the floor of Conception Bay to a submarine cable operator. The Bay's mouth was some 20 miles wide, so in the nineteenth century could not be validly closed using the then existing closing line rules. A competitor subsequently laid its cable on the seabed of the Bay, and the question before the Privy Council was whether the floor of the Bay was part of the colony of Newfoundland, permitting the government of the colony to grant exclusive rights to its use.

The Privy Council was unanimous in the view that the waters of Conception Bay were Newfoundland territory, and accordingly the Newfoundland Legislature could grant an exclusive right to use the seabed of the Bay to any individual. The Court reached this conclusion without having to consider whether there were any specific rules applicable to the closing of bays.²⁹ However, in the course of his judgment, Lord Blackburn (for their Lordships) stated:

It seems to them [their Lordships] that, in point of fact, the British Government has for a long period exercised dominion over this bay, and that their claim has been acquiesced by other nations, so as to shew that the bay has for a long time been occupied exclusively by Great Britain, a circumstance which in the tribunals of any country would be very important.³⁰

This is very reminiscent of what was later to become the doctrine of historic bays, in that British sovereignty over the bay was established by the exercise of sovereignty ('dominion' in the words of their Lordships) over a long period of time, with the acquiescence of other States.

One case relied upon by the Privy Council in the *Conception Bay Case* was *R v Cunningham, Brown & Summers*.³¹ There, the three defendants had been convicted of wounding a man on an American ship³² anchored in the Penarth Roads in the Bristol Channel. They appealed on the basis that the convicting jury had been drawn from the county of Glamorgan, when it was unclear that the offence had taken place in Glamorgan at all.

The Court quickly rejected this argument, and stated that they were of the view that the Bristol Channel was an 'inland sea' and that the waters closest to the littoral of any county facing onto the Channel were part of that county. In this instance, since the ship was closer to Glamorgan, that was where the offence had taken place. While the judgment's analysis of why the Bristol Channel should constitute an inland sea is unfortunately sparse,³³ it is clear that the Court regarded the waters of the Channel as British territory, although its mouth exceeded 100 nautical miles across.³⁴

These cases are part of the common law of Australia,³⁵ and are augmented by a brief reference in an Australian case, pertaining to the Gulf of St Vincent and Spencer Gulf. In *R v Wilson*,³⁶ Stow J of the South Australian Supreme Court expressed the view that a murder committed on board HMS *Sappho* in the waters between Kangaroo Island and the mainland of South Australia was within South Australian jurisdiction. He also indicated that his

²⁷ A selection of the more significant cases are discussed immediately below; also see Edeson, above n 21, 19-23; Colombos, above n 26, 182-183.

²⁸ *Direct United States Cable Company v The Anglo-American Cable Company* [1877] 2 AC 394; for discussions of the case see Mitchell P Strohl, *The International Law of Bays* (1963) 278-280; Colombos, above n 26, 184-185.

²⁹ [1877] 2 AC 394, 419-420.

³⁰ [1877] 2 AC 394, 420.

³¹ (1859) 169 ER 1171; for additional discussion see Strohl, above n 28, 290-291; Edeson, above n 21, 21.

³² Strohl notes that the offence occurred 'when seagoing life could still be one of the more brutal of human experiences, and anti-social behaviour on board ships in port was annoyingly common': Strohl, above n 28, 291. Neither at the appeal nor at first instance were similar sentiments expressed.

³³ The judgment of the Court was only 17 lines long, while the report of the case runs over seven pages, filled largely with the argument of counsel.

³⁴ It is worth noting that the width of the Bristol Channel in the vicinity of Penarth is less than 20 miles across. However, in a later case, *The Fagernes* [1926] P 185, Hill J held that the waters of the Channel at a point where it was over 20 miles wide were *inter fauces terrae*. This finding was later overturned on appeal by the Court of Appeal, largely due to the intervention of the Attorney-General, who indicated that the Minister for Home Affairs was of the view the place concerned was beyond 'the territorial sovereignty of His Majesty': [1927] P 311; see also Pleadings, *Anglo-Norwegian Fisheries Case*, Vol 1, 64-65; Vol 2, 491-494.

³⁵ Certainly they were discussed with approval by members of the High Court in *Raptis v South Australia* (1977) 15 ALR 223 especially per Stephen J at 247-248; and by Windeyer J in *Ferguson v Union Steamship Company of New Zealand* (1968) 42 ALJR 33 at 36-37.

³⁶ Unreported, 1875.

view was in accord with the then Chief Justice of that court, Sir Richard Hanson.³⁷

These early cases indicate that in spite of *R v Keyn*, the common law could accommodate the exercise of jurisdiction over bays, regardless of the size of those bays and the application of the closing line rules to them. However, not all bays were successfully deemed part of their respective colonies, states or territories. In *Haruo Kitaoka v Commonwealth*,³⁸ Wells J in the Supreme Court of the Northern Territory held that Boucaut Bay was not part of the Territory because it was not a bay at common law. In his discussion of the case, Edeson intimates that since Boucaut Bay did not conform to the definition of a juridical bay, it was not included.³⁹

The application of the common law in respect of bays to post-Federation Australia, however, has raised other problems. Firstly, the constitutive instruments that brought the Australian colonies into juridical being also prescribed their limits, and accordingly, any bay which an Australian state could lay claim to must not be inconsistent with those instruments.⁴⁰ An historic bay is, by definition, part of the State that claims it. If the instrument defining the boundaries of an Australian state precluded the inclusion of a particular bay, that state could not validly assert its sovereignty domestically over the bay, and so preclude the legislative action necessary to substantiate the claiming of the bay as historic.⁴¹

³⁷ O'Connell, above n 3, 237-238. Interestingly, none of the majority of the High Court in *Raptis v South Australia* (see part 3(d) below) referred to *R v Wilson* in their judgments, even though it appears that the positions of the vessels in both cases were reasonably similar. Justice Mason chose not to make any use of the decision at all: (1977) 15 ALR 223, 251; see also D P O'Connell, 'Problems of Australian Coastal Jurisdiction' (1968) 42 *Australian Law Journal* 39, 43; Edeson, above n 21, 23; W R Edeson, 'The Validity of Australia's Possible Maritime Historic Claims in International Law' (1974) 48 *Australian Law Journal* 299; Leo J Bouchez, *The Regime of Bays in International Law* (1964) 228.

³⁸ Unreported, 1937.

³⁹ A detailed study of this case can be found in W R Edeson, 'Foreign Fishermen in the Territorial Waters of the Northern Territory, 1937' (1976) 7 *Federal Law Review* 202, 202-223; see also Edeson, above n 37, 303.

⁴⁰ However, this may not necessarily be so: *South Australia v Victoria (State Boundaries Case)* (1912) 12 CLR 667 (HC); (1914) 18 CLR 115; see generally Stuart B Kaye, 'The Torres Strait Islands: Constitutional and Sovereignty Questions Post-Mabo' (1994) 18 *University of Queensland Law Journal* 38.

⁴¹ Theoretically, the Commonwealth could assert that a bay was historic, and then legislate for it as a new and separate territory under s 122 of the Constitution. However, the High Court did not appear to approve of a similar suggestion for the continental shelf in the *Seas and Submerged Lands Case* (1975) 135 CLR 337, 389 (Gibbs J), 456 (Stephen J).

Most of the original colonial Letters Patent or constitutive Acts deal only with land boundaries.⁴² If they refer to offshore areas at all, it is to confirm that the colony was to have jurisdiction over particular islands.⁴³ In addition, some of the Letters Patent also have tended to be somewhat vague in circumscribing the extent of the colonies, causing problems that, in one instance, gave rise to international complications as recently as 1976.⁴⁴ The reasons for this are obvious when one considers the time at which these documents were prepared, the lack of first-hand experience their drafters had of Australia, poor access to satisfactory charts, and the general remoteness of Australia to London.⁴⁵

The position of South Australia and the Northern Territory is different.⁴⁶ The Letters Patent that created the Province of South Australia expressly included all 'bays and gulfs' as well as Kangaroo

⁴² The original Letters Patent of New South Wales, Victoria, Queensland, Tasmania and Western Australia do not refer to bays in stating the limits of the colonies, although Edeson notes that Cook's taking possession of the east coast of Australia did make reference to bays: Edeson, above n 21, 14-16; the obvious exceptions to this are South Australia and the Northern Territory, which are discussed below. The Australian Capital Territory was surrendered from New South Wales by an Act of that state's Parliament and is unique in that it is the only landlocked political division in the Australian federal structure. The Jervis Bay Territory was also surrendered by New South Wales, but only to the high water mark, so no bays can exist within it. None of the instruments placing the various external territories under Australian jurisdiction refer to bays. The relevant instruments are found or reprinted at the following locations: NSW: *Historical Records of Australia*, Series 1, Vol 1, 1; Vic: 13 & 14 Vic ch 59 s 1; Qld: *Public Acts of Queensland*, (Sydney: Law Book Company, 1936) Vol 2, 569; WA: 10 Geo IV ch.22, s 1; Tas: *Historical Records of Australia*, Series III, Vol 5, 1; Jervis Bay Territory: Schedule 1 *Seat of Government Surrender Act 1909* (NSW).

⁴³ The Letters Patent confirming Kangaroo Island as part of South Australia are reprinted in *South Australian Statutes 1837-1975* (1979) Vol 11, 749; Macquarie Island to Tasmania reprinted in *Historical Records of Australia*, Series III, Vol 5, p.1; Torres Strait Islands to Queensland reprinted in *Queensland Statutes 1828-1936* (1937) Vol 2, 538.

⁴⁴ The scope and interpretation of the Letters Patent incorporating certain islands in Torres Strait to Queensland last century were creative of difficulties in the negotiation of the maritime boundary between Australia and Papua New Guinea: See generally Kaye, above n 40.

⁴⁵ However, it would be incorrect to say that not referring to bays in such instruments necessarily reflected Imperial practice. Edeson notes that in instruments pertaining to Nova Scotia, New Brunswick and Quebec, there were references to bays: Edeson, above n 21, 17.

⁴⁶ See *Seas and Submerged Lands Case* (1975) 135 CLR 337; Also Edeson, above n 21, 15-17; see M H McLelland, 'Colonial and State Boundaries in Australia' (1971) 45 *Australian Law Journal* 671, 677.

and other islands offshore.⁴⁷ The reference to gulfs and bays was continued when the Northern Territory was added to South Australia in 1863.⁴⁸ When South Australia surrendered the Northern Territory to the Commonwealth in 1910 bays and gulfs were again specifically mentioned.⁴⁹

The importance of these instruments is enhanced when one considers the position of the states with regard to their offshore areas. By virtue of the *Seas and Submerged Lands Case*, it is clear that the states themselves did not extend beyond the low water mark of their coastlines. In some limited circumstances, they could extend jurisdiction out to offshore areas,⁵⁰ but they could not assert their sovereignty over territorial waters. While this position has been modified by the OCS, at common law it remains unaltered. As much was confirmed by the Federal Court in *Yarmirr*, with Olney J at first instance.⁵¹

The exception to the common law in this area is internal waters. If a state can establish that a particular bay, inlet or gulf is part of its internal waters, then it can assert its sovereignty over those waters, and could have done so in 1975 in spite of the *Seas and Submerged Lands Case*. The relevance of the Colonial Letters Patent is that they make it significantly easier for South Australia, as against the other states, to establish that the waters of a particular bay are internal waters, be they historic or otherwise. The 1836 Letters Patent create a presumption in favour of South Australia that the waters of any bay on the mainland are internal waters.⁵²

For the other five states, the presumption is reversed and they must establish that they ought to assert their sovereignty over particular waters.⁵³ While not

precluding these states from claiming jurisdiction over bays,⁵⁴ the lack of specific reference to a grant of jurisdiction make it more difficult for them to assert the existence of an historic bay,⁵⁵ for the purposes of Australian domestic law.

In more recent times, the High Court has been compelled to wrestle with the question of jurisdiction over large bays. The jurisdictional issue involved lends itself to comparison more with the American cases considered earlier than the previous English authorities, if only because the cases here involved disputes over state and/or Federal jurisdiction over particular waters.

In *Ferguson v Union Steamship Company of New Zealand*,⁵⁶ Sir Victor Windeyer briefly considered whether the waters of Emu Bay near the town of Burnie in Tasmania were part of that state. After considering the old notion of land-kenning to enclose a bay, his Honour noted that the old test was 'more interesting than helpful today'. Unfortunately, Windeyer J chose not to indicate what he believed the contemporary test to be, and merely concluded that Emu Bay *in toto* was not part of Tasmania, although the wharves and port facilities were part of Tasmania.

Of most relevance to the discussion at hand is the High Court's decision in *A Raptis & Son v South Australia*.⁵⁷ In that case, the Court had to determine whether the waters of the two South Australian Gulfs were internal waters of that state, and if so whether these internal waters included the waters of the Investigator Strait between the Gulfs proper and Kangaroo Island. Clearly the waters of the Gulfs could not qualify for closure even under the most generous 24 mile closing rules for juridical bays, so the High Court's determination was in effect an assessment of whether the Gulfs of St Vincent and Spencer were historic bays, and if so how far did they extend.⁵⁸

Not all the judges chose to consider the question in terms of historic bays. Of the four majority judges,

⁴⁷ *South Australian Statutes 1837-1975* (1979) Vol 8, 830; This was authorised by 4 & 5 Will IV ch 95 s 1.

⁴⁸ *Northern Territory Act 1863* (SA) preamble.

⁴⁹ *Northern Territory Surrender Act 1907* (SA) s 5; *Northern Territory Acceptance Act 1910* (Cth) s 4.

⁵⁰ See, eg, *Robinson v Western Australian Museum* (1977) 138 CLR 283.

⁵¹ See below.

⁵² The reference to gulfs and bays has been held to only apply to the South Australia mainland, and not to any bays on Kangaroo Island, or any other islands within the state: *Raptis v South Australia* (1977) 15 ALR 223.

⁵³ O'Connell makes the point that it may not be clear on what basis the South Australian Gulfs could be claimed as historic bays: that is, whether they are based on principles of international law or domestic legal considerations. He suggests that it is probably a combination of both, with the domestic legislation providing the historic justification for the claim: D P O'Connell, 'Bays, Historic Waters and the Implications of A. Raptis & Son v South Australia' (1978) 52 *Australian Law Journal* 64, 67.

⁵⁴ This is 'bays' in the generic rather than juridical sense of the word.

⁵⁵ It was the view of Stephen J in *Raptis v South Australia* that without Letters Patent expressly including 'bays and gulfs' as within the colony, the two South Australian gulfs would not have been validly incorporated into that state. This is suggestive that it may be very difficult, if not impossible: (1977) 15 ALR 223, 243; it also appears to reflect the position of Edeson: Edeson, above n 21, 25-26.

⁵⁶ (1968) 42 ALJR 33.

⁵⁷ (1977) 15 ALR 223.

⁵⁸ A most useful geographical analysis of the decision has been provided by Prescott: J R V Prescott, *Australia's Maritime Boundaries* (1985) 53-56.

neither Barwick CJ nor Jacobs J referred to the term 'historic bay' or to any of the American or British bay cases or the UN Secretariat Studies.⁵⁹ Their reasoning focused very much upon the South Australia Letters Patent, and interpreted them to mean that the Gulfs ought to be closed separately, without incorporating the Investigator Strait into South Australia's internal waters.

Justices Gibbs and Stephen did look at a wider range of material, but reached the same conclusion. Justice Gibbs concluded that while the *Conception Bay Case* permitted a wide expanse of water like the Gulf of St Vincent to be enclosed,⁶⁰ the Backstairs Passage was too significant a feature and Kangaroo Island was too large to permit the Island to be treated as just an extension of the mainland.⁶¹ Justice Stephen, after reviewing some of the British authority considered above,⁶² placed the whole question of determining what was an historic bay in the 'too hard basket'. His Honour stated:

The geographical aspects of the particular feature would require to be adequately understood and the relevant aspects of history and usage would have to be examined...But to undertake such a task, as it were, at large and for an entire coastline, and this in the absence of appropriate detailed evidence, is a course upon which this court should not, in my view, embark.⁶³

Neither of these two judges really seriously addressed the international law ramifications of their decisions, although perhaps there are vague echoes of the historic bay tests in Stephen J's judgment. As Professor O'Connell has observed, essentially all of the majority engaged in an exercise of statutory interpretation.⁶⁴

The minority in *Raptis' Case* looked a little further afield for material in making their decisions, but essentially differed with the majority on the factual question of the extent of the two Gulfs. Justice Mason reviewed both English and American authority, and specifically referred to 'historical

bays',⁶⁵ while Murphy J went even further, citing the *Anglo-Norwegian Fisheries Case* and the 1962 Study to support his position.⁶⁶

In terms of an addition to the law of historic bays, *Raptis v South Australia* is disappointing. For the most part, the judges, perhaps with the exception of Murphy J and to a lesser extent Mason J, examined the question of the status of the two Gulfs from very much a domestic point of view.⁶⁷ Chief Justice Barwick and Jacobs J, for example, refer to no cases apart from those of Australian origin. The Court made no real attempt to analyse international law for principles, but appeared to prefer construing the Letters Patent setting up South Australia. This contrasts markedly from the approach of the US Supreme Court, which actively sought to apply international law in determining what the boundaries of the states before it were. In fairness to the High Court, they were not presented with evidence of any exclusion of foreign State nationals or acquiescence by other States that would be necessary in determining the existence of an historic bay at international law.⁶⁸

In addition to *Raptis' Case*, there have also been two unreported fisheries cases dealing with the status of Anxious Bay. In *Evans v Milton*⁶⁹ and *Glover v Paul*,⁷⁰ South Australian Magistrates held that, based on the 1836 Letters Patent and *Raptis' Case*, the waters of Anxious Bay were internal to South Australia.⁷¹ In both decisions, they indicated the points used to close the bay, and these were subsequently fixed upon by the Joint Commonwealth/South Australia Committee in 1987 as appropriate to close the bay. Neither of the decisions was reported, so it is not possible to say whether the vessels involved were Australian or foreign, or whether the magistrates involved made reference to international law.

The significance of the common law and the limits of the States is that the OCS did not alter the limits of the states – it merely gave them legislative authority to make laws with respect to waters to a distance of three nautical miles from the territorial

⁵⁹ In fairness to Barwick CJ, in the course of his judgment, he did indicate some approval of the reasoning of Stephen J, who had considered some of the above material.

⁶⁰ (1977) 15 ALR 223, 234-237.

⁶¹ (1977) 15 ALR 223, 237-238; his Honour also made reference to *Louisiana v United States* 394 US 11 (1968) and chose to distinguish that case's treatment of offshore islands on the basis that Kangaroo Island was far larger, and separated by more substantial and deeper waters.

⁶² (1977) 15 ALR 223, 243-249; his Honour also reviewed Windeyer J's judgment in *Ferguson v Union Steamship Company of New Zealand* (1968) 42 ALJR 33.

⁶³ (1977) 15 ALR 223, 249.

⁶⁴ O'Connell, above n 53, 65.

⁶⁵ (1977) 15 ALR 223, 254.

⁶⁶ (1977) 15 ALR 223, 263.

⁶⁷ O'Connell noted that if questions of international law were raised in the judgments, 'they were touched upon' but solutions were not developed to the questions: O'Connell, above n 53, 65.

⁶⁸ Ibid 68.

⁶⁹ Unreported, 1981.

⁷⁰ Unreported, 1984.

⁷¹ Commonwealth/South Australian Committee, *South Australian Historic Bays Issue*, (1986) 25; Prescott, above n 58, 70.

sea baselines. The OCS legislation also gave title to the seabed in this three nautical mile belt, but again this did not change the limits of the states.

This means that in the context of exercising powers at common law, the states are restricted to their old common law limits rather than being empowered under the OCS, although they can make laws and enforce them to a distance of three nautical miles within the territorial sea, and potentially further if a nexus between the activity being regulated and the state. This is significant because it means that any exercise of the executive power of a state, or the application of the common law offshore, will be limited to the common law limits of the state. This position was applied by the High Court and the Federal Court in *Commonwealth v Yarmirr*⁷² in the context of the common law basis of native title rights offshore, and is confirmed in the context of executive power by the High Court in *Joseph v Colonial Treasurer (NSW)*.⁷³ In the latter case, the High Court held that a state cannot determine the exercise of the war prerogative, and that aspect of executive power rested with the Commonwealth. This would appear to limit a state's ability to act independently in the context of security issues, although it may not prevent the Commonwealth from acting with a state in the exercise of executive power.

The complexities of the application of the common law in offshore areas were demonstrated in *Yarmirr*. At first instance, Olney J undertook an examination of the territorial limits of the Northern Territory. This analysis relied heavily upon the High Court's judgment in *Raptis & Son v South Australia*.⁷⁴ Interestingly, *Raptis* itself, and all the other cases his Honour made use of in this context,⁷⁵ predated the proclamation of territorial sea baselines.⁷⁶ The territorial sea is measured from baselines, proclaimed by the Governor-General with effect from

14 February 1983, and updated in 2002.⁷⁷ For the purposes of international law, and those of the OCS, the waters on the landward side of the baselines are internal waters. However, Olney J's discussion implicitly assumes that the common law offshore limits of the Northern Territory are still determined solely by application of the Letters Patent establishing the Province of South Australia.⁷⁸

Such an approach appears to be necessary on two grounds. Firstly, if the common law did not permit the existence of native title beyond the limits of the Territory, all native title rights beyond those limits would have been extinguished on its establishment.⁷⁹ Secondly, section 7 of the *Coastal Waters (Northern Territory Title) Act 1980* (Cth) states that nothing in that Act is deemed to alter the limits of the Northern Territory. It could also be assumed that the proclamation of baselines under section 7 of the *Seas and Submerged Lands Act 1973* (Cth) did not alter the limits of the Territory, as to admit that possibility would have meant that similar baselines proclaimed for the States would be invalid by virtue of conflicting with section 123 of the *Constitution*.⁸⁰ The essential validity of Olney J's approach was confirmed on appeal. Justices Beaumont and von Doussa recognised that the application of the Act to offshore areas was problematic.⁸¹ The majority ultimately adopted the view of Olney J that the Act did apply, and that it was unnecessary to determine the precise limits of the Northern Territory.⁸² They also undertook an exhaustive examination of the limits of the Northern Territory and, while providing more detail than Olney J, were in general agreement with his conclusions.⁸³

The majority of the High Court on appeal sought to restrict *R v Keyn* to matters involving criminal jurisdiction, and to indicate the common law could be extended offshore. Chief Justice Gleeson and Gaudron, Gummow and Hayne JJ stated:

⁷² *Commonwealth v Yarmirr* (2001) 208 CLR 1.

⁷³ (1918) 25 CLR 32.

⁷⁴ (1977) 138 CLR 346.

⁷⁵ *The Fagernes* [1927] P 311; *Direct United States Cable Company v Anglo-American Cable Company* [1877] 2 AC 394; *Adams v Bay of Islands County* [1916] NZLR 65; *Ferguson v Union Steamship Company of New Zealand Ltd* (1968) 119 CLR 191. Interestingly, Olney J made no reference to *Haruo Kitaoka v Commonwealth*, Unreported, Supreme Court of the Northern Territory, Wells J, No 14 of 1937) which considered whether Boucaut Bay was within the limits of the Northern Territory. This omission was rectified by the Full Federal Court upon appeal: *Commonwealth v Yarmirr* (1999) 168 ALR 426, 456–7 (Beaumont and von Doussa JJ).

⁷⁶ *Yarmirr v Northern Territory* (1998) 156 ALR 370, 389–95.

⁷⁷ See discussion below.

⁷⁸ Province of South Australia, 'Letters Patent under the Great Seal of the United Kingdom erecting and establishing the Province of South Australia and fixing the boundaries thereof', *Government Gazette*, Proclamation No SRSA: GRG 2/64, 19 February 1836.

⁷⁹ If this is so, then his Honour should have considered the Letters Patent establishing New South Wales, out of which South Australia was subsequently established by its own Letters Patent.

⁸⁰ See *Coastal Waters (States Title) Act 1983* (Cth).

⁸¹ This is because the date of acquisition of sovereignty over sea areas followed *R v Keyn* (1876) 2 Ex D 63.

⁸² *Commonwealth v Yarmirr* (1999) 168 ALR 426, 439–45 (Beaumont and von Doussa JJ).

⁸³ *Ibid* 448–71.

The Commonwealth contention that the common law does not apply beyond the low-water mark sometimes appeared, in the course of argument, to go so far as contending that the courts could give no remedies in respect of transactions or events which occurred in that area. *Keyn* does not warrant such a general or absolute proposition. *Keyn* established that, absent statutory authority, a criminal court cannot punish as criminal, conduct which happens beyond the low-water mark on vessels flying the flag of a foreign state. The same proposition, with respect to the Colonial Courts of Admiralty, previously had been established in New Zealand by *R v Dodd*. That conclusion owed much to the history of the criminal law and trial by jury and is a conclusion about the reach of the *criminal* law. As it happens, legislative action to reverse the effect of the decision in *Keyn* was soon taken but this may be put aside as irrelevant to the Commonwealth's contention about the *common* law.⁸⁴

The majority declined to explore what title the Northern Territory had acquired as a result of the OCS, only noting that the implementation of the OCS had not extinguished extant native title.⁸⁵ In noting the changes to the extent of the territorial sea since British settlement, the majority viewed the approach taken by Olney J at first instance with approval.⁸⁶

This raises an issue in the context of offshore jurisdiction to deal with maritime interception of vessels. This is because the criminal jurisdiction of the states will be in issue, potentially leaving *R v Keyn* in place, and still rendering the old limits of the states of importance.

State jurisdiction under Commonwealth statute

On 4 February 1983, a Proclamation was made under the *Seas and Submerged Lands Act 1973* (Cth), setting down new baselines, this time for the whole continent, Tasmania, and a number of offshore islands.⁸⁷ An earlier set of baselines for southern New South Wales and Tasmania which had been made in 1974 were revoked with the establishment of the new baselines.

Instead of proclaiming the baseline by representing it on a set of charts, the 1983 Proclamation nominated precise basepoints, rather than leave the

interpretation of the location of such points to a diagrammatic representation. Basepoints are described to the nearest second of latitude and longitude, and while each relates to a particular physical feature, no such features are referred to by name. The 1983 Proclamation also specified that where the coast itself was to provide the territorial sea baseline, it would be measured from the lowest astronomic tide.

There are 396 baselines prescribed in the 1983 Proclamation, and they are divided into three tables: those pertaining to the Australian mainland; those for Tasmania; and those for various groups of offshore islands separated from both the mainland and Tasmania. Notably though, the 1983 Proclamation only establishes baselines along the coasts of the states or the Northern Territory. No specific baselines have been created for any of the external Territories.

The 1983 Proclamation also differed from the 1974 Proclamation by not exhaustively indicating all the baselines or precisely indicating exactly where the baseline of Australia's territorial sea was to be found. The 1983 Proclamation does set down baselines, but it also indicates that these lines are by no means exhaustive. Rather, it adopts the formula for closing lines from Article 7 of the 1958 Territorial Sea Convention, and directs the reader to determine for themselves whether a particular feature should be closed. As such, all bays and river mouths conforming to the definition in Article 7 are to have baselines drawn across them, but the precise location of these lines, and whether indeed a particular feature ought to generate such baselines is left uncertain. This allows the 1983 Proclamation to close features such as Sydney Harbour or Port Phillip Bay without the necessity of setting down coordinates to do so.

The reasons why an exhaustive listing of basepoints was not embarked upon can be guessed at. The vastness of the Australian coastline would have made the job a most difficult and laborious one. By utilising the formula, this additional labour was rendered unnecessary. It also had the advantage of extending the ambit of the Proclamation to the external Territories as well, even though no specific baselines related to them. As such, Australia could contend that for over 10 years it has asserted its right to baselines across various features in the Australian Antarctic Territory without objection, whereas the proclamation of specific baselines would have been problematic, extremely laborious, and almost certainly inviting objection from those States which do not recognise Australia's claim.

⁸⁴ *Commonwealth v Yarmirr* (2001) 208 CLR 1, 43-44.

⁸⁵ *Ibid* 59.

⁸⁶ *Commonwealth v Yarmirr* (2001) 208 CLR 1, 60.

⁸⁷ *Commonwealth Gazette*, Proclamation No S29, 9 February 1983, made 4 February 1983.

The 1983 Proclamation, in setting basepoints for various portions of the coast, also does not completely indicate the precise locale of the territorial sea baseline. The 1983 Proclamation also sets out a convoluted mechanism for the adjustment of lines between basepoints in the event that such a line crosses a feature that is above the low water mark. When the line between two specified basepoints encounters a feature above water at the lowest astronomic tide, the territorial sea baseline incorporates the feature, and then continues along its path.

As noted above, the 1983 Proclamation was made under section 7 of the *Seas and Submerged Lands Act 1973* (Cth). This section expressly draws its validity from the Law of the Sea Convention. Section II deals with the limits of the territorial sea, and permits the drawing of baselines in the following circumstances:

1. where the coastline is 'deeply indented or cut into, or if there is a fringe of islands along the coast in its immediate vicinity', provided that such baselines do not, to an appreciable extent, depart from the general direction of the coast;
2. where there is a bay, with a mouth no wider than 24 miles across, that conforms to the semi-circle area test; or
3. where there is a river mouth.

On 19 March 1987, the then Governor-General of Australia, Sir Ninian Stephen, issued a Proclamation pursuant to section 8 of the *Seas and Submerged Lands Act 1973*.⁸⁸ Section 8 empowered the Governor-General to proclaim baselines to enclose the waters of certain bays as historic bays, and the Proclamation in this instance enclosed the waters of four bays in South Australia.

After the compilation of technical and historical data concerning the various bays, a joint Commonwealth/South Australian Committee recommended that four be proclaimed as historic bays: Encounter Bay, Lacedpede Bay, Rivoli Bay and Anxious Bay.

On 7 April 1991, the United States Embassy in Canberra lodged a formal protest to Australia over the proclamation of the four South Australian historic bays.⁸⁹ While the protest was part of a series of American protests over historic bay claims, it did purport to consider evidence provided by the Australian Government, and to assess the bays against the three basic criteria.

⁸⁸ *Commonwealth Gazette*, Proclamation No S57, 31 March 1987.

⁸⁹ See (1994) 15 *Australian Yearbook of International Law* 485.

More recently, a rectangular set of baselines was proclaimed in the Gulf of Carpentaria in 2000, to enclose a roadstead off the port of Karumba.⁹⁰ The enclosure of baselines around a roadstead is permitted under Article 12 of the Law of the Sea Convention.

Subsequent developments

In 2006, the Commonwealth moved to replace the 1983 and 1987 baseline proclamations. A new proclamation was made to update the geodetic coordinates originally used, while essentially leaving the original intention of those baselines intact. The 2006 baselines apply to the Australian mainland, Tasmania and a number of smaller offshore islands.⁹¹

In addition to specifying straight baselines, the Proclamation also retains the formula of creating additional baselines in certain circumstances, in a fashion that draws heavily from the Law of the Sea Convention. Such baselines are deemed to exist where there are permanent harbourworks, the mouth of a river or certain types of bay. Any bays closed in this fashion must be less than 24 nautical miles wide at the entrance, with allowance for islands in the bay mouth, and have an area of water greater than the area of a semi-circle using the width of the mouth of the bay as its diameter.⁹² In addition, the historic bay baselines were revoked and replaced with updated baselines in the same fashion as the wider baseline system in 2006.

More expansive baselines could conceivably be proclaimed in the future, for example, to enclose much of the Great Barrier Reef as a fringing reef. However, it is submitted that a baseline to enclose the Gulf of Carpentaria is unlikely and probably impossible. In 1968, the then Attorney-General, Mr Bowen, in response to an Opposition motion that Australia exert exclusive jurisdiction over the waters of the Gulf, stated:

I would simply say that because of the width and configuration of the Gulf of Carpentaria, it is a type of bay which normally under international law, has been accepted as unclaimable... Unfortunately we cannot make this [exclusive

⁹⁰ *Seas and Submerged Lands Act Proclamation 2000* (Cth), 29 August 2000.

⁹¹ *Seas and Submerged Lands (Territorial Sea Baseline) Proclamation 2006* (Cth), 15 February 2006.

⁹² This requirement is drawn directly from art 10 of the Law of the Sea Convention: *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994).

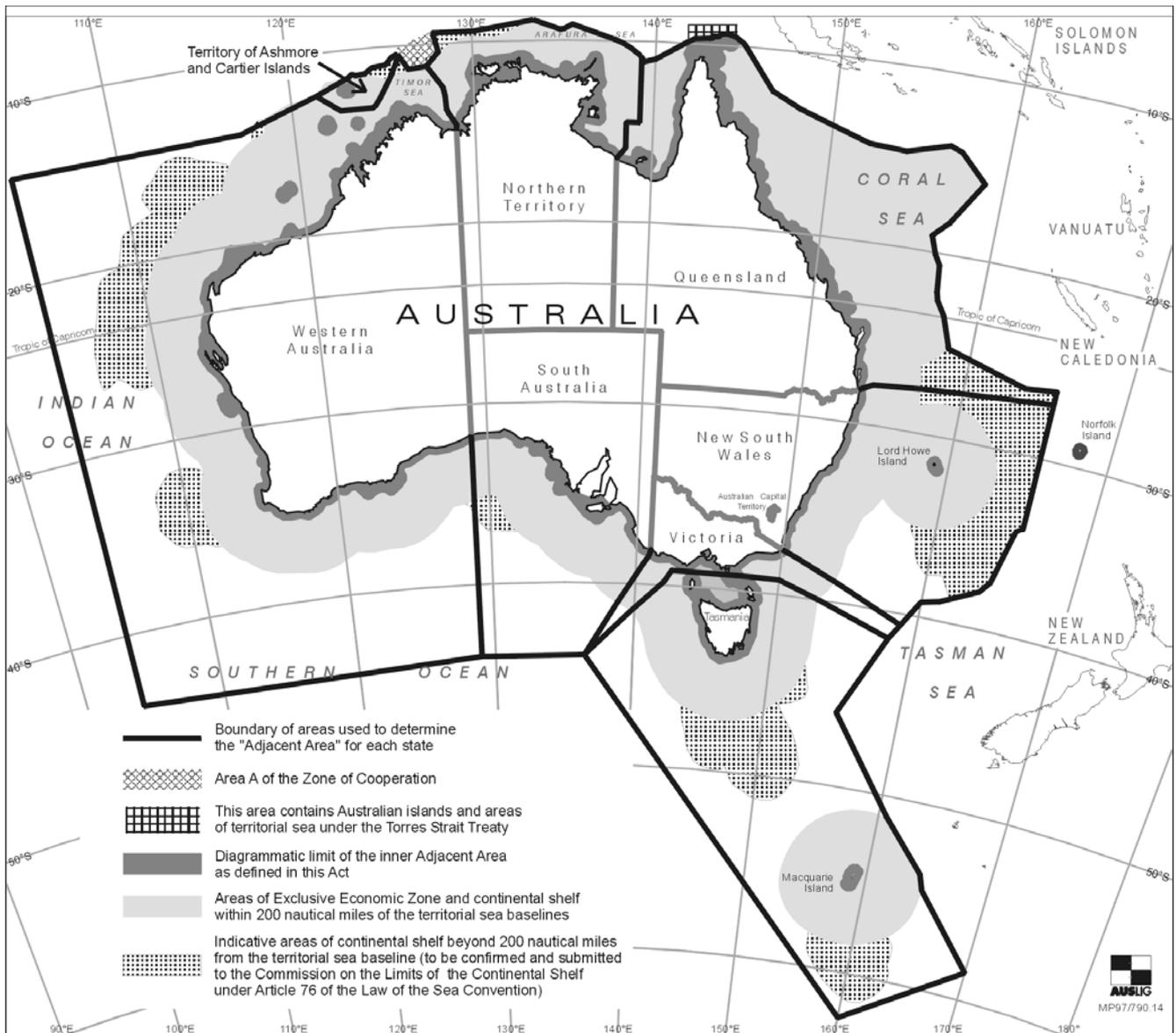


Figure 1. Adjacent areas under the *Crimes at Sea Act 2000 (Cth)*

jurisdiction] claim to the Gulf of Carpentaria. In the past we have not acted in such a way as to be able to claim we have excluded people from the area and made it an historic bay.⁹³

This is suggestive that Australia accepted the requirement of an assertion of jurisdiction over the area of the historic bay for some period of time, and that no such assertion in the past for the Gulf of Carpentaria precluded its claim as an historic bay.⁹⁴ This is to say nothing of the likely international protest that would certainly accompany any Australian historic waters claim to the Gulf.

By application of the OCS, the states would have jurisdiction over waters landward of the territorial sea baselines, and seawards to a distance of three nautical miles. This would seem clear in the application of state legislation, although for the reasons indicated not necessarily state executive power or common law.

Crimes at sea legislation

State criminal jurisdiction offshore is also affected by the *Crimes at Sea Act 2000 (Cth)*. Under the scheme agreed by the Commonwealth and states, state criminal law would operate aboard Australian flagged and certain other vessels depending on their location.⁹⁵ Each location for jurisdiction was determined by the adjacent areas used in the

⁹³ Commonwealth of Australia, *Hansard HR Debates*, Vol 59, 1795.

⁹⁴ Strohl, in 1963, also considered the status of the Gulf of Carpentaria: see Strohl, above n 28, 64; see also Edeson, above n 37, 302.

⁹⁵ *Crimes at Sea Act 2001 (Cth)* s 6.

Offshore Petroleum Settlement.⁹⁶ These areas are vast and extend well beyond the Australian Exclusive Economic Zone, but they are not inconsistent with international law because they are not used as a basis for jurisdiction in themselves (see Figure 1).

The identification of state criminal law in adjacent offshore areas does not mean that the state must be the government with responsibility for enforcement, or that the state can prevent the Commonwealth from acting. The *Crimes at Sea Act* makes it very clear that within the territorial sea, to a distance of 12 nautical miles, state law can operate by its own force,⁹⁷ presumably representing what the Commonwealth and the states viewed as a sufficient physical nexus to satisfy the post-Australia Act nexus test. The *Crimes at Sea Act* indicates that while the criminal law of a state will apply in the adjacent areas in the legislative scheme, it only applies beyond 12 nautical miles by virtue of the force of Commonwealth law.

On the other hand, it is difficult to see that enforcement by a state of its own criminal law on a ship in its adjacent area beyond the territorial sea could be *ultra vires*. Indeed, the *Crimes at Sea Act* explicitly notes that enforcement by state and Commonwealth agencies is possible, since Schedule 1 clause 2 provides that where an arrest is effected by state personnel, state laws of evidence and procedure apply, while where the arrest is effected by Commonwealth officers, the rules of evidence and procedure are federal. On the other hand, the explicit reference to state law being applicable by force of Commonwealth law may have the effect of severing the nexus with the state, placing a question over state enforcement, at least independent of Commonwealth collaboration, beyond 12 nautical miles.

Conclusion

The jurisdiction of the Australian states offshore is far from simple. Most confusing, and not generally understood, is that the common law extent of the states is not the same as the waters under their jurisdiction within the territorial sea baselines. In most cases, this difference will favour the proclaimed baselines, as is most graphically demonstrated in the area in the vicinity of Kangaroo Island off the South Australian coast. As discussed above, in *Raptis' Case*, the High Court held that the waters of the Investigator Strait between Kangaroo Island and

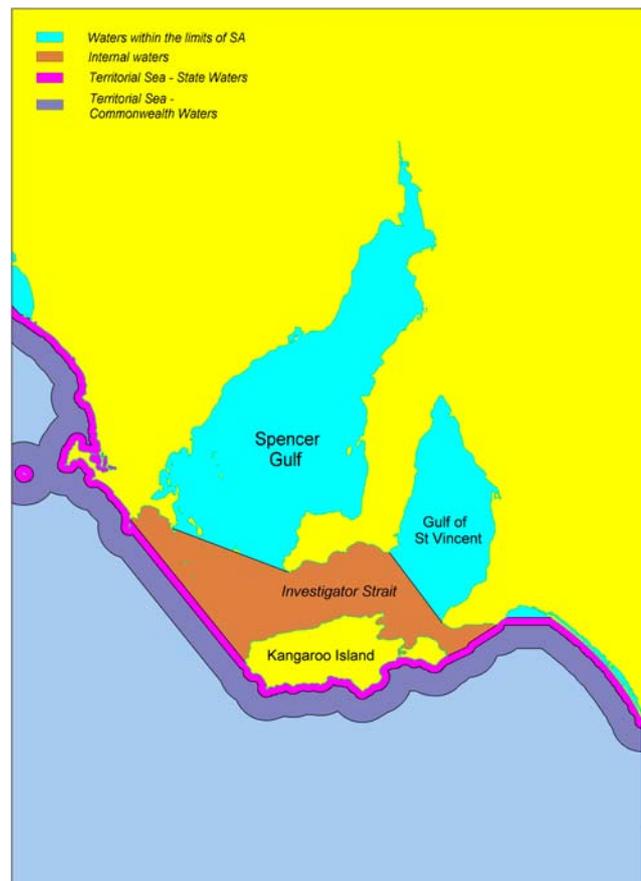


Figure 2. Complicated jurisdiction in South Australia

South Australia, including the narrow Backstairs Passage, were not part of South Australia, although the waters of the two great South Australian gulfs, Spencer and St Vincent, were part of South Australia at common law. On the other hand, the Commonwealth's territorial sea baseline proclamations enclose the waters between Kangaroo Island and the mainland as internal waters. This creates a substantial band of waters which are under the *Seas and Submerged Lands Act 1973* (Cth) internal waters, under South Australian jurisdiction, which are beyond the limits of the state at common law. The complexity is evident in Figure 2.

Such a disjuncture of jurisdiction is not limited to South Australia, although the illustration is certainly the largest example. It is also an example that is relatively clear, as the courts have rarely considered the status of waters around the Australian coast. Other areas around the country have generally not seen the courts determine the extent of the states at common law. With increasing claims to native title offshore, based on legislation relying on the common law, as well as increasing activity and regulation around the Australian coast, greater clarity as to the limits of the Australian states' jurisdiction would be desirable.

⁹⁶ See Cullen, above n 10, 65-70

⁹⁷ *Crimes at Sea Act 2001* (Cth) sch 1, cl 2(2).

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