COMMONWEALTH AND STATE JURISDICTION OVER OFF-SHORE AREAS

By C.W. Harders

I find once again, as I begin the preparation of this paper, that it seems never to be easy for a Government lawyer to engage, without some constraints, in public discussion of the subject of Commonwealth and State jurisdiction over off-shore areas.

On three occasions in 1968–1969 I spoke or wrote about these matters. At that time, the joint Commonwealth–State *Petroleum (Submerged Lands) Acts* had recently come into operation; a Senate Select Committee on Off-shore Petroleum Resources had been appointed to inquire into the scheme of the Commonwealth legislation but had still to make its report (and I was a witness before the Committee); the proceedings in *Bonser v. La Macchia* had come before the High Court but the Court's decision was still awaited; the political and legal disputation on whether the Commonwealth should legislate exclusively with regard to activities in the territorial sea and on the continental shelf had been more or less dormant but was about to come to the surface again.

Much has happened in the intervening eight or nine years. Principally, a *Seas and Submerged Lands Act* 1973 has been enacted by the Commonwealth Parliament and the constitutional validity of that legislation has been upheld by the High Court (*New South Wales and Others v. The Commonwealth* (1976) 8 A.L.R. 1,50 A.L.J.R. 218). There remain nevertheless some unanswered questions. In part, they are questions of constitutional law. In part, they are questions of constitutional policy. It would be rash of me to attempt to forecast the awaited decisions of the High Court in *Robinson v. W.A. Museum* and *Raptis v. South Australia.* Nor could I appropriately express an opinion on what should or should not be done, in point of policy, on matters on which the Commonwealth Government has not announced its decisions. Nevertheless, a paper such as you have invited me to contribute provides a suitable opportunity to bring together for your consideration the constitutional legal and policy issues that for several years now have engaged the attention of Commonwealth and State Governments and Parliaments.

You will have noted my continuing reference to constitutional policy. On present and future policy I do not comment. The shifts and turns of past policy are however part of the historical record; I believe that they are of absorbing interest and deserving, in time, of detailed study by commentators on Commonwealth–State relations. In practical constitutional terms the policy considerations seem to have had a significance little, if anything, inferior to the considerations pertaining to the law.

Australia is not unique among the Federations in this respect. For a comparative study of the situation in the United States, Canada and Australia up

to the year 1970 I refer you to an article by an Australian lawyer, John L. Taylor, 'The Settlement of Disputes between Federal and State Governments concerning Off-shore Petroleum Resources: Accommodation or Adjudication?' (1970) II Harvard International Law Journal 385 – a nicely chosen title, and question, as subsequent events have confirmed.

In the United States, the situation, both as to law and as to policy, was substantially resolved by the Tidelands decisions of the Supreme Court of the United States of America in 1947 and 1950 (*United States v. California* 332 U.S. 19; *United States v. Louisiana* 339 U.S. 699 and *United States v. Texas* 339 U.S. 707) and by the enactment by Congress in 1953 of the *Submerged Lands Act* ('an Act to confirm and establish the titles of the States to lands beneath navigable waters within State Boundaries and to the natural resources within such lands and waters') and the *Outer Continental Shelf Lands Act* ('an Act to provide for the jurisdiction of the United States over the submerged lands of the outer Continental Shelf'). In 1973, the Supreme Court, in relation to the State of Maine and a number of other Atlantic coast States, affirmed that the United States was entitled, to the exclusion of the individual States, to exercise sovereign rights over the seabed and subsoil beyond the three mile limit. The Supreme Court held unanimously that the prior decisions of the Court should not be overruled and that while the defendant States, which had not been parties to the earlier cases, were not precluded by the doctrine of *res judicata* from litigating the issues decided in those cases, the doctrine of *stare decisis* had peculiar force and relevance. In the Court's view it would have been inappropriate for it to disturb its prior cases, major legislation and many years of commercial activity by calling into question the constitutional premise of earlier decisions, (*United States v. State of Maine et al.* 420 U.S. 515).

In 1967, very shortly after the Petroleum (Submerged Lands) Act had been passed by the Commonwealth Parliament the Supreme Court of Canada, in an Advisory Opinion, answered in favour of Canada, and against the Province of British Columbia, questions referred for the opinion of the Court concerning property in, and rights of exploration and exploitation, and the exercise of jurisdiction over, lands and resources within the outer limits of the territorial sea adjacent to the Province of British Columbia (*Reference re Ownership of Off-shore Mineral Rights* (1967) 65 D.L.R. 353). The Supreme Court similarly found in favour of Canada in respect of the continental shelf.

Since that Opinion was given in 1967 the Canadian off-shore mining constitutional position has continued to be the subject of debate in that country. A breakthrough, by way largely of political settlement, appears to have emerged earlier this year in the case of the off-shore areas adjacent to the Maritime Provinces of Nova Scotia, New Brunswick and Prince Edward Island. The Dominion arrangements with these Provinces are discussed later in this paper. Newfoundland, which participated in the discussions leading to the arrangements, chose instead to take its chance in litigation which is expected to come before the Supreme Court in 1978.

In Australia, the position as to law and policy has not yet been made

entirely clear. The *Seas and Submerged Lands Act Case* has taken the legal clarification a long way, more particularly as to the existence of Commonwealth power. However, to what extent, and with respect to which activities, room is left by the Act, and the decision, for a State to enact off-shore legislation pursuant to its authority to legislate for the peace, order and good government of the State is still to be determined.

That certain State laws operating in the territorial sea may be valid under that concept, notwithstanding the sovereignty declared and held to be vested in the Commonwealth in respect of the territorial sea, has been shown by the subsequent High Court decision in *Pearce v. Florenca* (1976) 9 A.L.R. 289, 50 A.L.J.R. 670 (a unanimous decision by six Justices that the *Seas and Submerged Lands Act* did not exclude the operation in the territorial sea adjacent to Western Australia of provisions of the State *Fisheries Act*, 1905–1975 concerning the possession of certain undersized fish.) It must be borne in mind, as is evident from *Pearce v. Florenca*, that the *Seas and Submerged Lands Act* does not itself regulate or control activities (fishing, mining and so on) in the territorial sea or on the continental shelf. Further Commonwealth legislation is required if the existing legislative position is to be altered. Thus the Commonwealth *Petroleum (Submerged Lands) Act* continues to apply to mining for petroleum in the territorial sea and on the continental shelf. Whether the companion State Acts enacted pursuant to the inter-governmental arrangements of 1967 are likewise still validly in operation would seem to depend, as to the territorial sea for example, upon whether the existence of Commonwealth sovereignty over the seabed of the territorial sea means that the Commonwealth's authority to control mining of the seabed and subsoil is exclusive or is concurrent. Hopefully, the *Robinson Case*, which is concerned with title to an ancient wreck embedded in the subsoil of the territorial sea, will throw light on that question. Moreover, the High Court's decision in *R. v. Credit Tribunal of South Australia; Ex parte General Motors Corporation* (also pending) will, it seems, indicate whether the legislative attempt in section 150 of the Commonwealth Petroleum (Submerged Lands) Act to manufacture consistency and so avoid the operation of section 109 of the Constitution has been successful. The point I seek to make is that the exact degree of policy flexibility available to those who make the policy decisions depends upon further elucidation by those who make the judicial decisions.

One does not have to read far into the Constitution to come to a Commonwealth off-shore connection – Covering clause 5, for example, relating to the application of laws of the Commonwealth to British ships, the Queen's ships of war excepted, whose first port of clearance and whose port of destination are in the Commonwealth, but, more importantly for present purposes, Covering clause 7 continuing in force, until repealed by the Parliament of the Commonwealth, *The Queensland Pearl Shell and Beche-de-mer Fisheries (Extra-Territorial) Act* of 1888 and *The Western Australia Pearl Shell and Beche-de-mer Fisheries (Extra-Territorial) Act* of 1889 (being laws passed by the Federal Council of Australia under section 15(c) of the *Federal Council of*

Australasia Act, 1885, the precursor to section 51(x.) of the Constitution, and in force at the establishment of the Commonwealth). Those two laws of the Federal Council in fact continued in force until 12 October 1953 when they were repealed upon the commencement of operation of the *Pearl Fisheries Act* enacted by the Commonwealth Parliament in 1952.

The legislative powers of the Commonwealth Parliament in section 51 of the Constitution relevant for off-shore purposes – section 51(i.) (read with section 98), section 51 (vi.), section 51 (vii.), section 51(ix.), section 51(x.) and section 51(xxix.) I note briefly as I turn to refer to off-shore laws enacted by the Commonwealth Parliament since 1901.

Leaving aside the *Lighthouses Act* of 1911, the *Navigation Act* of 1912 and the *Control of Naval Waters Act* of 1918, the first such Commonwealth law to be mentioned is, I think, the *Beaches, Fishing Grounds and Sea Routes Protection Act* 1932 – the first anti-pollution law, based on the quarantine, trade and commerce and fisheries powers and providing for the control of such matters as the discharge of rubbish and the sinking of vessels in 'Australian waters' (a term of considerable geographical extent as subsequently explained in *Bonser v. La Macchia* (1969) 43 A.L.J.R. 275).

In 1935 the Commonwealth Parliament passed what appears to have been its first legislation relating to the natural resources of the sea – the *Whaling Act* 1935. The Act was expressed to apply to Australian waters beyond territorial limits (i.e., as understood at that time, to waters beyond the 3-mile limit of the territorial sea), with provision for the Act to be applied by Proclamation in Australian territorial waters or in any portion of such waters. The Act was passed to give effect to the Convention for the Regulation of Whaling and appears to have been based both on the 'external affairs' power (an early exercise of that power in relation to off-shore resources) and on section 51(x.) of the Constitution. (The same approach as to geographical area of operation was subsequently adopted in the *Whaling Industry Act* 1949 and the *Whaling Act* 1960).

In 1952 came the *Fisheries Act* and the Pearl Fisheries Act (the latter Act, as mentioned, providing for the repeal of the Federal Council Acts of 1888 and 1889). These Acts were passed in anticipation of the resumption of Japanese fishing after World War II and to provide a basis for the control of Australian fishermen and, hence, for regulating, by international agreement, the operations of Japanese fishermen. In 1953, in accordance with international law developments, the Commonwealth, by Proclamation of the Governor-General, declared the existence of Australia's sovereign rights over the continental shelf. At the same time, the Pearl Fisheries Act was amended so as to apply the Act to 'all persons, including foreigners, and to all ships and boats, including foreign ships and boats', on the basis that, under international law, the resources of the seabed and subsoil of the continental shelf included the living resources (pearl shell etc.) to which the *Pearl Fisheries Act* applied.

It will be seen that the Commonwealth's developing interest in off-shore matters coincided with international interest in the law of the sea and

particularly with the efforts being made in the United Nations to codify and develop the law in this area of international law, first through study in the International Law Commission and then by the adoption of International Law of the Sea Conventions at the First Law of the Sea Conference at Geneva in 1958. Among those Conventions was the Convention on the Continental Shelf which, on Australia's initiative, included a definition of 'natural resources' that embraced certain *living* natural resources (interestingly enough, Australia's more immediate international concern at the time) as well as the non-living mineral resources of the seabed and subsoil. Government and commercial interest in Australia was soon to turn to these last-mentioned resources and to lead to the Commonwealth–State discussions over several years that resulted in the joint off-shore petroleum arrangements contained in the Commonwealth–State Petroleum (Submerged Lands) Acts of 1967 and the accompanying Off-shore Petroleum Agreement between the seven Australian Governments.

As appears from the preambles to the legislation and the Agreement the Governments endeavoured through the joint arrangements to put aside the issues of constitutional power that had been the subject of long debate between them. Those issues were already politically contentious. It was not without difficulty that the Commonwealth Government of the day secured the passage by the Senate of the Petroleum (Submerged Lands) Bill. The Bill was passed by the Senate on 7 November 1967 after the Government had agreed to the appointment of a Senate Select Committee to inquire into the scheme of the legislation (the Senate Select Committee on Off-shore Petroleum Resources). Also on 7 November 1967 the Supreme Court of Canada delivered its British Columbia Opinion. It is interesting to speculate on whether the inter-governmental joint off-shore petroleum arrangements would have received the endorsement of the Commonwealth Parliament if the Canadian Opinion had been available a few weeks earlier.

The Australian constitutional issues were not to remain submerged for long. On 16 April 1970 a Territorial Sea and Continental Shelf Bill containing provisions to the effect of those now contained in the *Seas and Submerged Lands Act* 1973 was introduced by the Minister for National Development. That Bill was never to be passed. It remained on the House of Representatives Notice Paper until the dissolution of the House for the elections held on 2 December 1972. This period (1970–1972) was marked by the appointment of Mr. McMahon as Prime Minister in place of Mr. Gorton and by a number of efforts by the then Opposition to have the Bill brought on for debate. On 18 October 1972 the Bill was further briefly debated but the debate was then adjourned.

In due course, in 1973, under the Labor Administration, the Seas and Submerged Lands Act was enacted. But even then it was not all plain sailing.

The Bill, as introduced, included a Part III providing a code for controlling the mining of minerals other than petroleum (i.e., a code of Commonwealth legislation as in the case of petroleum). Part III was omitted in the course of the passage of the Bill and there is as yet no Commonwealth legislation relating to mining for minerals other than petroleum.

This survey of Commonwealth off-shore legislation must include reference to the amendment effected in 1967 to the *Fisheries Act* to provide for a declared fishing zone of 12 miles in which the *Fisheries Act* applies to foreign fishing boats as well as to Australian fishing boats. Here again, the Commonwealth Parliament was taking up in Australian domestic law developments that had occurred in public international law. Reference must also be made to the *Continental Shelf (Living Natural Resources) Act* 1968 which repealed the *Pearl Fisheries Act* and established a more comprehensive code for the control of the exploitation of sedentary species on the continental shelf. The Act, like the *Pearl Fisheries Act*, applies to foreign nationals and foreign fishing vessels. This is a case of Commonwealth 'solo' legislation which is not complemented by or associated with any State continental shelf legislation (compare the joint offshore petroleum legislation of 1967).

Reference must also be made to two further Acts passed in the period of the Labor Administration of 1972–1975. They are the *National Parks and Wildlife Conservation Act* 1975 and the *Great Barrier Reef Marine Park Act* 1975. The firstmentioned Act makes provision generally for the conservation of wildlife, including animals and plants indigenous to the Australian coastal sea and the continental shelf. The *Great Barrier Reef Marine Park Act* makes special provision for the Great Barrier Reef Region which is defined by reference to the areas over which sovereignty is vested in the Commonwealth by the *Seas and Submerged Lands Act*.

Finally in this survey of Commonwealth legislation I refer to the *Commonwealth Historic Shipwrecks Act* passed in 1976. The Act is expressed not to apply to waters adjacent to any State until a proclamation to that effect is made. Provision is also made for the devolution of responsibility under the Act to the States.

Any examination of the subject of 'Commonwealth and State Jurisdiction over Offshore Areas' must take into account the varying legal status of those areas.

Certain waters are waters that were within the limits of the States at Federation. These internal waters are excluded from the operation of the sovereignty provisions of the *Seas and Submerged Lands Act*. Obviously, State and Commonwealth authority in this area runs in the same way as in the case of the land territory of the State.

Beyond the limits of the States there are at various points along the Australian coastline further internal waters that have acquired that status in international law since Federation. These post-Federation waters are the subject of Commonwealth sovereignty by virtue of the *Seas and Submerged Lands Act*.

The dividing line between pre-Federation and post-Federation internal waters is not fixed by the Act.

Beyond internal waters lies the territorial sea and beyond the limits of the territorial sea are the high seas. Beneath the high seas to a point still under consideration internationally is the continental shelf over which Australia as a Nation has sovereign rights for the purpose of exploring and exploiting its

natural resources.

Last year the Standing Committee of Attorneys-General established three Committees of Commonwealth and State representatives to report back to the Attorneys-General with proposals on, among other things, the system of legislation to be applied to Australia's off-shore areas. All activities that require regulation have been considered by two of these Committees – the Seabed and Maritime Committee and the Off-shore Laws Committee. A further Committee, the Baseline Committee, was appointed to consider the principles for the establishment of the baselines from which the breadth of the territorial sea is measured.

At present, there is a mixture of Commonwealth and State legislation in the off-shore areas. As regards mining for petroleum, State legislation aione applies to the extent of the limits of the State. Except in the case of one State (South Australia) the joint *Petroleum (Submerged Lands) Acts* do not apply in any internal waters, either pre-Federation or post-Federation. The *South Australian Act* describes the waters of Spencer Gulf and the Gulf of St. Vincent as internal waters and applies to land beneath those waters.

Certain States, but not as yet the Commonwealth, have enacted legislation relating to off-shore mining for minerals other than petroleum. With regard to fishing, State legislation is applied to fishing to the limits of the territorial sea and Commonwealth legislation applies beyond those limits. The meaning of 'Fisheries in Australian Waters beyond Territorial Limits' in section 51(x.) of the Constitution, which was held by a majority in *Bonser v. La Macchia* to refer to fisheries in waters beyond the limits of the territorial sea, has been further considered in argument before the High Court in *Raptis v. South Australia* (not yet decided) as has the question as to where the limits of the State of South Australia end.

It is not possible in this paper to refer to all State and Commonwealth legislation operating in the off-shore area and regulating the various activities in that area. The Commonwealth and two of the States (Victoria and South Australia) have passed legislation applying the general laws of the Commonwealth and the States respectively to the territorial sea. (The law of the States that is so applied includes the criminal law.) In addition, three other States (Western Australia, Queensland and Tasmania) have passed legislation to apply their criminal law to the adjacent territorial sea. English criminal law is at present also applied throughout the territorial sea, by virtue of old Imperial legislation.

Beyond the territorial sea, Victoria and South Australia have passed legislation applying the laws of the State, including the criminal law, to an adjacent zone. Western Australia, Queensland and Tasmania have passed legislation applying their criminal law in an adjacent zone.

On the high seas, English criminal law applies to Australian ships which are 'British ships' within the meaning of old Imperial legislation. There is also existing Commonwealth legislation regarding offences of ships (Navigation Act, ss. 381, 382).

Questions as to which Parliaments have power and as to which of those Parliaments should be asked to enact legislation are still under examination in discussions between the Commonwealth and State Governments.

I promised to return to developments in Canada.

Within the last few months the Federal Government has entered into a Memorandum of Understanding with the Governments of New Brunswick, Nova Scotia and Prince Edward Island covering the administration and management of the off-shore mineral resources of those Maritime Provinces. The Memorandum recites that the Prime Minister and the Premiers of the Provinces recognize the importance of setting aside jurisdictional differences in order to encourage resource exploitation in areas off-shore their coasts.

The position under the Memorandum of Understanding, which is intended to lead in due course to a formal Agreement, appears to be that on the seaward side of certain mineral resource administration lines located about five kilometres from the coast it will be a Federal Agency that will administer and manage off-shore mineral resources but that the Federal Agency will itself be subject to a new Federal-Provincial Maritime Off-shore Resources Board. This Board will be composed of three members from the Dominion and one from each of the three Provinces. The Board is reported as being the crux of the arrangement since it is the Board that will issue rights over areas and that will ensure that when rights are issued there are adequate provisions relating to such matters as industrial, commercial and other spin-off aspects vital to the development of the maritime region. It appears that the Federal Government will have a veto power over the development of resources (i.e., in regard to such matters as to whether development should occur in one region before another). It would seem that in the area beyond the Mineral Resources Administration Line the legislation will be Dominion legislation alone. With regard to the area on the landward side of the Administration Line the Province will have the option of either administering the mineral resources itself through a Provincial Agency or having them administered by the Federal Agency through the new Board. All mineral resource revenues landward of the Line will accrue to the adjacent Province, while revenues derived from seaward of the line will be divided between the appropriate Provinces and the Federal Government on a 75% Provincial/25% Federal basis.

Finally, since the domestic law of the sea is so inextricably connected with developments in the international law of the sea, may I summarise those developments for you.

The Law of the Sea has been the subject of special attention in the international arena more or less continuously over the past 10 years. In 1970 the United Nations established a committee of the General Assembly to consider a wide range of Law of the Sea issues. The Committee, known as the United Nations Sea Bed Committee, met six times during 1970–1973.

The Sea Bed Committee came to be regarded as the Preparatory Committee for the Third United Nations Conference on the Law of the Sea. In the normal course of events such a committee, or the International Law

Commission, prepares a draft convention containing a number of articles for consideration by the International Conference. This was the case, for example, at the First United Nations Conference on the Law of the Sea held in Geneva during 1958 when four Conventions were adopted, namely, the Conventions on the Territorial Sea and Contiguous Zone, the High Seas, Fishing and Conservation of the Living Resources of the High Seas, and the Continental Shelf.

The first Law of the Sea Conference had been assisted by the work of the International Law Commission which discussed the issues for some six or seven years and then presented a series of draft articles to the Conference. However, because of the complex political issues, the assistance of the International Law Commission was not sought on this occasion and the Sea Bed Committee was unable to prepare such a draft for the Third United Nations Conference.

The Conference has so far held five Sessions, each lasting some 8 weeks. The first substantive Session took place in Caracas in June–August 1974 and it quickly became apparent that the lack of a draft convention was hindering the negotiations.

In order to assist the carrying on of its work, the Conference formed three main committees which are open to all Delegations. The First Committee deals with the Deep Sea Bed beyond national jurisdiction which is termed the 'international area'. The Second Committee is charged with the preparation of articles on the general regime of the Law of the Sea including territorial sea, straits and the proposed economic zone. The Third Committee has the responsibility of dealing with questions relating to preservation of the marine environment, marine scientific research and the transfer of marine technology.

The important question of peaceful settlement of disputes is being considered in the plenary of the Conference. A drafting committee has also been established whose task will be to refine the drafting of all texts referred to it by the Conference or a main committee.

The first major breakthrough in the Conference occurred at the end of its Third Session in May 1975 when the Chairman of the three main committees produced an informal single negotiating text. This text was expressly stated to be informal and to be the basis for negotiations rather than the outcome of negotiation – although in truth it was a little of each. Most importantly, the single negotiating text filled the gap to which I referred earlier and set out in one comprehensive document a series of articles on each issue before the Conference.

The single negotiating text was discussed during the Fourth Session held in New York in March–May 1976 and as a result of that Session, a Revised single negotiating text was produced by each Chairman of Committee.

The Fourth Session seemed to make good progress and it was agreed that at the Fifth Session discussion would be focused on the major outstanding issues. The Fifth Session was held during the period August–September 1976 and each of the Committees identified, in its area, the priority issues for consideration. These included the question of exploration and exploitation of the vast mineral resources of the international sea bed area, the precise balance

of the rights and duties of States in the proposed economic zone and the provisions regarding the conduct of marine scientific research in the zone as well as those regarding the settlement of disputes.

Since the Conference set itself the task of dealing only with the most difficult issues it was not surprising that the Fifth Session was not successful. Not only was there an attempt to confront major difficulties head on but the Session was held only some three months after the preceding one, thus allowing insufficient time for Delegations to consider the Revised Single Negotiating Text.

At the end of the Fifth Session the Conference was deadlocked in the First Committee over the question of the exploitation of the mineral resources of the deep sea bed. On the one hand, the developing States are seeking a regime pursuant to which only the proposed International Sea Bed Authority would be able to exploit the area. The developed countries, on the other hand, are in favour of a convention which would allow their nationals freedom of access into the international sea bed area subject only to licensing, the payment of royalties and fees and regulation by the International Sea Bed Authority.

The negotiation in the Second Committee almost produced agreement on a number of the issues facing that Committee, for example, the content of the economic zone concept and the question of straits. However, difficulties remain with respect to the economic zone concept including the balance of rights and duties of States in the zone, particularly, the rights of landlocked and geographically disadvantaged States in the proposed zones and the duties of coastal States towards them. In addition, the impasse in the First Committee overshadowed the whole Conference and precluded complete agreement in the other Committees.

In the Third Committee there was broad agreement on articles on the preservation of the marine environment but a division of opinion with respect to the legal regime for marine scientific research. The question of coastal State rights over marine scientific research is really part of the broader debate concerning the rights of the coastal State in the proposed Economic Zone.

The Sixth Session of the Conference will commence in New York on 23 May 1977 and continue until 8 or 15 July. There has been an intersessional meeting to deal with First Committee issues and a good deal of progress was made at that meeting. The outcome of the Sixth Session will depend on whether there is the necessary political willingness on the part of the broad majority of States attending the Conference to achieve a convention.