CONSTITUTIONAL LAW

THE COMMONWEALTH FISHERIES POWER AND BONSER v. LA MACCHIA

The Commonwealth Fisheries Power

The Commonwealth Constitution (s.51(x)) grants power to the Commonwealth Parliament to legislate for "fisheries in Australian waters beyond territorial limits". Under s.7 of the Commonwealth Fisheries Act 1952-1966 the Governor-General may by Proclamation declare any Australian waters to be proclaimed waters for the purposes of the Act. Section 4 defines Australian waters to mean

(a) Australian waters beyond territorial limits;

(b) the waters adjacent to a Territory and within territorial limits; and

(c) the waters adjacent to a Territory, not being part of the Commonwealth, and beyond territorial limits.

By Proclamation of the Governor-General certain scheduled waters were proclaimed to be waters for the purposes of the Act, which extend for varying distances from the shore, but generally speaking for 200 miles. A Notice gazetted by the Minister pursuant to s.8 of the Act forbade the use of nets of a certain size in a certain area within the limits of proclaimed waters. The defendant in the recent case of *Bonser* v. *La Macchia*[1] was prosecuted for breach of this regulation, and the matter was removed into the High Court under s.40 of the Judiciary Act 1903-1966.

The defendant challenged the constitutional validity of the Proclamation, firstly on the grounds that the constitutional power of the Commonwealth with respect to fisheries is limited to fisheries in waters within three nautical miles of the Australian coast. Implicitly this contained the argument that the States end at the low water mark. In the alternative the defendant claimed that if the Commonwealth power extends to waters beyond three nautical miles from the coast, "Australian waters" as mentioned in the constitution do not extend as far seaward from the coast as the outer limits of the area of water proclaimed by the Governor-General in purported exercise of his power under section 7 of the Act and that the proclamation being inseverable is for that reason wholly void as unauthorized by the Act[2].

The Commonwealth and New South Wales as Intervenor sought to exclude argument as to where "Australian waters" within the meaning of s.51(x) begins and to contend merely that a point 6½ miles offshore, which was the point at which the offence had been committed, was within "Australian waters", wherever they began and ended. The defendant, however, argued that they begin at low-water mark, which is thus where the Commonwealth fisheries power begins because it is there that, in his contention, the State boundaries lie,

1. (1969) 43 A.L.J.R. 275.
2. (1969) 43 A.L.J.R. 275, 277.

and end at the three mile limit because that is the end of "Australian waters", which expression is to be regarded as synonymous with "territorial waters". All the judges of the High Court found that "Australian waters" means more than territorial waters and that the point where the defendant had committed the offence lay within "Australian waters" and hence within Commonwealth power. Two judges, however, on grounds that are not very clear, considered that the point from which Australian waters are to be drawn was in issue, and they accordingly devoted themselves to enquiring whether "beyond territorial limits" means beyond the low-water mark or beyond the three-mile limit. In doing so they stirred up one of Australia's great constitutional issues, which has ramifications not only in the fisheries field but in the field of mineral exploration and in other fields as well. Undoubtedly their judgments will provoke a litigious serial in constitutional law, the end result of which is difficult to predict.

If the State boundaries lie at the low-water mark it follows that the territorial sea is extra-territorial to the States, and if the Commonwealth has legislative power from that line out to sea then a problem of the inconsistency of Commonwealth legislation and State extra-territorial legislation would arise, which in some respects might differ in nature from the problem of inconsistency which arises in the case of Commonwealth and intra-territorial State legislation. On the other hand, if the State boundaries lie at the three mile limit it follows that the State may possess exclusive power in certain fields within that limit. Obviously the questions of exclusiveness or concurrency will be posed differently in the case of different legislative fields.

For many years it had been assumed that the States' boundaries lay at the three-mile limit, and that is was in virtue of this that the States had exclusive fishery powers within that limit. It followed from this assumption that the Commonwealth's fisheries powers would begin at the three-mile limit and the contrast drawn in s.4 of the Commonwealth Fisheries Act between the waters adjacent to the States and the waters adjacent to the Commonwealth Territories showed that the draftsman acted on this assumption, and intended the Commonwealth Act to operate only from the three-mile limit.

This drafting intention complicates the problem, for it is possible to argue that the Commonwealth Parliament intended to legislate for fisheries only beyond the three-mile limit even though it might have legislated for them beyond the low-water mark. And it is even possible to argue that the Commonwealth Constitution intended to confer fisheries power on the Commonwealth only from the three-mile limit, irrespective of whether the State boundaries lie at that limit or at the low-water mark. In other words, the expressions "Australian waters" and "territorial limits" are open to different interpretations, and can only be analysed in their historical context.

The Assumptions Underlying the Fisheries Power

The assumption that the States would have exclusive fisheries jurisdiction within the three-mile limit which undoubtedly underlies the Commonwealth Constitution derives from the constitutional practice in relation to colonial legislative competence during the second half of the 19th century. At that time the view that the colonies might not legislate for things, persons and events beyond their boundaries was an absolute one, but a concession was made

in the case of legislation to operate in the territorial sea. The concession is a logical one, since international law allows for jurisdiction in the territorial sea, and any colony must be permitted to exercise that jurisdiction in matters which lie within its own judgment and do not involve Imperial concerns. The whole process whereby colonial authority extended over the territorial sea is confused and obscure, but it has been elsewhere suggested[3] that the reasoning behind it was that international law in the middle of the 19th century permitted extra-territorial exhibitions of authority only in the case of the territorial sea and in the case of national ships in the high seas; that it was politic to restrain the colonies from legislating for the high seas because Imperial responsibilities with respect to extra-territorial power were involved, but that there was no reason for restraining the colonies in this respect in the matter of the territorial sea.

The result was symmetrical : The colonies had no legislative power outside the territorial sea; but within the territorial sea they came to exercise as much power as the imperial government. This was not the achievement of legislation or even in the early days of case-law, but that of the Law Officers of the Crown who became involved because they advised on the allowance of Colonial Bills, which was the device whereby the colonies were kept in check.

By 1884 when the Federal Council of Australasia was set up this system had become settled. At that time Western Australia and Queensland were experiencing embarrassment at not being able to control pearl fisheries outside the territorial sea conducted by denizens of other British colonies. Such activities within the territorial sea they could deal with because this was regarded as part of the system. The Federal Council was accordingly granted power with respect to Australian waters outside the territorial sea, except that instead of using the expression "territorial sea" the Act used the expression "territorial limits"[4]. From 1884 things continued on the assumed basis: The colonies legislated for fisheries within the three-mile limit, the Federal Council enacted two pieces of legislation to supplement this beyond that limit.

Needless to say the question of colonial legislative powers over the territorial sea was independent of the question of where the colonial boundaries lay, for it was arguable that the powers with respect to the territorial sea did not derive from the circumstance that the colony was legislating for its own territory, but were valid extra-territorial powers. But it was also arguable—and the Law Officers indeed adverted to this—that "territorial limits" really meant the political limits, or the boundaries, of the States, and that the whole construction was a legal fallacy. Fallacious or not, the Federal Council system was imported into the Commonwealth Constitution almost without discussion, and certainly upon a misapprehension[5]; and because the symmetrical achievement was unquestioned of exclusive State fisheries powers within the territorial sea and Commonwealth powers, (possibly and even probably exclusive) outside the territorial sea, it came to be assumed that the three-mile limit constituted the boundaries of the States.

---

3. O'Connell; "Australian Coastal Jurisdiction" in O'Connell (Ed.) *Australia in International Law* (1966) 246.
4. Federal Council of Australasia Act 1885 (U.K.) s.15.
5. O'Connell, "Some Problems of Australian Coastal Jurisdiction", The British Year Book of International Law 1958, 199.

In 1958 that assumption was questioned[6], but the possibly disconnected question whether the Constitution commences the Commonwealth's fishery power at the three-mile limit on the basis that that was what was meant by "territorial limits" was left open. The question of State boundaries, if irrelevant to the terrain of application of State and Commonwealth fishery powers, would only become important for questions of mineral exploration and the application of other fields of legislative power, and it has taken some years for technological development to pose the relevant questions. The uniform Offshore Petroleum legislation aims to avoid the question but it may not entirely have succeeded in doing so[7]. In any event, the legislation depends on a political bargain which assumes that the territorial sea is State territory and not an "adjacent" zone within the meaning of the legislation. And it does not cover other mineral exploration activities. Grave issues thus depend on the question of where the maritime boundaries of the States lie.

The question whether the territorial sea of the States is within or without their boundaries turns on the interpretation of the famous case of *R.* v. *Keyn (The Franconia)*[8]. If this case held, as has been argued[9], that the realm terminates at the low-water mark and beyond that limit the Courts exercise an Admiralty jurisdiction which, in the case of the colonies derives from special Imperial legislation and is not confined to the territorial sea, then this is a conclusion respecting all the Crown's dominions. The immediate consequences of the decision were reversed by the Territorial Waters Jurisdiction Act, 1878, but despite the fact that this defines the territorial sea as that part of the sea within the Crown's "sovereignty" it did not in fact alter the boundaries of the realm.

Both the propositions that *R.* v. *Keyn* held that the territorial sea is extra-territorial, and that the Act did not declare it to be intraterritorial have been questioned, and in governmental as well as academic circles it has been supposed that the High Court would not disturb assumptions which have persisted for half a century or more.

But these propositions are now well supported by authority. In 1878 two of the minority judges in *R.* v. *Keyn* felt themselves bound by that decision to hold that the seabed below the low-water mark was extraterritorial[10]. The Law Officers interpreted the case in the same manner[11]. The Canadian courts on the whole did likewise[12]. In interpreting a Constitution where the question of Dominion or Provincial fisheries powers arises rather more explicitly on the basis of Provincial boundaries than it does under the Canadian Constitution, the Privy Council, despite a confusing, and in the circumstances almost flippant, supposition that the territorial sea of India is Crown domain, in a case where

6. *Op. Cit.*
7. O'Connell, "Problems of Australian Coastal Jurisdiction", 42 A.L.J. 39 at 46.
8. (1876) 2 Ex. D.63.
9. O'Connell, "Some Problems of Australian Coastal Jurisdiction", The British Year Book of International Law 1958, 199.
10. Coleridge C.J. and Grove J. in *Blackpool Pier Co.* v. *Flyde Union* (1877) 36 L.T. 251.
11. Colonial Office Law Officers' Opinions, Vol. iii; No. 129.
12. *Re Quebec Fisheries* (1917) 35 D.L.R.1.

the relevant statement is probably obiter, refused to decide the question without all members of the British Empire intervening[13]. Then in 1968 the Canadian Supreme Court, in a case where the Provincial boundaries were directly in issue in a matter of offshore petroleum exploration held unanimously that in virtue of *R.* v. *Keyn* the boundaries of the Provinces lie at the low-water mark and that they were not disturbed by the Territorial Waters Jurisdiction Act[14].

The Maritime Boundaries of the States

Conservative legal opinion in Australia was surprised at the Canadian decision, and immediately sought to distinguish it. There are factual differences between the Canadian and the Australian situation: the Canadian federation had been in existence for nine years before *R.* v. *Keyn* was decided, so that if international law after 1876 came to endow the realm with the territorial sea, and this was accepted by the Crown, the additional territory would probably not have accrued to the Provinces. And under the Canadian Constitution the Provinces stand in a subordinate relationship to Canada due to the hierarchical relationship of the Crown in right of the Provinces to the Crown in right of the Dominion, whereas in Australia the States and the Commonwealth stand in a vertical relationship to each other due to the distribution of sovereign functions. However, these factual differences are substantially irrelevant to the issue as a legalistic one, while the issue as a functional one of federalism would seem to be the same in both countries. Sir Percy Spender, with all the authority of a former President of the International Court of Justice, and at a symposium presided over by Barwick C.J. when the case of *Bonser* v. *La Macchia*[15] had been argued but not decided, stated emphatically that he could find no plausible argument for distinguishing the Canadian from the Australian constitutional situation, and argued for the persuasive authority in Australia of the Canadian Supreme Court decision.

Of the five judges who delivered judgments in *Bonser* v. *La Macchia* only two went into the question of State boundaries, and they, Barwick C.J. and Windeyer J., held that *R.* v. *Keyn* had determined that the colonial boundaries lay at the low-water mark, and that the Act of 1878 had not altered the position; and only one, Kitto J., in one sentence hinted that he might not agree with that view[16]. In contrast with the Canadian Supreme Court, however, which based itself simply on *R.* v. *Keyn,* Barwick C.J. and Windeyer J. embarked on circumstantial historical surveys, and in the process advanced an unexpected argument which will certainly feed the fires of controversy. Both of them considered that at some date after 1876 the Crown became invested with the territorial sea in virtue of the concession made by international law that States have "sovereignty" thereover, and the Crown's acceptance by conduct of that concession. One would have expected that had this occurred between 1876 and 1900 the additional territory would have been added to the territory of the Colonies, whereupon in the case of Australia the colonial boundaries in 1900 would have been drawn at the three-mile limit (in the case of Canada the

13. *Secretary of State for India* v. *Chellikani Ramo Rao* [1916] L.R. Ind. App. 199
14. (1968) 65 D.L.R. (2) 353.
15. Argument finished on 5th December 1969.
16. (1969) 43 A.L.J.R. 275 at 285.

accession would probably have accrued to the Dominion). And had it occurred after that date one would have expected it to accrue to the Commonwealth because the Colonial Boundaries Act, 1895 and the Commonwealth Constitution would appear to have frozen State boundaries at their 1900 limits, although this is, of course, arguable.

But Barwick C.J. and Windeyer J. did not express this view. They suggested that the additional territory accrued to the Imperial Crown at an indeterminate date before the Balfour Declaration of 1926, and was conveyed to the Commonwealth, as part of the process whereby the Commonwealth gained independence from the United Kingdom. The end of the argument may be the same as if one took the more expected position, but the importance of the argument is that it excludes the minor possibility that the additional territory accrued to the States after federation, and the possibility altogether that the extension of the realm occurred at such time and in such manner as to extend the colonial boundaries seawards. Because of this exclusionary aspect of the argument it may be expected that in future litigation the argument will be dissected in detail, and there is plenty of scope for this. The evidence of Crown acquisition can be attacked, for it is even arguable that ratification of a treaty in which the expression "sovereignty" over the territorial sea is employed does not necessarily mean that the Crown had acquired additional territory. Then the date at which this occurred might be queried, for neither of the judges referred to any literature on international law during the critical period 1876-1926, and it is highly doubtful if they had, that they would have derived much satisfaction from it. Finally the startling implications of the idea of the Colonies having adjacent to them maritime territory of the Imperial Crown, which presumably lay under the direct legislative authority either in the Prerogative or the Parliamentary sphere of United Kingdom authorities, bristles with constitutional conundrums which, had they adverted to the idea, which they did not, the Law Officers in the 19th century would have confronted with awe.

The intrinsic irrelevance of this historical superstructure, fascinating though it is to the authors of these learned judgments and to lawyers who read them, is demonstrated by the fact that on the instant question of whether "territorial limits" means the low-water mark or the three-mile limit Barwick C.J. and Windeyer J. disagreed. The latter accepted the implication that the territorial sea following the decision of 1876 was extraterritorial. Therefore, the expression "territorial limits" meant what it said, the territorial limits of the States and not the limits of their extraterritorial powers and accordingly the Commonwealth fisheries power begins at the low-water mark. Barwick C.J., however, takes the view that, unfortunate as it may have been, the misconception in fact led to a constitutional provision intended to exclude the Commonwealth fisheries power from the territorial sea, whether this was outside the political limits of the State or not, and that "territorial limits" meant not what it said but the territorial sea in the sense in which the expression "three-mile limit" is used.

State Extraterritorial Fisheries Power

Both judges agreed that the States have an extraterritorial fisheries jurisdiction as the Colonies had before 1900, though why this conclusion should be so readily assumed once the State powers in the territorial sea are exposed

as a misconception is not clear. One would have thought that it was arguable that the intention behind the constitution was to preserve a pre-1900 situation, namely exclusive State fishery powers within the State's physical area of competence and an exclusive Commonwealth fishery power beyond that area to fill in what would otherwise be a void. If the area of State competence had been mistakenly assumed to be three-miles in excess of what it was thought constitutionally to be, some might argue, if one followed Windeyer J.'s assimilation of "territorial limits" and "boundaries", that the mistake would be remedied by an appropriate adjustment, namely the expulsion of the States from the territorial sea in fishery matters. If one wished to preserve the status quo this might logically be better achieved by adopting Barwick C.J.'s view that "territorial limits" meant the "three-mile limit".

This easy theorem is not however, so easily defended. Barwick C.J. puts forward the thesis that at some time between 1876 and the Balfour Declaration the Imperial Crown acquired sovereignty over the three-mile belt of territorial sea around her Australian colonies and that this sovereignty was transferred to Australia at least by the time of the Statute of Westminster 1931. From this he draws the double-headed conclusion that the colonial boundaries at Federation were delimited by the low water line, and that the three-mile line, being the outer edge of Her Majesty's Imperial Dominions, was the division referred to in the phrase "beyond territorial limits". For this last conclusion two additional reasons are advanced but they are clearly ancillary to the central thesis. His various arguments seem to be as follows: International law conceded sovereignty over the territorial sea to those States which had sufficiently clearly made their claims. To establish this Barwick C.J. relies on four cases. The first three, *Fitzhardinge* v. *Purcell*[14-17], *Lord Advocate* v. *Clyde Navigation Trustees*[18] and *Lord Advocate* v. *Wemyss*[19], deal with property rights in tidal waters and although they loosely referred to the territorial sea had nothing to do with the three-mile limit but only with inland waters. They are not, therefore, authority for the view that the Crown has proprietary rights in the territorial sea. The fourth case *Secretary of State for India* v. *Chellikani Ramo Rao* is arguably the result of a confusion between the juridicial nature of the territorial sea and the doctrine that islands actually formed within the territorial sea are subject to the sovereignty of the coastal State on the "*portico*" doctrine of *The Anna*[20]. At any rate it would be strange if the Privy Council had decided the issue so casually in view of the grave warning it sounded in *A.G. for British Columbia* v. *A.G. for Canada*[21] that to decide so weighty a question would need at least the intervention of the rest of the British Empire.

An alternative argument and one advanced only on the hypothesis, which the Chief Justice himself doubts, that the Territorial Waters Jurisdiction Act was based on a claim to territorial ownership of the sea bed below the territorial sea, Barwick C.J. suggests that this claim could be on behalf of the Imperial Crown. In this support is drawn from the wording of section 7

17. [1908] 2 Ch. 139.
18. (1891) 19 Rett. 174.
19. [1900] A.C. 48.
20. (1916) 85 L.J.P.C. 222.
21. (1805) 165 E.R. 809.

which defines "offence" as an "act punishable on indictment according to the law of England for the time being in force". This is however by no means conclusive for it seems perfectly possible that a portion of colonial territory could have English law extended to it and where that territory is part of the sea the direct control of an Imperial Parliament, conscious of its naval power, is not unlikely. Further, one cannot but agree with the Chief Justice's doubts that the Territorial Waters Jurisdiction Act was a claim of sovereignty: this would have been an argument from jurisdiction to ownership—a dangerous progression to make even in the common law world.

During the hearing in *Bonser* v. *La Macchia* the Commonwealth Attorney-General indicated that he had a document which, he hinted, the Court might invite him to tender. The hint was not taken, and in somewhat jocular vein the Chief Justice indicated that it should not be tendered. This document was an Executive Certificate in which the Commonwealth sought to foreclose the issue by declaring that the Crown's authority covered the area of waters in dispute. It has been argued that, even though the Crown may bind the Courts in the United Kingdom by a certification as to the extent of its domain, such a certificate should not be used in Australia when the question at issue is the constitutional powers of Commonwealth or States, for this would enable the Commonwealth to adjudge its own functions. This view has now been confirmed in the judgment of Barwick C.J. and Windeyer J. The former said:

> "The matter to be decided in this connection is the meaning of the words 'Australian waters' in the constitutional provision s.51(x). Both the connotation and the denotation of 'Australian waters' is thus a matter for this Court exclusively. It is not a matter which can be decided by the Executive. Consequently there is no room here for the tender or the acceptance of a certificate of the Executive as to the status of any waters surrounding Australia in relation to the constitutional power"[22].

But this does not affect the competence of the Executive to decide upon the area in which the Fisheries Act is to apply within the limits of the Act, and this necessarily involves an Executive judgment on the extent of "Australian waters". This judgment is open to challenge in the Courts.

D. P. O'CONNELL*

22. [1914] A.C. 153.

23. (1969) 43 A.L.J.R. 275 at 282.

* B.A., LL.M. (N.Z.), Ph.D., LL.D. (Cantab.), Professor of International Law, University of Adelaide.