KENNETH BAILEY MEMORIAL LECTURE
THE SEABED IN LAW

BY THE RIGHT HONOURABLE SIR VICTOR WINDEYER*

Sir Victor examines the basic problems being encountered in the development of the international law of the seabed. An historical analysis reveals that the definitions used to effect the current allocation of rights in the seabed are not based on irresistible logical extensions of the concept of territorial sovereignty. On the contrary, legal definitions such as the definition of "continental shelf" represent and facilitate the political reality of competitive nationalism. Sir Victor then considers the constitutional relationship of the States and the Commonwealth in regard to the seabed. He argues that, historically, the States have no claim to sovereignty over their adjacent territorial seas as the colonies never exercised dominium *there. The territorial seas remained in British Imperial jurisdiction until federation, when the Commonwealth acquired sovereignty over them as an attribute of nationhood.*

It is an honour for me to be asked to give this lecture as a memorial of the late Kenneth Hamilton Bailey, who died in May 1972, at the age of seventy-three, after a lifetime of service. This is not the occasion for evaluating the measure of that service; but I would like to say just a few words about Sir Kenneth before I get to the topic of my talk. He was a learned lawyer in a broad sense. His interests and ideals were ripened by wide scholarship that was not submerged in legalistic detail. Yet his attainments were hidden from some people, by his modest and unassuming manner, causing some hesitancy in his pressing his opinions. He was a man whose friendship I valued, whose scholarly tastes I admired, and whose personal qualities of tolerance, kindness and goodwill for others were pleasing. He was, in a now almost oldfashioned sense, a good man—and too, a God-fearing man, a faithful member of his Church. I have many memories of him. I recollect gratefully that as Solicitor-General, he appeared and spoke on the occasion of my being sworn in as a judge of the High Court. In his latter years I did not see him, as he was in Canada as High Commissioner from 1964 for five years; when he returned to Australia I was much occupied in the Court and seldom in Canberra; he was then for a time far from well. But in earlier days we met fairly often. The first time was at his home in Melbourne when he was Professor of Law. That was before the War. I knew him in those days mainly through his interest in law as part of the history of England. He had read history at Oxford, when there as a Rhodes Scholar after service in the A.I.F. in 1918. He had an encourag-

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ing belief that upon its foundations in the seventeenth and eighteenth centuries the common law could be developed by Courts and by Parliament to meet the needs of the twentieth century. Later I saw him from time to time throughout the eighteen years when he was Solicitor-General. He held that office under different administrations, his duty, as he saw it, being to serve the Crown no matter who, for the time being, the Crown's advisers might be, to aid in giving legal effect to Government policy, but above all to uphold the law. It was not always an easy situation for him: but he acted with integrity and loyalty. And, as he once told me, he saw his position as Solicitor-General not simply as that of a senior public servant or a departmental head. The Solicitor-General was historically a learned Law Officer of the Crown and his office should, he considered, be so regarded.

Few lawyers, certainly no Solicitor-General, can ever be a rival for the place in the history of Australia that Sir Robert Garran has. It is thus a high tribute to Bailey to say that he was a not unworthy successor in office of Garran. His own mastery of Australian constitutional law was considerable. It was not merely an academic knowledge—of words and phrases in the Constitution and of the judgments of courts. Through sure learning in that, there ran too a sense of the policy and purpose of the Constitution as an instrument of government, designed to endure, to meet changing needs, yet to preserve the solidarity of the nation, with responsible government on the British model as the basis of the Australian political system. This he shewed in the masterly, extensive yet skilfully compressed, paper "Fifty Years of the Australian Constitution", that he presented at the Legal Convention in Sydney in August 1951.[1] Sir Robert Garran was then alive; commenting on this he said that it had been done "with an objectivity and philosophic detachment, which I think especially commendable in view of the fact that much of its history is so recent, and that Professor Bailey has been not merely an observer but an active participant in it". The exposition and elaboration of Australian constitutional law was not the only field in which Bailey was, in Garran's words, both observer and participant. That description is even more true of his concern with international law. This was for him far more than an academic interest. He was much engaged in the work of the United Nations in moulding parts of it in modern form.

However, I am not here tonight to recount Sir Kenneth Bailey's accomplishments, but to pay indirectly a tribute to his memory by a lecture according to the instructions in my invitation. That invitation came to me in the first instance from students of this University through their Law Society. That is pleasing, because those who knew Bailey remember him as having a kindly interest in young people, especially I

[1] (1951-1952) 25 A.L.J. 314.

think law students. I was told by the Law Society in their letter last year that I should speak on "contemporary issues in some area of public law with particular emphasis on Commonwealth constitutional law and/or international law". That seemed to allow a wide choice despite the uncertainty of the stipulated "and/or". That in *Fowler's Modern English Usage* is called an "ugly device" but "common and convenient in some kinds of official, legal and business documents", among which I assume a letter from law students may stand.

In seeking a topic that would fit the description I remembered that in 1959 Sir Kenneth Bailey had delivered a lecture "Australia and the Law of the Sea" which was printed in the Adelaide Law Review.[2] He spoke then not long after the Geneva Conference on the Law of the Sea in 1958 had concluded with the Conventions on the Territorial Sea; on the High Seas; on the Continental Shelf; and on Fisheries and the Natural Resources of the Sea. Events since 1958 have further emphasized the importance of the seas around us. New technologies have made the wealth that lies below the ocean available for man's use. But there has come too, as in other fields of new endeavour, a growing awareness of the cost to mankind of man's achievements. Throughout the world there are fears of harm arising from the pollution of the seas by industrial wastes and nuclear explosions, endangering living creatures and even making fish caught in some waters unwholesome as food. There is apprehension of the possibilities of engines which could be planted on the ocean floor to endanger shipping and add new terrors to warfare. Moreover natural resources are not inexhaustible. If we are to preserve much that is precious, the loss of which would be irreparable, man's activities must be controlled, not in the interest of one nation but of the whole human race. Here lawyers and lawmakers should have something to say which nations should be ready to enforce. Here international law and domestic law must meet; and here some special problems arise for Australia under our Constitution. I thought at first that I might go on to narrate events from the time at which Bailey left off and even to venture some predictions. But it would be imprudent of me to attempt so much.

I have no pretension to be learned in international law. Memories of long ago undergraduate studies under Professor Charteris are now dim —although delightful memories of him and of his kindness and friendship are not. I have had no close acquaintance with details of the public international law of today. The notes that Professor Starke has contributed to the Australian Law Journal have kept me aware of its continuing vitality; and I have learnt much from his *Introduction to International Law* and from parts of Professor O'Connell's learned

[2] (1960-1962) 1 Adel.L.Rev. 1. Reprinted in O'Connell (ed.), *International Law in Australia* (1965).

books and articles, also from writings by many others on recent aspects of the law of the sea in relation to Australia. In particular I should mention the four articles—by Doctor Lumb, Professor Thompson, Mr Dakin and Mr Harders—which appeared in the September 1968 number of the Melbourne University Law Review. If you have read these, you will, I fear, find listening to my superficial remarks is a waste of your time. My cursory acquaintance with the mass of modern material makes me reluctant to rush far in where professors eagerly tread. Moreover, a special reason for not going into the depths of the international law of the sea is that this is being rapidly developed. As you are no doubt well aware, it is very soon to be the subject of an international conference at Caracas in Venezuela. Australia has a special interest in the outcome of this and it seems is to have some unusual allies and supporters for its attitude there. The issues have been the subject of recent press articles: and also, as I suppose many of you know, of an informative, and mildly argumentative, discussion in the October 1973 issue of the Australian Foreign Affairs Record published by the Department of Foreign Affairs. And, as for Australian constitutional law, the opposing standpoints of the Commonwealth and the States in relation to proprietary rights in the sea-bed off the Australian coast, may it seems, come up for judicial determination.

Therefore, keeping away from current diplomatic issues, I shall, in respect of international law, confine my remarks in the main to some generalities of history and theory that, as it seems to me, lie behind attempts to formulate in terms of legal rights competing national interests in the bed of the ocean. This you may say is not meeting the request that I should speak on "contemporary issues". I can only say that it seems easier to look at the certainties of the past than to speculate about present uncertainties—which after all must be ultimately resolved in the light of the past.

I shall go from the international scene to notice the special problem created by the division of authority in our federal system. I shall refrain from offering answers to all the questions that I shall there suggest. After years of delivering judgments on questions of law, it is a luxury to be able to avoid coming to a decision. What I have to say will I have no doubt be trite for persons learned in international law or engaged as students in learning about it; and it will be trite too for those of you acquainted with constitutional law. For others it may be tedious, because technical. However, I must do my best in the field that I have chosen.

I first quote a few words from the lecture "A Defence of Jurisprudence" that Professor Bailey gave in 1929, his inaugural lecture from the Chair of Jurisprudence in Melbourne.

> The age of Darwin transformed jurisprudence as it did all other sciences. Man learned to see law—like everything else human—as an evolution. They began to study it historically.

Public international law furnishes much material illustrative of that. Doctrines have been evolved and elaborated in response to social changes and new inventions—whether the latter were new weapons of war, new forms of communication, of traffic by sea and air or new methods of mining below the sea. Explanations of the philosophic foundations of relations between peoples have varied through the centuries according to contemporary intellectual attitudes and political thought. The spiritual and temporal unity that the mediaeval Papacy and Empire gave to Europe gave way to the concept of a family of separate nations, not all of them in communion with the one Church. The *ius gentium* of Roman law became identified with the *ius naturale* as a *ius inter gentes*. Thus, in due course, Grotius could found his international doctrine on a theory of natural law, itself largely a product of mediaeval scholasticism. This would in modern times be supplanted by the theory, often called positivism, in which international rules are said to be based on general agreement and acceptance by states. Whatever theory be adopted, there is no doubt that, as the Privy Council said by Lord Sankey in reporting on a special reference in 1934, international law today is "a living and expanding code".[3]

Here I may say that I shall use the word "nation" as equivalent to a "state" as understood in public international law. This use may be unscientific; but I adopt it for two reasons. First it seems an appropriate term when speaking of the law of nations, international law. It thus embraces all internationally independent states, including those commonly called emerging nations, which have been born into an existing system of law. Secondly I am speaking to Australians and I want to avoid the impression that could arise from the use of the same word to describe the States under the Constitution, which are not states in international law, and the Commonwealth of Australia, the nation, which is. In using the word "nation" to designate a state in international law I have many things in mind. One is a statement by Edmund Burke: "A nation is not an idea only of local extent, and individual momentary aggregation, but is an idea of continuity which extends in time as well as in number and space". Another is the concept of territorial sovereignty—involving as I understand it a population permanently abiding in a defined territory with an established government to which the mass of the people is habitually obedient, that government being, by virtue of its own domestic law and by international recognition, capable of entering into direct treaty relations with the governments of other

[3] *In re Piracy Jure Gentium* [1934] A.C. 586, 593.

nations. The Commonwealth of Australia has these characteristics. Under the Constitution, and by virtue in particular of the power of the Parliament with respect to external affairs, the Commonwealth represents the people of Australia as a whole in international relations. Australia is now in international law an independent nation, a recognized member of the community of nations. That is trite, but it is fundamental. And with status comes responsibility—the responsibility of Government's obedience to the rules of international law and of a recognition that behind the ideas the rules embody, and backing them, are ethical ideals.

It is now many years since Sir Ernest Barker wrote

> Internationalism must pursue a legal development not based on (though it may be aided by) economic facts, but based (as all legal development is based) on a sense of right inherent in a common conscience—the common conscience of the civilized world.[4]

In the case of *The Christina* in 1938 Lord Macmillan said:

> Now it is a recognized prerequisite of the adoption in our municipal law of a doctrine of public international law that it shall have attained the position of general acceptance by civilized nations as a rule of international conduct.[5]

And in 1946 Scott L.J. referred to the adoption by English courts of a particular principle of international law "as one recognized generally by all civilized nations".[6] A more recent use of the same expression is in Article 38 of the Statute of the International Court of Justice requiring the Court, in deciding international disputes submitted to it, to apply, *inter alia*, "the general principles of law recognized by civilized nations". But what is meant by a civilized nation?

In the infancy of international law that question was readily answered. A civilized nation was one of the nations of Europe enjoying the heritage of Christian civilization and moral precepts based upon older doctrine, the Ten Commandments and maxims of the Old Testament. Thus Professor Pearce Higgins in the course of his stimulating preface to the seventh edition (1917) of *Halls' International Law*—the edition I read as an undergraduate—wrote:

> The older writers from Grotius downward to the end of the nineteenth century evolved the rules of international intercourse

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[4] *Political Thought in England, from Herbert Spencer to the Present Day* (1915) 247.

[5] [1938] A.C. 485, 497.

[6] *The Tolten* [1946] P. 135, 147; for references to general principles of the embodiment of international rules into municipal law, *Chow Hung Ching* v. *The King* (1948) 77 C.L.R. 449, 462 *per* Latham C.J., 477 *per* Dixon J. Also Sawer in O'Connell *op. cit.* 507.

> from the principles of the law of nature. It is easy to show the weakness of such a position, but the value of the work of Grotius lay largely in his appeal to the conscience of Christendom.

But today Christendom and civilization are not co-extensive. The community of nations, the term that Lord Wright used in the *Christina Case*,[7] is the modern extension of the European family of nations. It is now loosely united throughout the world. Whether all its members are equally entitled to be called civilized must for us be questionable. Yet customary doctrines concerning the conduct of affairs between nations and conventional engagements and treaties now govern peoples whose civilizations and cultures are very different from those of Europe or of European derivation. To accommodate, as universal doctrine, concepts that for many new nations are exotic and remote is not easy. We must, I think, be cautious lest we assume that doctrines of our law, expressed in our vocabulary, are all readily introduced into other systems. Professor Stone put this in 1954 when he wrote that: "To seek to transfer notions of justice automatically from the municipal to the international sphere is to sow strange seed in unprepared soil, and reap little harvest".[8]

Nevertheless we may, I trust, venture to hope that there are some common ideas of justice and fairness that may modify national assertiveness and that today the international soil is not now altogether unprepared for them. But I doubt whether we can be so sanguine about some other words familiar to us and meaningful for our law but more technical. Mr Justice Holmes once wrote that for anyone entering upon law, "it is well to have an accurate notion of what you mean by law, by a right, by a duty, by malice, intent and negligence, by ownership, possession and so forth".[9] He was addressing this to persons concerned with the law of the land; but the advice is cogent too for international law, for there "rights", "possession" and "ownership" are words that can have a chameleon character and take their colour from a context of contemporary national aspirations and political theory. Moreover it is not always easy to translate Roman law principles, that prevail in some countries today, into single words of the common law. For the civil law a distinction can be made between "*imperium*", meaning jurisdiction and rule over a place, and "*dominium*", ownership. But, as has often been noticed, the continuance in English law of the feudal theory by which all land is held of the Crown means that, in relation to land, sovereignty and ultimate ownership coalesce. Lands can be granted by the Crown to be held for estates of freehold but with a reservation by the Crown of proprietary rights in minerals. When the

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[7] [1938] A.C. 485, 502.
[8] Stone, *Legal Control of International Conflict* (1954) 56.
[9] "The Path of the Law" (1896-1897) 10 Harvard L.R. 457, 475.

question is of "rights" in the bed of the sea according to international law and resort is had to the 1958 Conventions, we come upon the words "sovereignty" and "sovereign rights". These must I consider be read as importing there the content of the concept of territorial sovereignty but subject to qualifications of the freedom of the seas for navigation, because "sovereign rights" exerciseable over the continental shelf are only for exploring it and exploiting its natural resources. But the whole matter of sovereignty is not beyond academic debate.

It is still a truism, I think, that only where there is some form of coercion behind it can any regime be law as we know it; but international coercion is not necessarily belligerent action. Economic measures and diplomatic demonstrations of disapproval have weight. Yet in the end the hope that nations will keep the law of nations is based upon a moral concept. Today it lies in the idea of the moral authority of international organizations—now the United Nations and the International Court of Justice. This may attract scepticism and cynicism when wars continue and some nations refuse to abide by the rulings of the international tribunals. As an old soldier I believe that we must still keep our powder dry.

Just as the idealism that colours, although it does not effectively control, international law is a reflection of the spiritual and intellectual history of Europe, so the theory of territorial sovereignty is a reflection of political history. It began with accretions and diminutions of the territory of European principalities and powers as the result of dynastic marriages and alliances and wars, especially in determinations of domains and boundaries in settlements dictated by the victors in war. Thus some writers have seen the modern history of international relationships and international law as beginning with the Peace of Westphalia in 1648 after the Thirty Years War. But Professor Parry in his lecture *Sources and Evidences of International Law* has preferred the Congress of Vienna as the beginning of the present age. That view appeals to me. For the final peace settlement of 1815 was not simply a drawing of the map of Europe afresh after the defeat of Napoleon and the collapse of his empire. It was not simply the restoration of old monarchies. It can be seen as the inauguration of a new era with a new idea; the Concert of Europe. The purpose was to secure peace—a peace dictated by the treaty engagements of victors in war on the basis of territorial boundaries as fixed at Vienna.

The hope that this would mean permanent peace was not to be fulfilled. History in the second half of the nineteenth century is filled with European wars. Yet the idea of a family of nations and the ideal of peace as its purpose had not been lost. Indeed before the end of the century it had been revived and enlarged. The Conference of Berlin in 1885 was called to deal with the tension between European Powers

caused by their scramble for African territories. The results were a new chapter in international relations and territorial demarcations—but the most significant thing was that the United States of America was present and took part in the deliberations of European nations. The old Concert of Europe dissolved; yet it can be seen as a distant forerunner of the League of Nations and the United Nations. Each of these was, like it, the creation of allies victorious in wars. Each gave new meanings and a new authority to international law. The concept of separate territorial sovereignties remained undisturbed. From it flowed proprietary rights of a state and its subjects. *Imperium* begat *dominium.*

But you will be asking when am I coming to the announced subject of my discourse.

In days of long ago the Psalmist exhorted men to give thanks unto the Lord who had laid out the earth above the waters. Mankind then knew of things in heaven above, in the earth beneath and in the waters under the earth. Today if they were to praise the Creator men would reverse their thanks and remember especially the earth under the waters and all that therein is. Nations have rushed to assert claims to exclusive rights to take what lies beneath the seas.

It is convenient at this point to deal with some matters of terminology. First as to "territorial waters". That is the term that has long been, and often still is, used in English and Australian enactments and legal writings. Today in international law the term "territorial sea" is preferred. It avoids any confusion between the open sea and internal waters of a country. However I shall use either expression, as being synonymous and interchangeable.

The 1958 Convention on the Territorial Sea and the Contiguous Zone states, in Article 1 paragraph (1), that: "The sovereignty of a State extends beyond its land territory and its internal waters, to a belt of sea adjacent to its coast described as the territorial sea". There is of course, nothing new in that, it being recognized that this sovereignty is by international law in effect restricted in several ways including the right of innocent passage. Provided that the word "sovereignty" is not allowed to beg the question, the statement is not inharmonious with the doctrine of English law incorporating international law rules established and recognized in the Territorial Waters Jurisdiction Act 1878 (Imp.). But the statement of the next Article, Article 2, of the Convention is new: "The sovereignty of a coastal State extends to the airspace over the territorial seas as well as to its bed and subsoil".

All I need add at this point is that, although the nations have not agreed as to the breadth that should be allowed to a nation's territorial sea, and national claims vary very greatly, the Convention recognized that the normal baseline from which it should be measured is the low water line along the coast; but that where the coast is deeply indented

a straight base line might be used. This is not significantly different from the historic doctrine of the law of England whereby the open sea begins at low water mark but does not include waters that are within narrow inlets of the sea and *inter fauces terrae.*

Article 1 of the Convention on the High Seas signed at Geneva on the same day, 29 April 1958, as the Convention on the Territorial Sea provides that "the term High Seas means all parts of the sea that are not included in the territorial sea or in the internal waters of a State". This is new nomenclature. I am perhaps sensitive of that, because Professor O'Connell has reproved me for a misuse of words. In my judgment in *Bonser* v. *La Macchia* I spoke of "areas of the high seas beginning at low water mark and extending seawards".[10] Professor O'Connell in his article "The Australian Maritime Domain" said that in order that my judgment be internally consistent the word "high" should be omitted from my phrase "high seas".[11] I was incautious and I confess it. In extenuation I say only that I was speaking in the English language, the language of the law of England, not that of the Geneva Convention. Blackstone for example spoke of "the main or high seas" as synonymous terms and said that "the main sea begins at low water mark".[12] Coke spoke of it as *altum mare.*[13] At one time, before the claims of the Admiralty Courts succumbed to the common law, the words "high seas" meant the areas of the Admiralty, including the sea below low water mark and inland tidal waters where great ships could go.[14] When the common law courts gained jurisdiction over events in inland waters and the Admiral's Court retained cognizance only of matters upon the high seas, the high seas meant all of the coastal sea beyond low water mark. Only in recent times have lawyers said that the high seas do not include the territorial sea. Indeed it is not long since international lawyers, as well as ordinary Englishmen, spoke of the high seas as beginning at the coast. For example in the article "International Law" in *Chambers Encyclopedia,* Professor Schwarzenberger described territorial waters as "that part of the high seas adjacent to the shores of a state over which the latter claims to exercise its sovereignty".[15] It is of course, open to those codifying the law of the sea, to give old words new meanings. Therefore I shall hereafter, in prudence, forego my fondness for the name, the high seas, in its old sense, and use the language of Geneva.

I pass now from the meanings in the 1958 Conventions of the terms "the territorial sea" and "the high seas" to the meaning of the term

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[10] (1970) 122 C.L.R. 177, 233.
[11] (1970) 44 A.L.J. 192, 199.
[12] *Commentaries* i, 110.
[13] *Co. Litt.* 260.
[14] *E.g. The Mecca* [1895] P. 95, 106; *The Tolten* [1946] P. 135, 156.
[15] *Chambers Encyclopedia* (1950) vii, 658, 660.

"continental shelf" in the Convention on the Continental Shelf. Sir Kenneth Bailey called this "an opaque, technical and imprecise expression"; but he said that the first Article of the Convention "supplied a lucid definition of the term".

This Article states:

> For the purposes of these articles, the term 'continental shelf' is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of these said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.

The next Article provides that the coastal State—that for Australia is the Commonwealth—"exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources". These are declared to be exclusive rights not depending on occupation, effective or notional, or on any express proclamation. The "natural resources" consist not only of the mineral and other non-living resources of the seabed and subsoil but with them of living organisms belonging to sedentary species, rather quaintly described as "that is to say organisms which at the harvestable stage are either immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil". For Australia that was important. Doctor Bowett in 1967 wrote that "the active part played by Australia in this aspect of the work of the Geneva Conference is explicable in terms of her wish to exclude the Japanese from the pearl fisheries off the northern coasts of Australia".[16] That old dispute is beyond my scope tonight. I simply refer you to Professor O'Connell's account of it in his paper "Australian Coastal Jurisdiction".[17] But I would like to remind you that Sir Kenneth Bailey was the leader of the Australian delegation which took so active a part at the Geneva Conference in 1958; and secured a result satisfying Australian national interests.

Statesmen and professors of international law first became aware of the continental shelf in 1945. Before then it had been known only to geographers, geologists and others concerned with geotectonical topics. But in 1945 President Truman, aware no doubt of the possibilities of the extraction of oil from beneath the sea, issued a proclamation. This declared that "the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States, as appertaining to the

[16] Bowett, *The Law of the Sea* (1967) 35.
[17] O'Connell, *op. cit.*

United States, subject to its jurisdiction and control". Many other countries soon made similar claims.

Australia joined the scramble when on 11 September 1953 two Proclamations were published by the Governor-General. One asserted that in accordance with international law Australia had sovereign rights over the sea-bed and subsoil of the continental shelf contiguous to its coasts, or the coasts of any of its territories other than New Guinea. The other, in similar terms, related to the trust territory of New Guinea. In each, the sovereign rights asserted were expressed to be "for the purpose of exploring and exploiting the natural resources of that sea-bed and subsoil". This anticipation of the language of the 1958 Convention is the result of the Proclamations, like the Convention itself, being framed in accordance with the Report on the Regime of the High Seas that was issued in August 1953 by the International Law Commission of the United Nations. The Proclamations expressly declared that they did not affect the "character as high seas of waters outside the limits of territorial waters", or "the status of the sea-bed and subsoil that lie beneath territorial waters". The latter proviso makes the Proclamations irrelevant in the current controversy between the Commonwealth and the States about off-shore rights. The constitutional validity of the Proclamations is, I assume, indisputable. In 1967 Diplock L.J. delivering the judgment of the Court of Appeal in *Post Office* v. *Estuary Radio Ltd* said that, "It still lies within the prerogative power of the Crown to extend its sovereignty and jurisdiction to areas of land or sea over which it has not previously claimed or exercised sovereignty or jurisdiction".[18]

The Conventional definition of the term "continental shelf" is not beyond criticism. First, seaboard countries, including islands, which have no continental shelf in a strict geological and geographical sense, are treated as having sovereignty in submarine areas which are merely measured areas of the ocean bed. Secondly, the bed of the territorial sea, whatever its geological structure, and whatever a particular nation claims is the breadth of its territorial sea, is not a part of the continental shelf as defined. These geological artificialities are the product of political considerations and a desire at the Geneva Conference that all coastal nations should share in the wealth below the seas off their coasts. But the difficulty is that the definition leaves it uncertain where, for the purposes of the law of the sea, a continental shelf begins and ends. It begins at the outer limit of the territorial sea—but nations are not agreed as to how far from the coast that is. It ends where the depth of the water is 200 metres, or beyond that if the depth of water does not preclude exploitation of the natural resources of the earth below. Thus the outer limit of the shelf as defined may move as methods of sub-

[18] [1968] 2 Q.B. 740, 753. This was referred to by Gibbs J. in *Cantley* v. *Queensland* (1973) 44 A.L.J.R. 538, 539.

marine mining are further developed. These uncertainties that lurk in the Convention may perhaps be resolved at the coming Conference: they do not directly beset Australia. Three miles is at present the breadth of territorial waters that Australia claims. Australia is an island with a true continental shelf. And the Commonwealth Parliament has expressly adopted, as part of our domestic law the Conventional definition of the continental shelf.[19]

The shelf it has been urged is in a geotectonic sense a prolongation of the dry land. National claims to exclusive rights in the shelf, recognized by the Geneva Convention, are rationalized as extensions of the territory of coastal nations: simply a new dimension, it is said for the old concept of territorial sovereignty. In the *North Sea Continental Shelf Case* in 1969 the International Court of Justice accepted this proposition. But the attempt to justify by geology, claims that arose out of national aspirations and new technology runs into difficulties. One is that at one point the shelf slopes away gradually till it meets the floor of the ocean, at a depth of some three thousand metres or more below sea level—the whole physical structure on which the land mass rests, now commonly called the continental margin, being larger than the actual shelf before it slopes away.

One problem of the definition occurs when the shelf is in fact common to two countries. Another is when there is a break in the shelf. The political issues, not resolvable by resort to geology, of a common shelf have been wisely settled by agreement between Australia and Indonesia. But elsewhere, as with Portugal in respect of Timor and perhaps in the future with Papua New Guinea, Australia can become engaged in diplomatic controversies.

That national rights in offshore oil fields are simply an extension by means of the continental shelf of traditional concepts of territorial sovereignty seems to me, in my innocence, no more convincing than is the suggestion that a claim to what lies under the sea-bed can be likened to customary practices of collecting shell fish, coral, sponges and so forth. Surely only a lawyer hard pressed for an argument would equate diving to collect oysters from the surface of the sea-bed with drilling for oil below it. The scramble by nations to have and to hold portions of the ocean floor are a new form of territorial aggrandizement. The claims are not truly the application of old rules and principles to new cases as they arise, the traditional assumption in the growth of the common law. Rather here, as in so many of its aspects, international law has been evolved by an explicit recognition of events accomplished and

[19] Continental Shelf (Living Natural Resources) Act 1968; which repealed the Pearl Fisheries Act (No. 2) 1953 which contained a different definition; Petroleum (Submerged Lands) Act 1967-1968; Seas and Submerged Lands Act 1973.

complete, leading to their legitimation by generalizations that are new doctrine, although expressed it may be in words that are old.

Before I leave now the international law of the sea-bed I commend to those of you who wish to pursue the topic, with the aid of diagrams of the continental shelf and the margin, the article that I have mentioned in the Australian Foreign Affairs Record; and, as a very useful introductory account of the position of Australia and of the constitutional questions involved as at 1969, the article by Mr Harders, "The Sea Bed" in the Federal Law Review.[20]

I turn now from the international law of the sea to the particular questions for Australian constitutional law that have arisen. Put in layman's language the question is: does the sea-bed belong to the Commonwealth or to the State having the adjacent coast?

The Petroleum (Submerged Lands) Act 1967-1968 was an adoption by the Commonwealth Parliament of measures agreed upon by the Commonwealth and State Government for co-operative endeavour in the exploration and exploitation of the petroleum resources of the sea-bed and subsoil beneath both the continental shelf and territorial waters. But the agreement between the Governments, as made effective by complementary statutes was expressed to be "without raising questions concerning and without derogating from their respective constitutional powers". Thus in products other than oil and gas the rights of the Commonwealth and the States respectively were not touched by the legislation; and the question of *dominium*, as between the Commonwealth and the States, of the sea-bed and its subsoil was expressly left aside. However, since 4 December last, when the Seas and Submerged Lands Act 1973 of the Commonwealth Parliament came into operation, the question has, from the point of view of the Commonwealth, been set at rest by that Act, which asserts that the Commonwealth has "sovereignty" in respect of the territorial sea of Australia and "sovereign rights" in respect of the continental shelf. Doubts have been voiced about the validity and constitutional effect of this enactment. Therefore, before going to the details of its provisions, I shall say a few words about the legal position of the sea-bed of the territorial sea at common law and apart from Australian statute law, Commonwealth or State. I confine this to the present area of the territorial sea, because beyond its limits the States cannot, it seems to me, have in legal logic or history any rights in the bed of the ocean. The Commonwealth confidently asserts sovereign rights there by virtue of recent international law, because Australia as a sovereign nation is a party of the Convention on the Continental Shelf.

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[20] (1968-1969) 3 F.L.Rev. 202.

The critical constitutional question apart from recent statute law is whether the bed of the coastal sea was in a legal sense part of the territory of the Australian colonies before Federation. That is to say was it vested in the Crown in right of the colonies severally and within the control and disposition of the Legislature of each? A full consideration of that must begin with the history of the legal position of the seas in relation to the realm of England, according to the law of England. I originally wrote a good deal about this and the bearing of it upon international doctrine of the freedom of the seas, and what Selden, Grotius and Pufendorf had to say of that. I have discarded it as interesting me, but wearisome for you. I just mention for anyone interested the fourth volume (published in 1971) of Doctor Verzijl's learned work *International Law in Historical Perspective*. It is enough to say here that a nation's maritime power, its capacity to control fisheries and sea-borne commerce in particular waters, has been sometimes taken as amounting to sovereignty over a region of the ocean, so that power has begotten "property". Control of activities upon the sea has sometimes been taken as amounting to possession of parts of the sea, using the word "possession" with what Professor Hart has called its "vague meaning in common not legal usage".[21] England as a maritime nation was not backward in the seventeenth and eighteenth centuries in claiming sovereignty over wide areas of the seas around the Kingdom. Early Law Dictionaries, those of Burn, Jacobs, Williams, Tomlin and Wharton, were to say under the heading "Sea" that the main or high seas beginning at low water mark are "part of the realm of England, for thereon the Courts of Admiralty have jurisdiction".

For this proposition Coke[22] was commonly cited. Hale too had said that "the narrow sea adjoining the coast of England is part of the waste, and dominions of the King of England".[23] And Blackstone had followed.[24] These statements must now be read in the light of the decision of *R.* v. *Keyn*[25] concerning jurisdiction of British courts over events occurring in British territorial waters. There Cockburn C.J., in the course of his impressively learned judgment pointed to the mistake of saying that because the Courts of Admiralty had jurisdiction over events at sea, the seas became part of the realm. He said that "some confusion arises from the term 'realm' being used in more than one sense" and "when it is used as synonymous with territory I take the true meaning of the term 'the realm of England' to be the territory to and over which the common law of England extends—in other words all that is within the body of any county to the exclusion of the high

[21] Hart, "Definition and Theory in Jurisprudence" (1954) 70 L.Q.R. 44.
[22] *Co. Litt.* 260.
[23] *De Jure Maris* Ch. 4.
[24] *Commentaries* i, 110.
[25] (1876) 2 Ex.D. 63.

seas . . .".[26] That is to say that, by the common law, the low water mark or the coast is the boundary of the territory of the realm. That of course does not mean that the nation has no rights in the territorial waters of the realm. But the question remains: does the jurisdiction and the control that a nation lawfully has over events occurring upon territorial waters mean that it has the same rights over the sea-bed there as it has over the dry land within its borders? As we have seen, it does according to the 1958 Geneva Convention. But this recent pronouncement of international doctrine, propounded to meet a new world situation, is in no way definitive of the doctrine of the common law of England governing the Australian colonies in 1901. For that we must look to old principles. And we must look at the history of the relationship between the jurisdictions of the courts of common law and the Admiralty Court.

It may seem far-fetched today to refer to the Statute of 1389, 13 Richard 2 c. 5, which Cockburn C.J. quoted. But the words are interesting and illuminating: "It is accorded and asserted that the Admirals and their deputies shall not meddle from henceforth of anything done within the realm, but only of a thing done upon the sea." This in the Norman French ran "*soulement de chose fait sur le meer*". If national rights in respect of territorial waters were still to be measured by the jurisdiction of the Admiralty, as there and in later statutes expressed, it could hardly be supposed that this gave the Crown *dominium* of the earth below the waters. Mining under the sea is surely not a "thing done upon the sea". However, by the common law as now developed sovereignty over territorial waters is not limited to matters that were in earlier times the concern of the Admiral. In successive editions of *Halsbury's Laws of England* it is said that "the soil of the sea between the low water mark and so far out to sea as is deemed by international law to be within the territorial sovereignty of the Crown is claimed as the property of the Crown, although outside the realm".[27] Professor O'Connell in his paper "Australian Coastal Jurisdiction"[28] has said that there is "no justification" for this statement in *Halsbury*. He reads it as an erroneous conclusion from section 7 of the Territorial Waters Jurisdiction Act 1878 (Imp.). The relevant words there are "such part of the sea . . . as is deemed by international law to be within the territorial sovereignty of His Majesty". I have never thought that this means that sea "within territorial sovereignty" is to be regarded as land and part of the territorial realm. The Act did not extend the realm. It was passed to abrogate the decision in *R.* v. *Keyn* and extend the jurisdiction of the Admiralty. The claim of the Crown to the soil below the territorial sea

[26] *Id.* 197.
[27] *Halsbury* (1st ed.) xxviii, 360; (2nd ed.) xxxiii, 520; (3rd ed.) xxxix, 556.
[28] O'Connell, *op. cit.*

had been categorically asserted by common lawyers on earlier occasions. For example in the case of the *Whitstable Free Fishers* v. *Gann* (1861) Erle C.J. said "The soil of the sea-shore to the extent of three miles from the beach is vested in the Crown and I am not aware of any rule of law which prevents the Crown from granting to a subject that which is vested in itself".[29] On appeal to the House of Lords the decision of the Common Pleas was reversed.[30] Lord Wensleydale did refer to "the right to the soil of the *fundus maris* within three miles of low water mark":[31] but Lord Chelmsford questioned the statement of Erle C.J.:[32] and, as the Lord Chancellor, Lord Westbury, pointed out, the case concerned an estuary, not the open sea.[33] This case and others cited in *Halsbury* may not compel a conclusion that the soil of the territorial sea is the property of the Crown but *dicta* in them are explicit—in particular what Lord Watson said in *Lord Advocate* v. *Wemyss*,[34] which I shall quote later. In 1969 Phillimore L.J. expressly endorsed what *Halsbury* had said: "The Crown claims property in the soil of the sea under its territorial waters and also claims to be entitled to the mines and minerals under that soil".[35] I do not think that this decided statement is to be disregarded. I do not find it surprising, having regard to the way law develops, that a jurisdiction over occurrences upon the surface of the territorial sea should become, for the common law, property in the soil beneath it. I consider that Sir Kenneth Bailey was quite right when in the lecture that I have mentioned he said, "The lawyer has no problems about the resources of the sea bed beneath the territorial sea. The coastal state has long been recognized as validly exercising sovereign power, not only over the territorial sea itself but over the sea bed and subsoil below it and the air space above it".[36] The term "the coastal state" there means the international sovereign. For us that is the Commonwealth of Australia. Clearly Bailey, who was speaking in 1959, did not regard the 1958 Convention on the Territorial Sea as the origin of rights "long recognized". The Convention codified old principles. It did not create new law. Nevertheless, general statements do not go far to resolve the critical issue for Australian constitutional law concerning the offshore resources of submerged lands. Assuming the *dominium* of the Crown, do they, apart from statutory claims, belong to the Crown in right of the Commonwealth of Australia, or the Crown in right of the Australian State, the coastline of which they adjoin?

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[29] (1861) 11 C.B.(N.S.) 387.
[30] (1865) 11 H.L.C. 191.
[31] *Id.* 213.
[32] *Id.* 216-217.
[33] *Id.* 208.
[34] [1900] A.C. 48, 66.
[35] *The Putbus* [1969] P. 136, 155.
[36] (1960-1962) 1 Adel.L.Rev. 8.

Beyond the three mile limit, and within the continental shelf, they belong, it seems to me, clearly to the Crown in right of the Commonwealth, and it is within its power to grant for such estate, rights and interests and on such terms as it chooses. Areas that were never thought of as being in any sense within the boundaries of the Australian colonies have not become so simply because the Commonwealth now claims rights there as the sovereign nation in international law. Its constitutional authority to assert its claim is assured under the Constitution by the power the Parliament has over external affairs and by its capacity pursuant to the State of Westminster to enact laws having an extra-territorial operation.

But in regard to lands submerged by the sea within three miles of the coast, the position, statute aside, is debatable. I gave some expression to my own views in *Bonser* v. *La Macchia*.[37] I shall not repeat here what I said there. I still think, until I be authoritatively corrected, that, for the reasons I gave, the seaward boundaries of the Australian colonies at the time of Federation were the low water line of the coast. The coastal waters up to the three mile limit were no doubt part of "the territorial waters of Her Majesty's dominions", within the meaning of The Territorial Water Jurisdiction Act 1878 (Imp.). But that Act did not alter the boundaries of British colonies. In support of the opinion I have expressed I refer to the judgment of Philp J. in *D.* v. *Commissioner of Taxes*.[38] The only way the boundaries of the colonies could have been altered was by the Imperial Crown with the consent of the Parliament of the colony concerned: that is to say pursuant to the Colonial Boundaries Act 1895 (Imp.). That Act ceased to apply to the Australian States after the establishment of the Commonwealth. State boundaries are now alterable by the Commonwealth Parliament in accordance with section 123 of the Constitution. The possible impact today of the Colonial Boundaries Act upon that raises questions which I need not here consider. That question was discussd by Doctor Lumb in an article in The Australian Law Journal.[39]

No doubt it has been, and is, generally assumed that the Australian colonies last century and the States since Federation had and have lawful authority over persons and events in coastal seas, and that their governments can lawfully exercise some authority with respect to land submerged there. But that, I consider, is so because such matters concern the peace, order and good government of the local community. The international three mile limit merely suggests an area within which occurrences may bear directly upon the peace, order and good government of the adjacent lands. Furthermore by authorizing the construction

[37] (1970) 122 C.L.R. 177, 221-222.
[38] [1941] St.R.Qd. 218, 228.
[39] Lumb, "Territorial Changes in the States and Territories of the Commonwealth" (1963-1964) 37 A.L.J. 172.

of a variety of seaward projecting works—from breakwaters and piers to sewerage outlets—and by granting off-shore mining rights in some places, there have been some appropriations by the States of parts of the sea-bed below low water mark. But such small encroachments, here and there, do not in law create *dominium* over the whole bed of the territorial sea. They are rather attributable I assume to an unchallenged recognition of acquisitions for the satisfaction by the local government of local needs not involving any further assertions of title. In 1900 the seas that washed the coasts of the Australian colonies were no doubt territorial waters of British possessions; and events there were within the jurisdiction of the Admiralty. That jurisdiction was exercisable by colonial courts. But this did not make the seas a colonial possession. In the eastern Australian colonies Admiralty jurisdiction stemmed from the Imperial Act 9 Geo 4 c. 83, s. 4. The reference in the Admiralty Offences (Colonial) Act (1849) (an Imperial Act) to "offences committed upon waters within the colony" may include territorial as well as internal waters: but even so it did not make the sea-bed part of the land of the colony. Jurisdiction over the territorial waters of British Dominions, by whatever court it was exercised—in civil matters pursuant to the Colonial Courts of Admiralty Act (1890)—was a local operation, through Imperial statutes, of British Admiralty law. This did not make the bed of the sea a colonial possession. Notwithstanding that Australian legislatures and Australian governments exercised some powers over territorial seas, it has seemed to me that, in strict law, they remained simply British waters until such time as the Commonwealth of Australia became in its own right a nation. That is because a nation's rights in territorial waters, being an emanation of international law, are an attribute of sovereignty. In 1901 the Australian colonies were not sovereign nations. They were parts of the British Empire. Now, when Australia is recognized as an internationally sovereign nation, this attribute of sovereignty in respect of Australian territorial seas has, it seems to me, accrued to Australia. I see no need to find any conveyancing transaction by which that was accomplished. I see no need to fix a precise time when it occurred. The Commonwealth of Australia now has the rights that by international law a nation has in territorial waters. And it is the Commonwealth, not the States, that may need to assert these rights; for the national interests which they protect, defence, health and quarantine, immigration, overseas shipping, customs dues, are all within Commonwealth control.

My conclusion that the bed of Australian territorial seas belongs to the Commonwealth and not to the States accords with the decision of the Supreme Court of Canada in *Re Ownership of Off-Shore Mineral Rights.*[40]

[40] (1967) 65 D.L.R. (2d) 353.

In approaching the problem in the way I have, I have sought to avoid measuring rights under Australian domestic law by the words of the Geneva Convention in 1958. But there is another way to the same end, suggested by Sir Garfield Barwick in his judgment in *Bonser* v. *La Macchia*.[41] It depends as I see it, and I see no reason to question it, on two considerations. First, on recognizing the provision in the Convention on the Territorial Sea that the sovereignty of a coastal state—meaning for us the Commonwealth—extends to the bed and subsoil of the territorial sea; and accepting this as part of our domestic law because it accords with the established doctrine of English law; and treating "sovereignty" in the Convention as importing the whole content of the concept of territorial sovereignty. Secondly, it depends upon accepting as part of our law, because it was adopted by the Australian Parliament, the definition of the continental shelf and provisions of the Convention concerning it. The result is logically satisfying and geologically intelligible. It avoids supposing that the shelf in fact begins three miles from the shore. It accepts a physical unity of the formation as a prolongation of the land, and it overcomes the artificiality of a divided control of off-shore submarine areas. Oil fields and mineral deposits have not been arranged by nature to fit neatly into the three mile range of gunfire in the eighteenth century or into modern enlargements of territorial waters. And what is the boundary of sea-bed wealth? Is the test of position where a drill is sunk or where lie the strata whence oil is drained?

The Supreme Court of the United States said in 1949 "once low water mark is passed the international domain is reached. Property rights would then be so subordinated to political rights as in substance to coalesce and unite in the national sovereign": *United States* v. *Texas*.[42] This is significant if it reminds us that statesmanship, as well as legal learning, is needed for the solution of problems of federalism. The Supreme Court of the United States made a reference to the "paramountcy" of federal power. This may rouse an approving echo from those who rejoice in the growth of Australian national sentiment and consider that the management of the great natural resources of Australia and the distribution of their proceeds and benefits should be in control of the national government. Those who are of that persuasion would no doubt look happily on Bailey's prediction in 1944 that the uniform tax system means that "the States should eventually move, with a simplified political structure into the position primarily of administrative agencies, the main lines of policy in all matters being nationally determined".[43]

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[41] (1970) 122 C.L.R. 177, 180-198.

[42] 339 U.S. 707, 719. Also *U.S.* v. *Louisiana* 339 U.S. 699, 705-706.

[43] *The Economic Record*; quoted by Birch, *Federalism, Finance and Social Legislation in Canada, Australia and The United States* (1957).

Others, who see Australia as in truth a federation of States with different histories, political traditions, and local needs, will be dismayed and apprehensive of that and ask why must all new-found Australian wealth in Australian seas enhance the Commonwealth's already great power of the purse. But for a lawyer the question is: where does the right lie?

I have stated—at perhaps inordinate length—a view of the position apart from the Commonwealth Act of last year, the Seas and Submerged Lands Act 1973. I have done so to make clear that, as I see it, that Act appears as a valid exercise of Commonwealth power, and that it does not impinge upon any proprietary or political rights of the States. That is a purely personal opinion. And my opinions on matters of law are no longer of much moment. Those who can speak with authority will, I assume, be required to do so in due course. We must wait and see.

The Act is quite explicit. It is described in its long title as:

> An Act Relating to sovereignty of certain Waters of the Sea and in respect of the Airspace over, and the Sea-bed and Subsoil beneath, those Waters and to Sovereign Rights in respect of the Continental Shelf and relating also to the Recovery of Minerals, other than Petroleum from the Sea-bed and Subsoil beneath those Waters from the Continental Shelf.

The words about the recovery of minerals other than petroleum are puzzling. Apparently the explanation is that the Long Title is as it was in the Bill for the Act: but a part of the Bill was not enacted. The last part of the Title thus remains to shew where one gun in the salvo misfired. The words "other than petroleum" are I take it explicable by relation to section 6, which saves the operation of any law of the Commonwealth in force at the date of the commencement of the Act—and the Petroleum (Submerged Lands) Act 1967-1968 is such a law.

The Preamble recites first that the territorial sea adjacent to the coast of Australia, and the airspace over it and its bed and subsoil are within the sovereignty of Australia. It then recites that Australia is a party to the Convention on the Territorial Sea and the Contiguous Zone, and to the Convention on the Continental Shelf. The two Conventions, in their English language versions, are set out *ipsissima verba* as Schedules to the Act.

The operative provisions of the Act commence "It is declared and enacted". This form is apt—because in relation to the bed of the territorial sea the Convention and the Act correspond with the common law position for Australia as I see it and have sought to explain it: and in relation to the continental shelf Australia had acceded to the Convention and claimed the benefit of it.

I see no ground for doubting that the Act is within the competence of the Commonwealth Parliament. As a matter of political history it is

notorious that it was passed after some partisan divergency and alleged tergiversation. It is in fact largely a reproduction of the Bill introduced in April 1970 which was then abortive. The subjects with which it deals are in relation to Australia themselves "external affairs". Moreover a law giving effect for Australia to an international Convention, relating to external matters, to which Australia and the nations generally have agreed, is surely of itself within the power under section 51(xxix) of the Constitution. I am, of course, aware that the scope of the power of the Commonwealth Parliament to legislate directly to give effect to treaty undertakings of all kinds is debatable. It has produced some controversy recently concerning the proposed law declaratory of human rights, now the subject of a Bill before Parliament. But the question there is very different. Matters with which the proposed law there would deal are matters that are ordinarily dealt with by State law. And the Bill there, by omissions and additions, departs from the simplicity of the United Nations Declaration relied upon to support it. My own view of the constitutional power in general I stated in 1965 as follows: "A law necessary to give effect to a particular treaty obligation of the Commonwealth is a law with respect to external affairs. But a law that is not necessary to give effect to an international obligation cannot be brought within Commonwealth power by linking it with one that is".[44] I added that: "It is always worth while recalling the words of Higgins J. that 'the thirty-nine articles contained in section 51 are subjects for legislation, not pegs on which the federal Parliament may hang legislation on any subject that it likes' ".[45]

The Seas and Submerged Lands Act deals directly with rights of the Commonwealth in international law not with obligations. Its provisions need to be read as a whole for its full import to be understood. It is enough here to set out two or three of them as follow: Section 6:

> It is by this Act declared and enacted that the sovereignty in respect of the territorial sea and in respect of the airspace above it and in respect of its bed and subsoil is vested in and exerciseable by the Crown in right of the Commonwealth.

To apply a notion of property as well as jurisdiction to an airspace is not easy. Reasons that when Pufendorf wrote had been given against the appropriation of the high seas apply strongly today to the upper air. It cannot be enclosed; it is not exhausted by use. But in relation to the sea-bed and subsoil to say that sovereignty in respect of them is vested in the Commonwealth surely carries *dominium* as well as *imperium*. I recall Lord Watson's words in 1900: "I see no reason to doubt that, by the law of Scotland, the solum underlying the waters of the ocean,

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[44] *Airlines of N.S.W. Pty Ltd* v. *N.S.W. (No. 2)* (1965) 113 C.L.R. 54, 152.
[45] *Huddart Parker & Co. Pty Ltd* v. *Moorehead* (1900) 8 C.L.R. 330, 415.

whether within the narrow seas or from the coast outward to the three mile limit, and also the minerals beneath it, are vested in the Crown."[46] Section 11 states:

> It is by this Act declared and enacted that the sovereign rights of Australia as a coastal State in respect of the continental shelf of Australia, for the purpose of exploring it and exploiting its natural resources, are vested in and exerciseable by the Crown in right of the Commonwealth.

The Act does not affect any waters of the sea that are waters of, or within any bay, gulf, estuary, creek, inlet, port or harbour that were on 1 January 1901 within the limits of a State and remain so, or the sea-bed or subsoil of such waters (section 14). And the Crown in right of the Commonwealth does not acquire title to any wharf, pier, breakwater or other structures and works as described in section 15.

Sections 7 and 12 authorize the Governor-General from time to time to declare by Proclamation the limits of the whole or any part of the territorial sea, or of the continental shelf of Australia. This is merely a legislative recognition of an existing prerogative power to which I referred earlier.

Anyone wishing to know more of the Act and its purpose would be well advised to read the speech of the Minister for Minerals and Energy on the second reading of the Bill in the House of Representatives on 10 May 1973, or the speech by Senator Wriedt introducing the Bill in the Senate on 22 May.[47] Who composed these two careful, learned and informative speeches which are in similar terms, I do not know. Not, I assume, either of those who uttered them. They reproduce some of the material that was in the speech by the Minister for National Development under the previous administration on the second reading of the Bill that he presented in 1970 which never took effect. This makes me suspect that Sir Kenneth Bailey who in 1970 was a special adviser to the Foreign Affairs Department may have had a hand in the preparation of the exposition for Parliament of the proposed measure. I shall not add to this already swollen paper by quoting from the Parliamentary speeches. The effect of the law must be found from the words of the Act not from the speeches of politicians, however learned the language and by whomsoever written.

The belief that it was "Nature's wide command, Divide the waters from the land" lingered long. So that in Childe Harold's Pilgrimage (canto clxxix) Byron wrote:

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[46] *Lord Advocate* v. *Wemyss* [1900] A.C. 48, 66.
[47] H.R.Deb. 2005; S.Deb. 1773.

> Roll on, thou deep and dark blue Ocean—roll!
> Ten thousand fleets sweep over thee in vain;
> Man marks the earth with ruin—his control stops with the shore.

But today man by pollution marks seas too with ruin; and his control stops not with the shore, but where he can mine no more.

Reverting then for a few moments to world affairs. International co-operation has not yet supplanted national rivalries and competition. Communism stops short at national boundaries and is suppressed by patriotism. Claims to the new-found wealth of the sea-bed are dressed up as new principles of international law supposedly justified by geography. Yet looking behind reliance on this plausible doctrine many men might see that for powerful nations whose territories are bordered by the sea

> The good old rule
> Sufficeth them—the simple plan,
> That they should take who have the power
> And they should keep who can.

Yet other men, preferring idealism to realism, may wonder whether it is a just rule that makes the wealth that lies under the world's oceans belong only to peoples whose lands have a sea coast, giving those with the longest coast the greatest share, and denying any share to people who live in inland countries. Where, they might ask, is the morality on which international law was once said to be founded?

They might perhaps remember what Pufendorf said of the freedom of the seas. I quote from the delightful translation by Kennett (folio edition 1710):

> It is clear that to sail the ocean in a peaceful manner both is and ought to be the free privilege of all nations. It is, because no one people have attained such a right over the ocean as will justify them in shutting out others from the same benefit. And it ought to be, because the law of general kindness and humanity recognizes it.

But my undertaking is to speak about the international and constitutional law of the sea-bed, not the law of general kindness and humanity. International human rights over the surface of the high seas have not frustrated national claims to parts of the earth below. Australia's claims are geographically lavish.

Before I finish I should say that the Pipeline Authority Act 1973 (Cth) would need consideration by anyone wishing to survey the whole topic. I have left it aside as it deals not so much with rights as with administrative machinery for the exercise of rights for the recovery and the distribution by pipelines of petroleum derived from the Australian continental shelf, and the "continental shelf" of the territory of the Ashmore and Cartier Islands.

Finally I mention, as a postscript really, that I have deliberately said nothing of the Petroleum and Mineral Authority Bill which has excited political controversy. It is not yet enacted. For a lawyer it is enough to try to understand the progeny of which Parliament is safely delivered, and not to trouble about those of which it is in labour or has suffered a miscarriage. However, as it may be that in time lawyers will have to wrestle with the Bill's provisions, I just refer you to the definition in it of the "Australian continental land mass"—as a new description of an area of sovereignty.

> Australian continental land mass means so much of the morphological unit of which Australia forms part as comprises Australia and the part of that unit surrounding Australia extending to the outer boundary of the continental shelf, within the meaning of the Convention, adjacent to that coast, that is to say—
>
> (a) subject to paragraph (b), to the foot of the continental rise or, any place where there is no continental rise, to the foot of the continental slope; and
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> (b) in any place where the outer boundary of the continental shelf, within the meaning of the Convention, adjacent to the coast of Australia has, whether before or after the commencement of this Act, been determined by agreement between Australia and another country—to that boundary,
>
> but does not include—
>
> (c) Papua New Guinea; or
>
> (d) a part of that morphological unit adjacent to Papua New Guinea declared by Proclamation to be excluded from the Australian continental land mass.

Law was much simpler—and so too was the task of the Parliamentary draftsman—when the realm ended at low-water mark, when national claims for rights over the seas were only for navigation and fishing, and when the internal combustion engine had not been invented and men were unconcerned by needs for petroleum or natural gas.