AUSTRALIA'S OFFSHORE PETROLEUM LEGISLATION: A SURVEY OF ITS CONSTITUTIONAL BACKGROUND AND ITS FEDERAL FEATURES

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I am grateful to APEA, and to Mr. Horler in particular, for this opportunity to present some thoughts to you on the subject of Australia's new offshore petroleum legislation. Perhaps it might be said of the Government lawyers that they take part all too infrequently in the discussion of legal affairs with their colleagues in the profession and in the research and teaching branches of the law. The criticism, if it is made, would, I think, have particular application where the topic under discussion belongs, as it does today, to the field of public law—the law of the Constitution and the law of Nations—in which the Government lawyer has the privilege of practising and of seeing at first hand the development of legal relationships both internationally between countries and domestically between the Government of the Commonwealth of Australia and the Governments of the several Australian States. Privilege, of course, carries with it obligations and there are recognized limits beyond which one naturally cannot be expected to go, but even within those limits there is, I believe, a deal of room for a valuable exchange of views on the new Australian legislation, for the promoting of ideas and perhaps even for assisting in a clearer understanding of its background and operation. If, at the same time, it is possible to give some insight into the extremely interesting range of problems that arises in the practice of the public law, and thereby to encourage others to contemplate a career in Government legal service—preferably with the Commonwealth, of course—so much the better.

There can scarcely be any topic that has been given closer attention by international lawyers in the past twenty years or so than that relating to the doctrine of the continental shelf. From the viewpoint of the domestic scene, I must bear in mind that towards the end of last year seven Australian Parliaments gave very thorough attention to the terms of the legislation and to the arrangements for its administration, and, indeed, that the Upper House of the Commonwealth Parliament has appointed a Select Committee to inquire into a wide range of questions, including questions of a legal nature. Having reflected upon these various considerations, and appreciating how difficult it is to find anything really new to say, I have decided to leave aside virtually altogether the detailed mechanisms of the so-called Common

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Mining Code and to concentrate on a survey of the scheme of joint Commonwealth and State legislation itself, the constitutional questions that are associated with it, the federal character of its approach to the problem and the legal provisions that needed to be devised to enable the scheme to function effectively.

I have described the legislative scheme as a "joint" scheme, but that does not, I think, adequately convey its true nature and effect. I shall, for the purposes of illustration, first give a very short outline of the operation of the legislation in its application to the off-shore area adjacent to Victoria.

In 1967, the Commonwealth Parliament passed the Petroleum (Submerged Lands) Act and five accompanying Acts of a revenue nature. This group of six Commonwealth Acts applies to the exploration for, and the exploitation of, petroleum resources in the area specified in the Second Schedule to the Petroleum (Submerged Lands) Act as being adjacent to the State of Victoria. The adjacent area includes both the sea-bed and subsoil beneath the territorial sea (referred to from here on as the "territorial sea-bed") and the continental shelf beyond the limits of the territorial sea. The constitutional basis for the Petroleum (Submerged Lands) Act 1967 is section 51(xxix.) of the Constitution (the "external affairs" power). This is so, in my view, both as to the territorial sea-bed and as to the continental shelf. The Commonwealth legislation is complete in itself. It is designed to operate separately and independently of any Victorian legislation.

The Victorian legislation—also entitled the Petroleum (Submerged Lands) Act 1967—is, except in formal respects, in terms identical with the terms of the Commonwealth legislation. The Victorian Act applies to the same two categories of submerged land (the territorial sea-bed and the continental shelf) and it establishes the same petroleum mining code. The Victorian Act, likewise, is designed to stand by itself and to function as a separate piece of legislation.

There will, therefore, be two sets of laws—Commonwealth and State—applying, concurrently and in parallel, to the same subject-matter and operating in the same geographical area. There will always, in point of law, be two grants of authority—one under the Commonwealth Act and one under the Victorian Act—to explore for or to exploit the petroleum resources of the adjacent off-shore areas. As the lawyers might put it, there will always be two "acts in the law".

This is not the first occasion on which the Commonwealth Parliament and the Parliaments of the States have combined in producing a legislative scheme—the Commonwealth and New South Wales Coal Industry Acts of 1946 under which the Joint Coal Board was established, the Commonwealth, New South Wales and Victorian legislation

with regard to the Snowy Mountains Hydro-electric Authority, the wheat industry stabilization legislation and the legislation relating to the River Murray Waters Commission are instances that come readily to mind. Legislative co-operation is necessarily part and parcel of the Australian federal system and the measures adopted with regard to off-shore petroleum can, I suggest, be fairly regarded as a continuation and development of the process. I say "development" because, on close analysis, the off-shore petroleum scheme differs in certain respects, I believe, from what has gone before. I propose presently to describe the points of difference, but I think that they will emerge more clearly if I first make some observations on the constitutional positions of the Commonwealth and the States, as I understand them, with regard to mining on the territorial sea-bed and the continental shelf. I have said that the constitutional basis for the Commonwealth's Petroleum (Submerged Lands) Act 1967 is to be found in the "external affairs" power and it will be apparent therefore that considerable significance attaches to the international legal considerations, at least so far as the Commonwealth's constitutional position is concerned.

The legislation we are considering does not apply to land beneath internal waters. These are the waters that lie to the landward side of the baselines from which Australia's territorial sea is measured. They include, for example, the waters of Port Phillip Bay and of the two South Australian Gulfs. The legislation proceeds upon the footing that these waters and the lands beneath them form part of the State to which they are adjacent and that the Commonwealth has no general legislative power with regard to mining in this area. In a statement in the House of Representatives on 31 October, 1967, the Commonwealth Attorney-General announced certain adjustments with regard to the baselines employed for measuring the territorial sea, which in Australia's case still remains at three miles. The Attorney-General observed that the adjustments would be made pursuant to the provisions of the first of the Conventions adopted by the First United Nations Conference on the Law of the Sea in 1958 — the Convention of the Territorial Sea and the Contiguous Zone; that, wherever relevant around the Australian coast, straight baselines of up to twenty-four miles in length would be drawn across bays instead of the ten miles system previously applied and that in certain circumstances use would be made of provisions in the Convention authorizing the drawing of straight baselines of more than twenty-four miles where a coastline is deeply indented or cut into, provided that no appreciable departure from the general direction of the coast is involved. I mention this announcement for two reasons — first, because a side effect of the new baselines policy will be to extend the area of internal waters that, on the view taken by the legislation, forms part of a State and, second, because when we are consider-

ing the position with regard to the territorial sea-bed a question will arise as to the relevance of section 123 of the Constitution, and that very same question arises, it would seem, in the case of an increase in the area of internal waters.[1]

The status of the territorial sea-bed in international law is well established. The question whether, under the Commonwealth Constitution, the general legislative power to control the subject-matter of mining on lands beneath the territorial sea belongs to the Commonwealth Parliament, or to the Parliaments of the States, or to both the Commonwealth and State Parliaments, has always been a matter of real difficulty so far as I am concerned. My own view is that the position remains obscure notwithstanding the conclusions reached by the Supreme Court of the United States in 1947 and 1950 and by the Supreme Court of Canada on 7 November, 1967,[2] concerning the constitutional situation in those respective countries.

Article 2 of the Convention on the Territorial Sea and the Contiguous Zone provides that the sovereignty of the coastal State (i.e., of a coastal country) extends to the air space above the territorial sea as well as to its bed and subsoil. In effect, the territorial sea-bed (including, of course, the subsoil) is regarded in international law as forming part of the territory of a coastal State. The Convention on the Territorial Sea and the Contiguous Zone entered into force on 10 September, 1964, but Article 2 re-states, in Convention form, a principle that had long since formed part of the body of customary international law.

In the United States, the Supreme Court has found that the principle did not exist at the time of Federation (1789); that at the establishment of the Constitution the jurisdiction of the individual States extended only to low-water mark; that it was the Federal Government that had, as it were, effected acquisition of the marginal belt and that the Federal Government rather than the individual sea-board State had paramount rights in and full dominion and power over the lands, minerals and other things underlying the territorial sea.[3]

The time factor alone provides reason for caution in considering the applicability of the United States decisions to the Australian

[1] "123. The Parliament of the Commonwealth may, with the consent of the Parliament of a State, and the approval of the majority of the electors of the State voting upon the question, increase, diminish, or otherwise alter the limits of the State, upon such terms and conditions as may be agreed on, and may, with the like consent, make provision respecting the effect and operation of any increase or diminution or alteration of territory in relation to any State affected."

[2] In the Matter of a Reference Concerning Off-Shore Mineral Rights, Opinion Given 7th November, 1967.

[3] U.S. v. California 332, U.S. 19, affirmed and applied by Supreme Court in subsequent decisions in 1950, relating to the particular situations of Louisiana 339, U.S. 699; U.S. v. Texas 339, U.S. 707.

situation. I am disposed to think that on a thorough legal-historical analysis, which space does not permit here, it will be found that at the date of the Commonwealth of Australia Constitution Act (9 July, 1900) international law recognized that the sovereignty of a coastal State extended not only to the territorial sea, but also to its bed and subsoil. The United States decisions are, moreover, intriguing, and perhaps of lessened authority in that, whereas in the 1947-1950 group of cases the Supreme Court seems to have placed particular emphasis on aspects of international responsibility, by 1954 the Court, its composition having altered in the meantime, did not regard the international considerations as precluding a finding in favour of the validity of the Submerged Lands Act 1953.[4] It was by this Act that Congress, acting under a power to dispose of Territory or other Property belonging to the United States, transferred the territorial sea-bed to the respective individual sea-board States, but left mining on the continental shelf in the control of the Federal Government itself.

The state of international law is, of course, but part of the problem. The further, and even more difficult question, is whether, in Australian domestic law, the extended sovereignty over the territorial sea-bed that is referred to in Article 2 of the Territorial Sea Convention appertains to — whether the "territory" consisting of the territorial sea-bed forms part of the territory of — the individual Australian States. The legislative scheme recognizes the difficulties, but seeks to put them aside. Both the Commonwealth and the States assert power. Neither accepts the validity of the assertion of the other, but, equally, neither seeks to detract from the other's assertions.

My own view, as I have said, is that the relevant Commonwealth constitutional power is to be found in section 51(xxix) and not in section 122 of the Constitution. I think, however, that it would be an over-simplification to say that the Commonwealth's legislative power to control mining on the territorial sea-bed is established through the mere entry into force of the Convention on the Territorial Sea and the Contiguous Zone, namely, on 10 September, 1964. The powers listed in section 51 of the Constitution are, of course, concurrent legislative powers. Let us assume for the moment that at 1900 the territorial sea-bed was regarded in the common law of England as forming part of the territory of an Australian Colony and that this position was not disturbed by anything in the Commonwealth of Australia Constitution Act. Could it be said, in these circumstances, that the adoption, in Convention form, of a long-standing rule of customary international law suddenly enabled the Commonwealth to

[4] Alabama and Rhode Island v. Texas and others 347, U.S. 272.

exercise the extended sovereignty permitted by international law? In other words, in the circumstances described, could the Commonwealth's position with regard to the control of mining on the territorial sea-bed be any different from its position with regard to mining in the land territory of a State? It seems to me that this is unlike the case where the Commonwealth legislates to give effect to an international Convention in the area of strictly concurrent Commonwealth and State legislative powers. The Whaling Act 1960 provides an illustration of the last-mentioned class of case. That Act constitutes an exercise of both the fisheries power in section 51(x) of the Constitution and, in so far as section 8 of the Act makes provision for the Act to be applied in territorial waters adjacent to a State, of the "external affairs" power for the purpose of giving effect to the International Whaling Convention.

The status of the territorial sea-bed in domestic law as at 1900, and the treatment of the matter in the Constitution, seem to me, therefore, to lie at the heart of the problem. The Constitution itself gives no direct assistance. No doubt, however, a State lawyer would seek to draw inferences from section 51(x) of the Constitution by which the Commonwealth Parliament is authorized to make laws with respect to "Fisheries in Australian waters beyond territorial limits". The geographical area of the Commonwealth power is defined, it is to be observed, by reference to Australian waters beyond "territorial limits". While the expression is not "limits of territorial waters" or "limits of the territorial sea", the provision has been applied on the footing that this is what it means, and fisheries within the limits of the territorial sea adjacent to a State have been treated as being subject to State, and not to Commonwealth, legislative power (I refer, of course, to the general subject-matter of fisheries — as we have just seen, Commonwealth legislative powers apart from those in section 51(x) may become relevant from time to time).

The view has been advanced that "territorial limits" means the limits of Australian land territory and that the Commonwealth's fisheries power accordingly runs from low-water mark. As I understand the position, the legislative history of section 51(x) points strongly against the correctness of this view. Hence the writer's belief that the practice of the Australian Governments in this field is entirely in accord with the true meaning and intention of section 51(x) of the Constitution. The provision derives from section 15(c) of the Federal Council of Australasia Act, 1885 under which the Federal Council was provided with legislative authority in respect to "Fisheries in Australasian waters beyond territorial limits". The Federal Council made two laws under the authority of section 15(c) — The Queensland Pearl Shell and Beche-de-mer Fisheries (Extra-territorial) Act of 1888 and the Western Australian Pearl Shell and Beche-de-mer Fisheries

(Extra-territorial) Act of 1889. Both Acts appear on their face to have been clearly concerned with fisheries beyond the limits of the territorial sea (or "territorial waters" — to use the traditional description). I think that this conclusion is inescapable when regard is had to the express limitation of the application of each Act to "British ships and boats attached to British ships". This leads me to believe that the Acts were concerned only with activities on the high seas beyond the limits of the territorial sea and that, in the light of the legislative history, section 51(x) of the Constitution must be regarded as having a similar operation.

I understand that, arising out of certain proceedings for an offence under the Commonwealth Fisheries Act, the High Court may shortly be called upon to give its attention to the meaning of section 51(x) of the Constitution. As matters stand, however, I would not be prepared to regard the provision either as excluding the operation of State fishing laws in the area of the territorial sea or as excluding the possibility that the authority of a State over mining may extend beyond low-water mark. The view that I put as to the legislative powers of the Commonwealth and the States with respect to fisheries does not, of course, resolve the question of where the sovereignty in respect of the territorial sea-bed resides. I suggest that we now examine whether that question is any the more readily answered in the light of the recently delivered Opinion of the Supreme Court of Canada.

On a reference by the Governor in Council pursuant to the Supreme Court Act, the Court was asked to consider these questions relating to the territorial sea-bed—

> "1. In respect of the lands, including the mineral and other natural resources, of the sea-bed and subsoil seaward from the ordinary low-water mark on the coast of the mainland and the several islands of British Columbia, outside the harbours, bays, estuaries and other similar inland waters, to the outer limit of the territorial sea of Canada, as defined in the Territorial Sea and Fishing Zones Act, Statutes of Canada 1964, Chapter 22, as between Canada and British Columbia.
>
> (a) Are the said lands the property of Canada or British Columbia?
>
> (b) Has Canada or British Columbia the right to explore and exploit the said lands?
>
> (c) Has Canada or British Columbia legislative jurisdiction in relation to the said lands?"

The Court answered all three questions in favour of Canada. Canada, the Court said, possessed full constitutional authority to acquire new areas of territory and the territorial sea was "part of the territory of Canada". It was Canada that had the right to explore and exploit the

submerged lands and Canada that had exclusive legislative jurisdiction in respect of them either under section 91(1)(a) of the British North America Act or under the residual power in section 91. British Columbia had no legislative jurisdiction since the lands in question were "outside its boundaries". The lands under the territorial sea did not fall within any of the enumerated heads since they were "not within the Province". The Court applied strictly the majority view in *R. v. Keyn* that at common law "the territory of the realm" ends at low-water mark. It referred to, but did not prefer, later dicta taking a different view of the common law position. The Court appears throughout to have treated as of fundamental importance the description of the boundaries of British Columbia.

Any decision of the Supreme Court of Canada is naturally deserving of the greatest of respect. However, I confess that I find myself left in real doubt whether the Court's reasoning would be followed and applied by the High Court of Australia. For one thing, there are the well-known differences between the provisions of the British North America Act and those of our own Constitution — in Canada, the residual powers belong to the Dominion and the Dominion's specific powers include the subject of sea-coast fisheries. But it is the importance that the Canadian Opinion attached to the description of the boundaries of British Columbia that causes me the greatest difficulty. The Reasons for Judgment commence with an examination of the described boundaries of the Province and the conclusion against the Province is reached, as I have mentioned, for the stated reason that the lands beneath the territorial sea were "outside its boundaries" or, putting it another way, they were not "within the Province".

If, in the Australian situation, the question were only one of boundary description, the States, it seems, would probably lack authority to control mining on the territorial sea-bed. The State of Victoria, for example, is described in the Letters Patent of 29 October, 1900, constituting the office of Governor of the State, as being bounded 'on the South by the sea'. Indeed, on this description, the waters of Port Phillip Bay would probably not be included and the joint off-shore petroleum legislation would in that case be in error in treating the lands beneath the Bay as forming part of the State. But perhaps this only adds point to the thought that the answer to the question whether Victoria may control mining on the territorial sea-bed is not to be found in the terms of an instrument such as the Letters Patent. Instruments of this kind describe the land territory of the realm. Their only purpose is to identify land territory. I suggest, with respect, that the question of the inter-relationship of international law and municipal law is deserving of still closer examination. At this point, however, I wish to do no more than offer for your consideration Lord McNair's

description of the territorial sea and of what it entails for a coastal State.

> "To every State whose land territory is at any place washed by the sea, international law attaches a corresponding portion of maritime territory consisting of what the law calls territorial waters (and, in some cases, national waters in addition). International law does not say to a State: 'You are entitled to claim territorial waters if you want them.' No maritime State can refuse them. International law imposes upon a maritime State certain obligations and confers upon it certain rights arising out of the sovereignty which it exercises over its maritime territory. The possession of this territory is not optional, not dependent upon the will of the State, but compulsory."[5]

The territorial sea-bed comprises only about five per cent of the submerged lands to which the offshore petroleum legislation applies. You may well think therefore that in the context of the present paper the attention I have given to it is out of all reasonable proportions. But there may come a day when Australia will extend its territorial sea from the present breadth of three to, say, twelve miles. It would be for the Commonwealth Government to decide whether this step should be taken. Questions would then arise whether sovereignty over the additional nine miles of sea-bed would belong to the Commonwealth or, if it be assumed that the present three-miles territorial sea-bed appertains to the States, whether the territorial sovereignty of the States would be increased accordingly. In the latter case, moreover, would this involve an alteration of the limits of a State within section 123 of the Constitution and therefore necessitate the Parliamentary attention and referendum provided for in that section? I suggest that the answer should be in the negative. I doubt that section 123 is at all concerned with the additions to territorial sovereignty that stem from the application of the rules of the international law of the sea. If this is not the correct view, then even the increases in the extent of internal waters that will flow from the decision announced recently by the Attorney-General would appear to call for attention under section 123.

The United States and Canadian decisions arrived very quickly at the conclusion that the Federal Government had authority to control mining for the natural resources of the continental shelf. I suggest that it may be quickly concluded also that the Commonwealth Parliament has authority to legislate with regard to this subject-matter. The Convention on the Continental Shelf belongs to the class of international instrument that, as it seems to me, may clearly be given effect to by legislation under the "external affairs" power on the test applied in The King v. Burgess; Ex Parte Henry[6] and in Airlines of

[5] Anglo-Norwegian Fisheries Case, 1951 I.C.J. reports at p. 160.
[6] (1936) 55 C.L.R. 608.

New South Wales Pty. Ltd. v. The State of New South Wales (No. 2).[7] It has been suggested at times that section 51 (xxix) of the Constitution authorizes only such legislation as is necessary for the discharge of international obligations and it is true that the judgments in the Burgess case are studded with mention of "obligations". The Convention on the Continental Shelf recognizes rights (the important sovereign rights, referred to in Article 2 of the Convention, for the purpose of exploring the continental shelf and exploiting its natural resources) and it also imposes obligations (e.g., the obligation in Article 3 to preserve the freedom of the high seas). In the light of the subject-matter under discussion, it is not surprising that the Burgess judgments should have concentrated upon the aspect of obligations, but it would be wrong, I suggest, to infer that the power is confined to that aspect alone. In the Second Airlines case of 1964-1965 the present Chief Justice left little doubt that he regarded the Commonwealth power as extending to the securing of the benefits which a treaty or convention confers on Australia.

I put the view, therefore, that the legislation that the Commonwealth Parliament has enacted to give effect to the Convention is perfectly valid legislation. However, the Convention did not enter into force until 10 June, 1964. This was some two years after the Commonwealth and the States had commenced their consultations on off-shore petroleum and the question might fairly be asked whether the Commonwealth was competent, at that earlier stage, to legislate for the control of mining on the continental shelf. In my view, it was, on the basis that the "external affairs" power provides authority not only for legislation giving effect to a treaty or convention, but also for laws giving effect to rules that are part of customary international law. It will be recalled that as far back as 1953 the Commonwealth took the view, and issued Proclamations accordingly for the international record, that the legal doctrine of the continental shelf had become established as part of the international customary law of the sea.

The States have likewise, in their legislation, asserted authority over mining for petroleum on the continental shelf. The Convention does not ascribe to the continental shelf the status of territory and different legal considerations therefore arise from those that are relevant in the case of the territorial sea-bed. What is the basis of State power in these circumstances? In the light of decisions such as Johnson v. Commissioner of Stamp Duties,[8] should any narrow view be taken of the legislative competence of an Australian State in respect of things existing or acts taking place beyond its territorial limits, provided that there is some real and substantial nexus with the State?

[7] (1964-1965) 113 C.L.R. 54.
[8] (1956) A.C. 331.

And, in the circumstances we are considering, is a sufficient nexus to be found in the fact that a mining company conducts its off-shore activities from a base in the State and with the use of its facilities? Would one possible course have been for each State to have legislated to exercise the rights recognized by the Convention and for the Commonwealth to have ensured the discharge of international obligations and the exclusion of foreign companies not operating from a base in the State? I refer to these matters only for the purpose of putting in better perspective the place occupied by the legal assertions in the negotiations leading to the adoption of a joint legislative scheme.

It would be wrong, however, to suppose that the joint scheme was embarked upon solely, or even primarily, for reasons of law. The desire to provide operators with certainty of legal title with as little delay as possible and to expedite off-shore petroleum exploration, the objective of a uniform mining code applying both to the territorial sea-bed and the continental shelf — whatever the constitutional position — and the good sense of employing existing skilled State Mines administrations — as the preamble to the Petroleum (Submerged Lands) Act 1967 shows, these were all matters influencing the decision of the seven Governments to adopt a joint scheme and to avoid the system of divided legislative control that applies in the United States. There is, of course, considerable Australian precedent for the use of State administrations. In the sphere of judicial matters, the Constitution itself deliberately departed from the United States precedent and adopted what the present Chief Justice, when Attorney-General, described as an original Australian contribution to federation — the "autochthonous expedient" as Dixon, C.J., described it in the Boilermakers' Case[9] — which the Chief Justice saw as potentially permanent and, as such, desirable feature of the Australian judicial system. Sir Robert Garran once suggested that "it ought not to be difficult to express in the Constitution the intention to devolve upon the States part of the responsibility for the administration of federal laws". "It may be difficult," he continued, "to educate our federal administrators to a self-discipline which will counter their natural inclination to keep all the strings in their own hands. But I do not think that even that need be impossible." There must be limits to the idea that Sir Robert expressed, but obviously he would have regarded off-shore petroleum administration as a clear-cut case.

I must now carry out my undertaking to compare the off-shore petroleum legislation with some of its fore-runners in Commonwealth-State legislative co-operation. We have seen that the Commonwealth and the States have each asserted constitutional power to enact legislation covering both the territorial sea-bed and the continental

[9] (1957) 95 C.L.R. 529.

shelf. The question whether those assertions are constitutionally justifiable has been put aside. The Commonwealth does not recognize, though it does not seek to dispute, the existence of State power — similarly with the States so far as the existence of Commonwealth power is concerned. The Commonwealth and New South Wales Coal Industry Acts of 1946 authorized the setting-up, by arrangement between the Governor-General and the Governor, of an authority to be known as the Joint Coal Board. The powers and functions of the Board are set out in identical terms in the Commonwealth and State legislation. It seems not to have been the Commonwealth's intention, however, to vest the Board with authority other than in respect of inter-State trade. For present purposes, I refer to the explanation by the Commonwealth Minister, when introducing the Bill, that it should not be read as an attempt by the Commonwealth Parliament to vest in the Board all the powers set out. The purpose of setting out all the powers in each Act was to assist the public in getting a comprehensive picture of what the Board had to do and of what powers it would have.

Contrast this with the off-shore petroleum legislation which proceeds upon the basis of "asserted" powers and of leaving aside the question of the constitutional validity of those assertions. Moreover, in the off-shore petroleum scheme, the Commonwealth Act and the Act of a particular State cover precisely the same ground. Except in formal respects, they "mirror" each other exactly and each Act is intended to operate fully according to its terms. For myself, I do not think that either of these features presented any constitutional impediment to the adoption of the joint scheme. Indeed, the scheme avoids a possible difficulty in the coal industry legislation, to which Dixon, C.J. on one occasion drew attention but which he did not pursue. In Australian Iron and Steel v. Dobb[10] the High Court referred to, but did not decide, the question whether a local coal authority appointed under the joint legislation was an officer of the Commonwealth within the meaning of section 38(e) of the Judiciary Act, under which the High Court has exclusive jurisdiction in a matter in which a writ of prohibition is sought against an officer of the Commonwealth. In that case Dixon, C.J. said—

> "The State Act and the Coal Industry Act of the Commonwealth are corresponding enactments of the two legislatures setting up joint or combined authorities by concurrent exercise of their respective constitutional powers. This is not the occasion to inquire into the extent constitutionally to which such a legislative conflation may succeed."

It seems to me that the off-shore petroleum scheme does not run into this difficulty. There is no joint setting-up of an authority and

[10] (1957) 98 C.L.R. 586.

there is, I believe, no legislative fusing together in the sense referred to by the Chief Justice. There are, in fact and in law, two separate sets of legislation. Each set of legislation, for purposes of administration, establishes a "Designated Authority" who is a Commonwealth agent and who, quite separately, is an agent also of the State.

It follows that an oil company that is authorized to explore for petroleum will receive two permits — a Commonwealth permit and a State permit — and that, wherever obligations are imposed, there will be both an obligation under the Commonwealth Act and an obligation under the Act of the State. It must be borne in mind too that the legislation, in addition to applying a mining code, adopts and applies the body of law in force in the adjacent State. This is done by Part II of the Commonwealth's Petroleum (Submerged Lands) Act and there are corresponding provisions in the State Acts. Special provision has, therefore, been made, for example, to prevent a company having to make a double payment of royalty. Section 128 of the Commonwealth Act provides that, to the extent to which a person pays royalty to a State, he is not liable to pay royalty under the Commonwealth's Royalty Act. The State legislation, in turn, "mirrors" this provision. Sections 152 to 154 of the Commonwealth Act go on to meet generally the position arising out of the system of "dual" legislation. Section 152, for example, has the effect that, if an obligation or liability imposed by a State Act is discharged, the obligation or liability under the Commonwealth Act is likewise discharged. And there are, of course, corresponding provisions in the State Acts.

It follows also from the system of "dual" legislation that it is not possible to exclude completely the possibility of a challenge being made to the constitutional validity of either the Commonwealth legislation or the legislation of a State. Whenever legal proceedings are contemplated pursuant to any of the applied laws a choice will have to be made whether to bring the proceedings under the law as applied by the Commonwealth Act or under that law as applied by the State Act. It is difficult to imagine circumstances in which a purpose would be served by taking a constitutional objection to the validity of one Act since the liability or obligation would remain under the other Act. Section 150 of the Commonwealth Petroleum (Submerged Lands) Act, however, seeks to minimize the possibility of constitutional litigation still further. The section provides that it is the intention of the Act "not to affect the operation of any law of a State or Territory in the adjacent area". By this means it is hoped to put aside arguments based on section 109 of the Constitution. But for section 150 it could be argued that the Commonwealth legislation intends to cover the field, that the State legislation is inconsistent with the Commonwealth legislation and that, having regard to section 109 of the Constitution,

the State legislation is, to the extent of the inconsistency, invalid. Section 150 is not a novel provision in Commonwealth legislation. Similar provision is made in section 35 of the Wheat Industry Stabilization Act 1963 and in section 27 of the Crimes (Aircraft) Act of the same year.

Again because of the existence of two sets of laws functioning side by side, special arrangements have been made for the administration of the legislation. These arrangements are contained in a formal Agreement entered into between the Commonwealth and State Governments on 16 October, 1967. Part III of the Agreement relates to the administration of the Common Mining Code. Clause 11 takes care of the Commonwealth's special interests at the point of a permit, licence or other authority referred to in the clause being granted or transferred. The clause enumerates a wide list of Commonwealth powers and responsibilities and provides that a Commonwealth decision with respect to any of those matters will be given effect to by the State. Questions, for example, as to international boundaries and as to whether a permit should be granted to a particular foreign company are reserved by this clause for the Commonwealth's decision after consultation with the State concerned.

The legislative scheme that all seven Australian Parliaments have adopted provides a most interesting illustration of Federalism at work and of efforts to make it work without stretching the assertion of legal powers to the point of inter-Governmental litigation. No doubt it would be true to say that the scheme involves some element of legal, as well of political, compromise, but, after all — if I might borrow again from the wisdom of one who spent a long and renowned life-time in the service of the Commonwealth of Australia — Federation itself is a *compromise* form of government (the emphasis is Sir Robert Garran's own). Through the compromise achieved in this case, the petroleum companies have certainty of legal title without litigation and in that respect the scheme would, I believe, have their wholehearted support, whatever the view might be of this or that individual provision of the operating code. If the avoidance or deferment of litigation should disappoint the lawyers, then at least there will be opportunity for discussion and analysis and the present writer looks forward with a great deal of interest to the continuation of the discussion in the learned legal journals both within and beyond the territorial limits of Australia.[11]

[11] The views expressed in this talk are not necessarily those of the Commonwealth Attorney-General's Department.