REGULATION OF AUSTRALIAN COASTAL FISHERIES

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INTRODUCTION

Generally it has been assumed that the power to legislate with respect to fisheries in Australian territorial waters is within the exclusive province of the State legislatures and that the Commonwealth Parliament fisheries power relates only to fishing in that part of the seas outside the three-mile limit. Under the Commonwealth Constitution the Federal Parliament has power to legislate with respect to "fisheries in Australian waters beyond territorial limits" (s. 51 (x)) and in the exercise of this power the Commonwealth has sought to regulate fishing in proclaimed areas outside the three-mile maritime zone.[1] Likewise, in legislating on sedentary fisheries on the continental shelf,[2] sovereignty over which was proclaimed in 1953,[3] the Commonwealth Parliament has made no attempt to regulate the exploitation of the living resources of the sea-bed within territorial waters. While common interest has persuaded Commonwealth and State fisheries authorities that uniform policy and regulation is desirable in many aspects of fisheries administration, the Commonwealth has not, as yet, disputed the validity of State legislation on fisheries in territorial waters. For their part the States appear to have had no doubt as to the competence of their legislatures to make laws regulating and controlling fishing in territorial waters, including laws dealing with sedentary fisheries within the three-mile limit.

Although the matter has not been the subject of judicial pronouncement there is State legislation which implicitly assumes that submerged land below the foreshore is land of the Crown in the right of the States. The question whether this assumption or the assumption that territorial waters are the domain of the States is well founded in law has not

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1 Commonwealth Fisheries Act, 1952.

2 Commonwealth Pearl Fisheries Act, 1952-53.

3 By a proclamation dated September 10, 1953, it was declared "that Australia has sovereign rights over the seabed and subsoil of—

(a) The continental shelf contiguous to any part of its coasts, and

(b) The continental shelf contiguous to any part of the coasts of territories administered under the trusteeship system of the United Nations."

It was declared also that "the status of the seabed and subsoil that lie beneath territorial waters" was not to be affected: *Commonwealth Gazette*, 1953, p. 2563.

received the attention it deserves, for should petroleum in economically exploitable quantities be found in the submerged lands below low-water mark it is possible that the Australian States might find themselves engaged in a tidelands dispute with the Commonwealth comparable to that which has troubled certain of the oil-producing States of the American Union. Until 1947 is was generally believed that each of the coastal American States had *dominium* over the territorial waters adjacent to its coasts. However, in that year the United States Supreme Court exploded popular belief by ruling that the States had no such rights or powers as would permit them to grant oil and gas leases in the submerged lands of territorial waters. The United States precedents may have only limited importance in Australia, but they should at least serve as a warning to the States that their hitherto unresisted claims may rest on false foundations.

In determining the respective limits of the Commonwealth and States fisheries powers it must be borne in mind that the States powers derive from the general constitutional rule that all legislative powers not expressly conferred upon the Commonwealth Parliament remain with the States and that the reference to "territorial limits" in section 51 (x) of the Commonwealth Constitution means the limits of State territory in 1900. By implication from the Federal Constitution, the States have power to legislate with respect to fisheries within territorial limits.

The suggestion has been made recently by Dr. D. P. O'Connell that territorial limits are not synonymous with territorial waters and that in 1900 it was very doubtful whether the territorial limits of the Australian colonies extended beyond low-water mark. He has therefore concluded that it is questionable whether the State legislatures are now competent to legislate with respect to fishing in territorial waters.[4] He bases this conclusion principally upon the controversial decision in 1876[5] of the Court of Crown Cases Reserved in *R. v. Keyn* (*The Franconia*) and upon the Territorial Waters Jurisdiction Act, 1878,[6] a statute of the Imperial Parliament applying to all of Her Majesty's overseas dominions.

Nothing like universal agreement has been reached on what *R. v. Keyn* decided apart from the ruling that Admiralty jurisdiction did not extend to aliens on board foreign vessels passing through English territorial waters who committed criminal offences against British subjects. Some courts and writers have interpreted the case as a precedent on Admiralty jurisdiction only, while others have said that even if it did decide that the seaward limit of British territory is low-water mark, the Act of 1878 had the effect of assimilating territorial waters with land territory. In Dr. O'Connell's opinion *R. v. Keyn* cannot be construed as a judgment confined to the question of whether the jurisdiction of the Lord High Admiral before its transfer to commissioners and later to the Central

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4 D. P. O'Connell, *Problems of Australian Coastal Jurisdiction* in *British Year Book of International Law* 34 (1958) 199-259.

5 (1876) 2 Ex. D. 63.

6 41 and 42 Vict. c. 73.

Criminal Court, embraced offences against British subjects committed by aliens on board foreign vessels in English territorial waters. As he interprets the case, the matters directly in issue were: (a) whether the acts alleged to constitute the offence took place within the body of the county, in which event the Court of Oyer and Terminer would have had jurisdiction, and if not, (b) whether prior to the statute 28 Hen. 8, c. 15, the statutory jurisdiction of the Lord High Admiral would have extended to such offences. Having ruled that territorial waters were not within the body of the county, the Court proceeded to determine whether the offence was cognizable by the Lord High Admiral. Hence, concludes Dr. O'Connell: "The question whether territorial waters were within the body of a county was . . . placed directly in issue, and the discussion of the jurisdiction of the Lord High Admiral followed only upon a determination that they were outside the realm".[7] In essence, "*R. v. Keyn* decided that British Crown land terminates with the low-water mark. . . ." [8]

The effect of the Territorial Waters Jurisdiction Act, 1878, was, according to Dr. O'Connell, to extend criminal jurisdiction to offences committed by aliens against British subjects in British territorial waters. It did not reverse the ruling that the territory of the United Kingdom stopped at low-water mark. Although by 1900 there was substantial authority for the exercise of wide jurisdiction over territorial waters, there had been nothing to alter the conclusion reached in *R. v. Keyn* that territorial waters were not a part of state territory.

What attitude the High Court of Australia might adopt in a case involving interpretation of the Commonwealth and States fisheries powers is exceedingly difficult to predict. Assuming that Dr. O'Connell's doubts regarding the States power to regulate fisheries in territorial waters were accepted, the Court would either have to rule State fisheries legislation to be *ultra vires* or would have to find some plausible basis for preserving the *status quo*. When the United States Federal Government contested the right of the States of California, Louisiana and Texas to grant oil and gas leases in the tidelands, the Supreme Court did not hesitate in exploding the long held assumption that the States had *dominium* over territorial waters.[9] National interest coincided in this instance with what the Court considered the law to be. The reason for denying the States *dominium* over territorial waters was briefly this. At the time the thirteen original American colonies entered into federal union, the doctrine of territorial waters had not been received as a universally recognized doctrine of international law. Since all States subsequently admitted to the Union were admitted on the same terms as the foundation members, the States of California, Louisiana and Texas could not be attributed with *dominium* over territorial waters and, hence, could not validly grant leases in submerged lands off their coasts.

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7 O'Connell, *op. cit.*, 206.

8 *Ibid.*, 201.

9 *U.S. v. California* (1947) 332 U.S. 19; *U.S. v. Louisiana* (1950) 339 U.S. 669; *U.S. v. Texas* (1950) 339 U.S. 707.

At the time when the Australian colonies agreed to form a federal union the status of territorial waters in international law had changed. Subject to the right of innocent passage of foreign vessels, international law permitted states to exercise jurisdiction in and over territorial waters to a distance of three miles seawards. The publicists were still divided on the question whether territorial waters were assimilated to state territory, but it was generally agreed that fisheries within the three-mile limit were the exclusive domain of littoral states. The framers of the Australian Constitution seemed to entertain no doubts that the Australian colonies were possessed of extensive powers over territorial waters and judging by the comments made at the constitutional conventions it was taken for granted that the colonial legislatures were competent to legislate for fisheries within this zone.[10]

Ever since the Commonwealth exercised its powers with respect to ocean fisheries Comonwealth-State relations in the field of fisheries have been most cordial and there is little evidence of conflict between State or Commonwealth fisheries authorities which might lead to litigation. It is conceivable that the High Court might be called upon to determine the extent of State fisheries jurisdiction as a result of an individual contesting the validity of State legislation adversely affecting him and in this event the Court would have no alternative but to determine whether for the purpose of fisheries legislation the territorial limits of the States extend to the maritime boundary drawn at a distance of three miles from low-water mark or whether they stop at low-water mark.

Unlike the United States Supreme Court, the High Court of Australia does not canvass openly such policy considerations as were introduced into the American tidelands cases. Thus, whether the national interest makes it expedient for control of sea fisheries to be vested exclusively in the Commonwealth would not be a factor which the High Court would allow consciously to influence its judgment. In construing the Commonwealth fisheries power the High Court's most likely course would be to search for the probable intentions of the Imperial Parliament when it enacted the Constitution Act in 1900. Since *travaux preparatoires* are not admissible in the interpretation of the Constitution, the Court could not rely upon the Convention debates but reference to the legislative antecedents of section 51, placitum x, would, it is submitted, be in order. On this basis, the Court could take notice of the assumption on the part of the Australian colonies prior to federation that their legislative competence extended to territorial waters and that they had no power to regulate fisheries outside territorial waters. That assumption led to the creation by the Imperial Parliament in 1885 of a Federal Council of Australasia with power to legislate with respect to fishing by British subjects in "Australian waters outside the territorial limits of the colonies".[11] In this context,"territorial limits" was intended clearly to refer to the three-mile limit. This grant of power to the Federal Council was copied in

10 O'Connell, *op. cit.*, 225-6, outlines briefly the points of view expressed at the Conventions held in 1897 and 1898.

11 48 and 49 Vict. c. 60.

almost identical terms in the Federal Constitution, from which one may conclude that the States were intended to retain their assumed power to exercise fisheries jurisdiction in territorial waters.

Prediction of High Court decisions is at any time a hazardous venture and the well-documented arguments presented by Dr. O'Connell make it impossible to state with any assurance what line the Court might take in the future. On balance, this writer is of the opinion that the authorities discussed by Dr. O'Connell do not create as many and so grave doubts as he contends. More specifically, the writer's objections are:

(a) That in the interpretation of the Commonwealth fisheries power *R. v. Keyn* is not so pertinent as Dr. O'Connell suggests.
(b) That although the object of the Territorial Waters Jurisdiction Act was to cure deficiencies in criminal jurisdiction, the definition of territorial waters given in the Act could be construed as an affirmation of British sovereignty over territorial waters for all purposes.
(c) That *R. v. Keyn* is of no authority on the question whether the Crown has title to the *solum* of territorial waters and that there are pre-1900 cases supporting the proposition that the *solum* to a distance of three miles from low-water mark is Crown land or Crown territory.
(d) That the authority of *R. v. Keyn* in connection with the limits of British territory in 1900 has been diminished as a result of the subsequent ruling by the Court of Appeal that in disputed cases it is for the executive rather than the courts to determine the limits of state territory.
(e) That the proper course for the High Court of Australia in a case involving the territorial limits of the States would be to look to the acts and presumed intentions of the United Kingdom legislature and executive when the boundaries of the Australian colonies were fixed.
(f) That the term "the coast" occurring in the instruments defining colonial boundaries is not elucidated by the meaning attributed to the word in the context of conveyances or rules describing the jurisdiction of parishes, manors or local authorities.
(g) That alterations in State limits cannot, as Dr. O'Connell implies, be effected by the Commonwealth executive.
(h) That the meaning of "territorial limits" with reference to the Commonwealth fisheries power need not be regarded as synonymous with State boundaries, and that in the light of the probable intentions of the legislature, "territorial limits" here might be read as "territorial waters".

The following pages are devoted to more detailed explanation of the author's reasons for supposing that the Australian States may validly legislate in respect of fishing in territorial waters and that the Crown in the right of the States may exercise proprietary rights over the *solum* of territorial waters.

I. A Consideration of *R. v. Keyn*

Whether the understanding of the majority in *R. v. Keyn* of the international law doctrine of territorial waters in 1876 was correct or not has been controversial for many years. Since the Court of Crown Cases Reserved was endeavouring to apply international law, an erroneous understanding by the majority of the relevant rules of customary international law could be regarded by the High Court as further impairing the precedent value of a decision which, strictly speaking, is not binding upon the High Court.

While the majority in *R. v. Keyn* reasoned from international law sources, the opinions of the minority reveal that there was still confusion in the minds of the judges as to the theoretical foundation of Admiralty jurisdiction in territorial waters. Before the emergence of an international law doctrine of territorial waters the Crown had asserted and the common law courts had affirmed proprietary rights in the waters and *solum* of what were called narrow seas. In time this proprietary claim was whittled down by the development of public rights of navigation and fishing, but the interest claimed by the Crown nevertheless remained proprietary in character and the exercise by the King's courts of jurisdiction over persons and vessels on the narrow seas was predicated upon the Crown's property rights.[12]

By 1800 the doctrine of property in the narrow seas had been abandoned by the Crown in favour of the international law doctrine which sanctioned the exercise by coastal States of certain rights and powers over territorial waters. If the Crown had in fact abandoned its original claims, the courts did not appreciate until quite late what the substitution entailed and frequently operated on the assumption that the Crown's interest was still proprietary but qualified by rules of international law.[13] Such confusion was understandable for the international law rule of innocent passage was, in its practical consequences, no different from the public right of navigation at common law. Moreover, the public right of fishing applied only to British subjects and thus could be confused with the international rule that fisheries to a limited distance from the shore are the domain of the littoral state and reserved for nationals of that state. To add to the confusion a number of publicists had propounded the view that by international law coastal states had *dominium* in territorial waters and the subjacent *solum* to a maximum distance of three miles, which, of course, did not seem much different from the older doctrine that the Crown had title to the waters and *solum* of the narrow seas.[14] Judicial uncertainty was clearly evident in the handful of nineteenth-century cases dealing with Crown rights in lands below the foreshore and, in some

12 See O'Connell, 204, nn. 1-3.

13 This confusion is most clearly apparent in those cases in which the parties were either British subjects or in which the dispute was one between Crown and subject. While proceeding on the basis that the bed of the sea below low-water mark was Crown land, the courts frequently emphasised that the submerged lands of the Crown extended no further than three miles.

14 See O'Connell, 207, n. 6.

instances, there was either no or only veiled reference to international law.[15] Any distinction between Crown land and British territory would have been a distinction not easily comprehended by the common law mind. Hence, to speak, as does Dr. O'Connell, of abandonment of the early proprietary doctrine and the substitution of the international law doctrine of territorial waters is to underestimate the extent to which the proprietary doctrine continued to influence judicial reasoning throughout the nineteenth century.

In the year 1856, Dr. Lushington had the task of determining what the United Kingdom Parliament intended by the words "in the United Kingdom" contained in sections 458 and 460 of the Merchant Shipping Act. In his opinion they meant "the land of the United Kingdom and three miles from the shore".[16] Dr. O'Connell queries the correctness of this interpretation but in doing so he has failed to consider the very pertinent question whether any other interpretation would have been reasonable in the circumstances. The action was one for salvage services rendered to a vessel within three miles from low-water mark. To have held that "within the limits of the United Kingdom" meant territory down to low-water mark would have had the result of excluding from Admiralty jurisdiction any actions for salvage services rendered beyond that point. Such a result the legislature could not have intended. If this had been its intention it would have been sufficient to refer to the rendering of services to ships and boats stranded on the shore. But section 458 referred to ships "stranded or otherwise in distress, on the shore of the sea or tidal water situate within the limits of the United Kingdom" and to the saving of "any wreck . . . within the United Kingdom". Dr. Lushington's view was that, taken together, these words indicated that Admiralty jurisdiction in actions for salvage service extended seawards to a distance of three miles.

To speak of *R. v. Keyn* as involving directly the extent of lands of the Crown or the limits of British territory is misleading, for the immediate issue was a jurisdictional question requiring constructon of statutes of ancient origin. Traditionally, jurisdiction between the Lord High Admiral's court and the ordinary courts had been divided according to whether the alleged offence took place above or below low-water mark. At the time the Admiral's criminal jurisdiction was transferred to the common law courts (the sixteenth century) it was recognized that the Admiral had jurisdiction over English ships only. The transfer of jurisdiction conferred no

15 See, *e.g.*, *Blundell v. Catterall* (1821) 5 B. & Ald. 268; *Benest v. Pipon* (1829) 1 Knapp 60 at 67; *A.-G. v. Chambers* (1854) 4 De G.M. & G. 206; *Free Fishers of Whitstable v. Gann* (1865) 11 C.B. (N.S.) 387. In those cases one finds references to seventeenth and eighteenth-century English law books (*e.g.*, Coke, Hale, Selden and Blackstone) in which the proprietary rights of the Crown in submerged lands and marginal seas had been asserted categorically. There is little to indicate that the Crown might have abandoned its traditional claims although Cockburn C.J. in *R. v. Keyn* recognised that the Crown's claims to narrow seas had "long since been abandoned" (at 175).

16 *The Leda* (1856) (Swab.) Adm. 40. See also *The Annopolis* (1861) 1 Lush. Adm. 306 where Dr. Lushington maintained that the United Kingdom Parliament had a right to legislate for foreigners within territorial waters. In this instance he referred disjunctively to British territory and waters within the three-mile limit.

additional powers upon the common law courts and the power given to the Central Criminal Court by the statute 4 and 5 Wm. 4, c. 36, to try "offences committed on the high seas and other places within the jurisdiction of the Admiralty of England" gave it only such criminal jurisdiction as had been conferred upon the Admiral by statute.

The Crown's argument in *R. v. Keyn* that the Central Criminal Court had jurisdiction to try Keyn rested not, as Dr. O'Connell suggests,[17] upon the contention that territorial waters came within the body of the county. Indeed, the Crown admitted that the alleged offence did not occur within the body of the county. Essentially, the Crown's argument was that the ancient jurisdiction of the Admiral under statutes of the reign of Richard II should be interpreted in the light of contemporary international law. Cockburn C.J. understood the Crown to be urging

> ". . . recourse to a doctrine of comparatively modern growth, namely, that a belt of sea, to a distance of three miles from the coast, though so far a portion of the high seas as to be still within the jurisdiction of the admiral, is part of the territory of the realm, so as to make a foreigner in a foreign ship, within such belt, though on a voyage to a foreign port, subject to our law. . . ."[18]

Even if the majority had accepted the argument that territorial waters were part of the territory of the United Kingdom—subject to its *dominium* or sovereignty—that would not necessarily have resolved the problem of whether the Lord High Admiral would have had jurisdiction. Admiralty jurisdiction had been defined by two statutes of Richard II's reign and at a time when there were no rules of international law defining the jurisdiction of States in territorial waters. The first of the statutes (13 Ric. 2, c. 5) provided "that the admirals and their deputies shall not meddle from henceforth with anything done within the realm of England, but only with things done upon the sea, according to that which had been duly used in the time of the noble King Edward, grandfather of King Richard the Second". The second (15 Ric. 2, c. 3) re-asserted that the Admiral had no jurisdiction over causes arising within the body of the county but conferred concurrent jurisdiction with the common law courts in cases of murder and mayhem committed on ships at the mouths of great rivers.

To regard territorial waters as part of British territory would have been tantamount to holding that they were part of "the realm of England" which, on a strict construction of 13 Ric. 2, c. 5, would have excluded the Admiral from the exercise of jurisdiction. To characterize territorial waters as a category of British territory intermediate between "the realm" and "the body of the county" would not have helped. In either event, to concede that Keyn came within Admiralty jurisdiction would have so altered the meaning of the statutes as to produce what was tantamount to an amendment of those statutes.

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17 O'Connell, 206.

18 *R. v. Keyn* at 173.

Most of the minority judges appear to have glossed over this problem. Lord Coleridge C.J. stated that the offence had been committed within the realm and without considering the statutory basis of Admiralty jurisdiction, concluded that the Admiralty formerly had, and its jurisdictional successor still had, criminal jurisdiction over aliens.[19] Brett J.A. likewise sustained the plea that the Admiralty had jurisdiction but did so on the basis that the term "realm" in the statute 13 Ric. 2, c. 5, meant only that part of the realm which was within counties.[20] In the judgment of Amphlett J. A., the offence, having been committed on British territory on the high seas, was "clearly within the former jurisdiction of the Admiralty".[21] Grove J.'s agreement that the offence would have been cognizable by the Admiral was predicated on the analogy of offences committed within ports or havens. Over such offences the Admiralty had concurrent jurisdiction with the common law courts. If territorial waters were part of British territory the Admiralty must have criminal jurisdiction over offences committed in territorial waters "in the same right" as it had jurisdiction over offences committed in ports and havens.[22]

In Lindley J.'s opinion the Admiral's statutory criminal jurisdiction "both as regards distance from the shore and as regards persons . . . was as wide as it could be . . .".[23] The statutes he referred to were not the statutes of Richard II but the statute of 28 Hen. 8, c. 15, and the statute 39 Geo. 3, c. 37, and it was on the basis of them rather than of any rule whereby territorial waters were deemed part of British territory that the Central Criminal Court now had jurisdiction. What Lindley J. overlooked was the fact that the statute 28 Hen. 8, c. 15, simply transferred Admiralty jurisdiction from the Admiral to commissioners appointed under the statute and that despite the generality of the terms in which the offences cognizable by the Admiral were described, the Admiralty formerly had no jurisdiction over foreign vessels on the high seas. The statute 39 Geo. 3, c. 37, extended the commissioners' jurisdiction to all offences committed upon the high seas out of the body of the counties but once again did not specify the geographical limits or the class of persons over which criminal jurisdiction might be exercised. The striking feature of Lindley J.'s judgment is that without making inquiry as to what rules of international law had been universally recognized in the reign of Henry VIII, he assumed that Parliament intended that the Admiral's criminal jurisdiction over aliens should extend no further than three miles from low-water mark. Had Lindley J. inquired more deeply into the theoretical foundation of the exercise of Admiralty criminal jurisdiction in the fifteenth century he would have found that the notion of territorial waters was unknown and that the claim to jurisdiction on the high seas was confined to English subjects and vessels. Finding no

19 *Ibid.* at 158.
20 *Ibid.* at 146.
21 *Ibid.* at 118.
22 *Ibid.* at 116-7.
23 *Ibid.* at 87.

authority to support his conclusion that criminal jurisdiction over aliens on board foreign vessels located in territorial waters might be exercised, Lindley J. fell back on the necessity of its exercise for "the preservation of peace and order" in the littoral State.[24]

Without seeking to dispute the merits of the reasons given by Lindley J. for the conclusion that foreign vessels *ought* to be subject to the criminal jurisdiction of British courts when, in the course of innocent passage through territorial waters, aliens on board inflict injury upon British subjects, the proposition that the Parliaments of Henry VIII and George III respectively intended that such jurisdiction should be exercised by English courts is unacceptable on purely historical grounds. Much is to be said for the view that statutes should be interpreted consistently with the current version of international law irrespective of what Parliament might have intended, but this was not the view taken by Cockburn C.J., who of all the judges sitting in *R. v. Keyn* was most impressed by the historical origins of Admiralty jurisdiction and by the theory that the courts are but the executors of Parliament's will.

His considered opinion was that in the reign of Henry II the realm and the body of the county extended no further than low-water mark and that the Admiral's jurisdiction ranged over the high seas irrespective of the proximity of the seas to the coasts. Speaking of the two statutes of Richard II he commented:

> ". . . There is no distinction taken between one part of the high sea and another. The three-mile zone is no more dealt with as within the realm than the seas at large. The notion of a three-mile zone was in those days in the womb of time".[25]

The Admiral's jurisdiction beyond the realm had never, he said, extended to aliens aboard foreign vessels on the high seas. "There having been no new statute conferring it, how has he acquired it?"[26] The only way in which jurisdiction could be acquired would be through legislative enactment.[27] An act of the Crown or Parliament would be sufficient to convert high seas to British territory. Whether an executive act would of itself and without a specific legislative enactment be effective to confer criminal jurisdiction on the successor to the Admiral's jurisdiction, Cockburn C.J. did not state clearly.[28]

To describe *R. v. Keyn* as determining that territorial waters were "outside the realm"[29] and as clearly deciding "that the territory of England ends at low-water mark"[30] fails to take sufficient account of the majority's disinclination to do that which they believed to be the function of the legislature rather than that of the Court, namely, the expansion of Lord

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24 *Ibid.* at 96. See also at 92, 97-8.
25 *Ibid.* at 194.
26 *Ibid.* at 197.
27 *Ibid.* at 170, 198, 230-1.
28 *Ibid.* at 202.
29 O'Connell, 206.
30 *Ibid.* at 209.

High Admiral's statutory jurisdiction, the true nature of which was to be ascertained by reference to the views prevailing when the statutes were made. Having accepted the contention that "body of the county" and the "realm of England" occurring in the statutes of Henry II did not include territorial waters, the majority was not inclined to "amend" those statutes merely to accommodate developments in the international rules on territorial waters. To sustain the Crown's plea that the Court had jurisdiction the Court would have had to hold first, that territorial waters were not within the realm but were part of the seas, and secondly, that territorial waters were nevertheless British territory for the purpose of exercising jurisdiction over aliens. This in turn would have involved the drawing of a distinction between "the realm" and "British territory" and the conferring of jurisdiction upon the successor of the Lord High Admiral by judicial fiat.[31]

When the majority decisions in *R. v. Keyn* are read as decisions on the meaning of statutes, when it is remembered that the courts tended to interpret the criminal law in favour of the accused and when one considers the conception of parliamentary supremacy which runs through the opinions, it is difficult to accept without reservations the opinion that the case represents the final verdict on the limits of British territory in 1876 and the key to the interpretation of "territorial limits" occurring in section 51 (x) of the Commonwealth Constitution.

II. The Territorial Waters Jurisdiction Act, 1878

The primary purpose of this Act of the United Kingdom Parliament was to remedy the deficiencies in Admiralty jurisdiction which, according to *R. v. Keyn*, had precluded the criminal courts from exercising jurisdiction over aliens on board foreign vessels situated in territorial waters who committed offences against British subjects. The Preamble declared the jurisdiction of the Crown to extend and to have always extended "over the open seas adjacent to the coast of the United Kingdom and of all other parts of Her Majesty's dominions to such distance as is necessary for the defence and security of such dominions". Territorial waters were defined in section 7 as "such part of the sea adjacent to the coast of the United Kingdom, or the coast of some other part of Her Majesty's dominions, *as is deemed by international law to be within the sovereignty of Her Majesty*" (italics supplied), and provided that "for the purpose of any offence declared by this Act to be within the jurisdiction of the Admiral any part of the open sea within one marine league of the coast measured from low-water mark shall be deemed to be open sea, within the territorial waters within Her Majesty's dominions".

Although the operative parts of the Act related to jurisdiction, the first part of section 7 quoted above sought to incorporate into the statute

31 See *R. v. Keyn, per* Cockburn C.J., at 219.

32 O'Connell, 209-11. The authorities cited are a few brief remarks made by Lord Haldane in the course of argument in *A.-G. for British Columbia v. A.-G. for Canada* [1914] A.C. 153; Philp J.'s dissent in *D. v. Commissioner of Taxes* [1941] Q.S.R. 218; and one opinion given by the Law Officers.

the international law doctrine of territorial waters, more particularly that version according to which states are attributed with sovereignty over territorial waters. Whilst a statutory definition is a slender basis for the contention that the United Kingdom Parliament has assimilated territorial waters to British territory it is not without significance that the definition purports to declare what was already law. By virtue of the principle of incorporation of international law rules into municipal law wherever those rules are not inconsistent with statute law, and the principle of statutory interpretation according to which statutes are to be interpreted consistently with international law except where the words of the statute make this manifestly impossible, it may be argued that in appropriate cases a municipal court might interpret "territory" or "territorial limits" to include territorial waters. "Territorial limits" is not defined in the Commonwealth Constitution but one may assume that the Imperial Parliament did not intend to introduce a conception of maritime territory different from that implicit in the Territorial Waters Jurisdiction Act.

Whatever doubts *R. v. Keyn* may have given rise to regarding the limits of British territory, the Act of 1878 now provides the courts with a statutory mandate to assimilate territorial waters with land territory for purposes of delimitation of State territory. The authorities cited by Dr. O'Connell for a contrary interpretation of the Act are not of binding or even persuasive authority.[32] After all, a comment by Lord Haldane during the course of argument, the opinion of a dissenting judge of the Queensland Full Court and a categorical assertion by the Crown Law Officers, cannot be taken as the final word on the effects of the Act.

III. The Precedent Value of *R. v. Keyn*

In assessing the significance of *R. v. Keyn* in the interpretation of the Commonwealth fisheries power and in the determination of Federal-State rights with respect to the *solum* of territorial waters, one should not overlook the fact that the case dealt primarily with criminal jurisdiction over aliens. Had the case concerned Crown lands or breach of fisheries regulations the results might have been vastly different.[33] Had the accused, Keyn, been prosecuted under fisheries legislation the question whether territorial waters were part of British territory would never have arisen, for by the nineteenth century it was firmly established that coastal States had exclusive rights to fisheries in territorial waters and that in protecting their interests they might exercise jurisdiction over aliens who poached on their coastal fisheries or who infringed national fisheries laws. So far as jurisdiction over aliens was concerned, no distinction was made between fishing in territorial waters and fishing within State territory. Hence, in the context of national fisheries legislation reference to fisheries within territorial limits would normally mean fisheries within territorial waters.

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33 *R. v. Keyn* at 219.

Should the respective rights of the Commonwealth and the States in the *solum* of territorial waters be at issue, *R. v. Keyn* assumes less relevance than those cases between Crown and subject, and subject and subject, concerning the proprietary rights of the Crown in the seabed. Even if one accepts the interpretation of *R. v. Keyn* advanced by Dr. O'Connell it does not follow from the proposition that territorial waters are not British territory, that the *solum* is not British territory or Crown land. Sovereignty or *dominium* over the continental shelf does not imply sovereignty over the superjacent waters and by the same token a ruling that territorial waters are not subject to the sovereignty of the coastal state does not necessarily imply absence of sovereignty over the *solum*. Prior to *R. v. Keyn* there was ample authority for including within the category of Crown lands submerged areas below the foreshore and the only way of reconciling those authorities with *R. v. Keyn*, as interpreted by Dr. O'Connell, is by distinguishing the *solum* from the superjacent waters. While such a distinction is foreign to international law doctrine on territorial waters, there is no reason why it should not assume significance within a municipal legal system.

Whether the Crown in the right of the Commonwealth or the Crown in the right of the States owns the *solum* of territorial waters is primarily a municipal question and only secondarily an international question and for this reason the High Court might prefer to be guided by the rules regarding Crown lands under the sea than by any implications to be drawn from *R. v. Keyn*.

The late nineteenth century British cases on the submerged lands of the Crown are important in two respects, namely, the fact that they are decisions of the House of Lords and that they represent a fusion of medieval doctrine on Crown lands with modern international law doctrine on territorial waters. In *Gann v. The Free Fisheries of Whitstable* (1865),[34] a case involving the validity of a Crown grant of an oyster fishery in the bed of an arm of the sea, Erle C.J. in the court below (with whom Williams and Byles JJ. agreed) observed: "The soil of the seashore to the extent of three miles from the beach is vested in the Crown. . . ."[35] Without actually refuting Erle C.J., Lord Chelmsford in the House of Lords hastened to point out that whatever rights the Crown enjoyed in the marginal seas below the foreshore were derived from international law. Referring to the above quoted remarks of Erle C.J., Lord Chelmsford commented:[36]

> "With great respect for the learned Chief Justice, I do not think it can be assumed as an unquestionable proposition of law that, as between the Crown and its subjects, the seashore to the extent mentioned is the property of the Crown in such an absolute sense as that a toll may be imposed upon a subject for the use of it in the regular course of navigation. In stating the right of the Crown in the seashore, the

34 (1865) 11 H.L.C. 192.
35 (1865) 11 C.B. (N.S.) 387 at 413.
36 (1865) 11 H.L.C. at 217-8.

> text writers invariably confine it to the soil between high and low water mark. The three miles limit depends upon a rule of international law, which by every independent state is considered to have territorial property and jurisdiction in the seas which wash their coasts within the assumed distance of a cannon-shot from the shore. Whatever power this may impart with respect to foreigners, it may well be questioned whether the Crown's ownership in the soil of the sea to this large extent is of such character as of itself to be the foundation of a right to compel the subjects of this country to pay a toll for it in the ordinary course of navigation".

It may be significant that in *R. v. Keyn*, Cockburn C.J. noted only Erle C.J.'s judgment.[37] In Lord Chelmsford's judgment he would have found an unequivocal statement that States have "territorial property and jurisdiction" in the seas within three miles of their coasts and that the rule of international law to this effect is part of English law. As between British subjects the rule was expressed in the proposition that the bed of the sea below low-water mark to a distance of three miles is Crown land.

The Scottish courts appear to have little difficulty in incorporating into municipal law international law rules regarding exclusive fishing rights and exclusive ownership of the sea-bed and subsoil of territorial waters. Two decisions of the House of Lords on appeal from Scotland are of particular interest. *Gammell v. Commissioners of Woods and Forests*[38] (1859) concerned the alleged exclusive right of the Crown to a salmon fishery on the Scottish coasts. Although the distance seawards to which the exercise of the prerogative might be exercised was not in issue, Lord Wensleydale did state that by the law of nations the right could not be exercised beyond three miles and that the area within this three miles is "under the dominion of the country by being within cannon range".[39] Cockburn C.J. in *R. v. Keyn* construed this observation as unnecessary to the decision[40] but, on the other hand, it may be argued that adjudication of the dispute regarding the exclusiveness of the Crown's right proceeded on the assumption that the United Kingdom had dominion over territorial waters. Unless this assumption was made there would have been little point in considering whether the Crown might exclude British subjects from salmon fishing grounds.

Crown property in the bed of territorial waters was affirmed in *Lord Advocate v. Clyde Navigation Trustees*[41] (1891) and *Lord Advocate v. Wemyss* (1900)[42] the latter being a decision of the House of Lords handed down in 1899. Dr. O'Connell maintains, contrary to the views expressed in Halsbury,[43] that those Scottish decisions do not express the law applicable to territorial waters in other Crown dominions for the reason that

37 *R. v. Keyn* at 228.
38 (1859) 3 Macq. App. Cas. 419.
39 *Ibid.* at 465.
40 *R. v. Keyn* at 227.
41 (1891) 19 R. 174.
42 [1900] A.C. 48.
43 *Laws of England* (3rd ed.), Vol. 7, 454 n. (k).

"the Scottish kings from time immemorial had property in the marginal sea, and differing streams of interpretation in Scotland and the rest of Great Britain are to be expected".[44] Dr. O'Connell ignores the fact that the English kings also asserted property in the seas from early times and that although by 1800 the general claim to property in marginal seas had been abandoned, the claim of ownership in the sea-bed had never been relinquished. The fact that after Magna Carta the Crown could not make grants of fisheries and the fact that the proprietary rights of the Crown were subject to public fishing and navigation rights tended to obscure the doctrinal basis of the Crown's rights. But the proper view, it is submitted, is that the vindication of various public rights qualifying the Crown's rights did not affect the proprietary character of the Crown's rights.

Another factor which tends to diminish the importance of *R. v. Keyn* in the interpretation of the Commonwealth fisheries power is the absence of general agreement among the superior British courts as to what was actually decided in the case. In the seventy years since judgment was given no appellate court whose decisions are binding on the High Court of Australia has interpreted the decision as laying down unequivocally that territorial waters are not part of British territory or that the *solum* of territorial waters is not Crown land. In *Secretary of State for India v. Chellikani Rama Reo* (1916)[45], a case proceeding from India to the Judicial Committee of the Privy Council, Lord Shaw had no doubt that *R. v. Keyn* was concerned only with Admiralty jurisdiction and that it was irrelevant to the question whether islands arising out of the sea within the three-mile limit were Crown lands or *terra nullius* which might be appropriated by the first occupier. Counsel for the respondent occupiers had argued that *R. v. Keyn* had thrown doubts on the correctness of the proposition that land below low-water mark is Crown land, to which Lord Shaw replied: "When, however, the actual question as to the dominion of the bed of the sea within a limited distance of our shores has been actually in issue, the doubt just mentioned has not been supported, nor has the suggestion appeared to be helpful or sound".[46] Although this opinion was expressed in an Indian case, the principles applied by the Judicial Committee were principles of English law and as such pertinent to adjudication of similar issues in Australia. For this reason and in view of the authoritativeness of Judicial Committee opinions, the High Court of Australia might well prefer the emphatic pronouncement of Lord Shaw to the uncertain implications of *R. v. Keyn*.[47]

In assessing the weight of *R. v. Keyn* one cannot ignore the repeated stress of the majority upon the incompetence of the courts of law to pass

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44 O'Connell, 217, n. 2.

45 85 L.J.P.C. 222.

46 *Ibid.* at 224.

47 In *D. v. Commissioner of Taxes* [1941] Q.S.R. 218, Webb C.J. accepted the decision as settling the question whether the Australian States had dominion over territorial waters. Douglas J. drew issue with this interpretation but on the other hand did not pronounce on the effects of *R. v. Keyn*. See also O'Connell's strictures on *Chellikani's Case* at 222.

finally on the extent of State territory. In the absence of any unequivocal declaration by the legislature or the executive they were not prepared to pronounce upon a question about which the publicists were divided. There may have been evidence favouring the Crown which was not brought to the Court's notice. Dr. O'Connell has pointed to "some of the most important evidence favouring sovereignty over territorial waters" which the Court overlooked,[48] and it is conceivable that any court considering the territorial limits of the Australian colonies in 1900 might have regard to this as a surer guide to the Crown's claims than *R. v. Keyn.*

Where the limits of State territory are directly in issue the court's most prudent course is to request from the executive a statement as to what is comprised within the territory of the State. This course was followed in *The Fagernes* (1926) where the merits of the case depended upon whether a collision between two vessels occurred within British territorial waters. The Court of Appeal finally accepted a statement of the Attorney-General that the collision occurred outside territorial waters. Atkin L.J.'s comment was:

> "Any definite statement from the proper representative of the Crown as to the territory of the Crown must be treated as conclusive. A conflict is not to be interpreted between the Courts and the Executive on such a matter where foreign interests may be concerned, and where responsibility for protection and administration is of paramount importance to the Government of the country".[49]

Whether territorial waters are territory of the Australian States does have international implications, but in disputes regarding the limits of State territory the certificate of the Commonwealth Executive could not be accepted by the courts as conclusive, even although it is the Commonwealth which bears responsibility for the conduct of foreign relations. Under the Federal Constitution the fixing of State boundaries is not a matter exclusively within the power of the Commonwealth and to allow the Commonwealth Executive to determine what are State limits would amount to a serious derogation of State rights and a disregard of the constitutional provisions safeguarding the territorial integrity of the States. Because of the federal complication neither the certificate of the Executive of the States nor the Commonwealth Executive could be accepted as conclusive of the States' limits. It is submitted that the courts would be entitled to look at various legislative and executive acts of the United Kingdom, and any subsequent legislative and executive acts of the Commonwealth of Australia and the Australian States, in order to determine for themselves what the territorial limits of the States were at the critical date.

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48 *Ibid.* 216. This evidence consisted of the report of the Select Committee on British Channel Fisheries (1833), a subsequent Fishery Convention with France (1839), Customs Regulations declaring the limits of the Port of Dover (1845), and a statement made in the House of Lords.

49 [1927] P. 311.

IV. Australian Colonial Constitutions

None of the colonial constitutional instruments throw direct light on the question whether territorial waters were to be treated as part of the territory of individual colonies. Instruments defining the boundaries of the colonies did not mention specifically a maritime boundary drawn at any distance from the shore. On the other hand, the courts in considering the territorial extent of the legislative powers of colonial legislatures assimilated territorial waters to colonial territory.

Although he concedes that there is a "whole stream of opinions and decisions on the subject of colonial extra-territorial legislative incompetence which assume that there is jurisdiction over territorial waters because these are 'intra-territorial'," [50] Dr. O'Connell maintains that the identification of jurisdiction and sovereignty was ill-conceived and that the only basis upon which territorial waters could be treated as "intra-territorial" would be legislative or executive acts of the United Kingdom. [51] Admittedly the international law conceptions of jurisdiction and territorial sovereignty are distinct, and admittedly the common law of the nineteenth century recognized that jurisdiction did not always imply sovereignty over the place or places in which jurisdiction might be exercised, but the notion of jurisdiction implicit in the decisions and opinions cited by Dr. O'Connell was sufficiently comprehensive as to make it indistinguishable from sovereignty. The application of colonial statutes in territorial waters was not limited to British subjects and the competence of colonial legislatures to legislate for territorial waters was limited effectively only by Imperial statutes applying in the colonies.

The theoretical foundation of colonial legislatures' competence to legislate for territorial waters and their incompetence to legislate beyond territorial waters did not engage serious attention until after the colonies federated. To assert, as does Dr. O'Connell, that "colonial legislatures had competence over territorial waters because they were exercising over them the protective jurisdiction necessary for the 'peace, order and good government' of the colonies, not because the waters were within their boundaries", [52] is to introduce a rationale which was unknown to nineteenth-century courts. At that time the doctrine of extra-territorial incompetence was not thought of as derived from the grant of power to legislate for peace, order and good government. Indeed, its theoretical foundations were shaky and it was only when the courts began to seek ways of sustaining colonial laws of extra-territorial application that the words "peace, order and good government" were seized upon as the proper criterion for determining whether colonial laws should be applied extra-territorially.

While the law officers and the courts may have been mistaken in assuming that territorial waters were part of colonial territory, their erroneous assumption is not irrelevant when considering what the framers

50 O'Connell, 224; also 248-56.
51 *Ibid.* 226.
52 *Ibid.* 224.

of the Federal Constitution intended by the division of legislative competence with respect to fisheries between the State and Commonwealth Parliaments. What "territorial limits" means in the context of fisheries regulation does not, of course, answer the question whether in 1900 the seaward boundaries of the Australian colonies extended to the low-water mark or to the outer rim of territorial waters.

The legislative and executive instruments of the United Kingdom defining the Australian colonies refer to the seaward boundaries as "the coast" or "the sea", while in the case of Van Diemen's Land the colony was described as all islands and territories lying within specified degrees of latitude and longitude.[53] Dr. O'Connell cites several cases in which "the coast" was interpreted to mean low-water mark but, with the exception of one case, none of those cases concerned colonial boundaries.[54] It cannot be assumed that the meaning of "coast" is constant and it is possible that its meaning in the context of conveyances, rules regarding property rights in wrecks, or the jurisdiction of parishes, manors and local authorities may be different from its meaning in the context of the boundaries of State territory.

R. v. Gomez (1880)[55] is the only Australian case in which "the coast" occurring in Letters Patent was construed to mean low-water mark. This interpretation was followed by Philp J. in his dissenting judgment in *D. v. Commissioner of Taxes* (1941) but was discredited by Webb C.J., who took the view that the opinion of the Judicial Committee in *Chellikani's Case* had resolved the issue. It is interesting to note that the ruling in *R. v. Gomez*, to the effect that an island one and one half miles from the mainland of Queensland was not within Queensland, conflicted with an opinion of the Law Officers in 1863 that islands within three miles from the mainland were "dependencies of Australia".[56]

Even if determination of what is meant by "the coast" or "the sea" is irrelevant to the territorial delimitation of State powers to legislate with respect to fishing, it is of the utmost importance in determining whether the sea-bed and subsoil of territorial waters are lands of the Crown in the right of the States or the Commonwealth. The Judicial Committee had thrice on appeal from Canada supported the notion that the power to legislate with respect to fisheries does not imply Crown ownership of the *solum* or of the fisheries, but in none of those cases did the Committee pass judgment on the ownership of the *solum* or fisheries

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53 See Royal Commission issued to Governor Phillip in 1786 defining the settlement of New South Wales; Order in Council separating New South Wales from Van Diemen's Land, 1825; An Act for the Better Government of Her Majesty's Australian Colonies, 1850 (13 and 14 Vic., c. 59, s. 1); Australian Colonies Act, 1861 (61 and 62 Vic., c. 22, s. 3).

54 O'Connell (at 227) cites the *Forty-Nine Casks of Brandy* (1836) Hag. Adm. 257 at 275, a case concerning the claim of a lord of the manor to wreck; *Esquimault and Nanaimo Rly. Co. v. Treat* (1919) 121 L.T. 657 at 658, a case concerning the construction of a statutory conveyance; and *Mellor v. Walmesley* [1905] 2 Ch. 164.

55 Q. *Crim. R.* 1860-1907, 119.

56 Cited by O'Connell at 243.

within the three-mile limit.[57] Whether the Provinces have property in the *solum* and fisheries has become an academic question for, irrespective of any proprietary interests they may have, the public right of fishing precludes them from granting exclusive fishing rights to individuals.[58]

The position in respect of sedentary fisheries and the exploitation of the mineral and living resources of the sea-bed and subsoil is slightly different for in those matters the question of Crown ownership of the *solum* cannot be avoided. The fisheries legislation of several Australian States makes provision for the granting of leases of oyster beds and other sedentary fisheries, and in some instances Crown land is defined as including the *solum* of tidal waters.[59]

V: Alteration of State Boundaries

In the international sphere it is the Commonwealth rather than the States which pronounces on the limits of Australian territory and the area claimed by Australia as territorial waters. In its replies to questionnaires from the Preparatory Committee of the Conference for the Codification of International Law in 1929 and from the International Law Commission, the Australian Government has declared Australian territorial waters to be three miles from low-water mark. It is not beyond the realms of possibility that some time in the future more extensive claims may be made or that the territorial waters claimed might be altered by the adoption of the straight baseline method of delimitation along the eastern coast of Queensland or by the drawing of closing lines across bays. Assuming that territorial waters are State territory, would an executive or legislative act of the Commonwealth endow the States with additional territory? If territorial waters are not the territory of the States, are the States competent to extend their maritime boundaries by claiming larger areas of sea enclosed by headlands as internal waters? Irrespective of whether the States' territory includes territorial waters, any redefinition

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57 *A.-G. for Canada v. A.-G. for Ontario* [1898] A.C. 700; *A.-G. for British Columbia v. A.-G. for Canada* [1914] A.C. 153; *A.-G. for Quebec v. A.-G. for Canada* [1921] 1 A.C. 401.

58 Whether the Canadian cases asssist greatly in the interpretation of s. 51 (x) of the Commonwealth Constitution is doubtful seeing that the British North America Act (30 and 31 Vict. c 3, s. 91 (12)) confers upon the Dominion Parliament power to legislate on fisheries in both inland and tidal waters whilst the Provinces have power to legislate on civil and property rights (s. 92). Moreover, the British North America Act has no provision comparable to the provision in the Commonwealth Constitution preserving the powers of the State Parliaments to legislate on subjects for which specific legislative power has not been conferred on the Commonwealth Parliament.

59 See Part V of the Victorian Fisheries Act, 1958 (No. 6252) Division III of the Tasmanian Fisheries Act, 1959 (No. 16 of 1959); ss. 4 and 67 of the New South Wales Fisheries and Oyster Farms Act, 1935 (No. 58); s. 4 of the South Australian Fisheries Act of 1917-35 (No. 1293 of 1917). *Cf.* the Queensland Fisheries Act, 1957 (6 Eliz. II, No. 11) (6(1)) which defines Queensland water as "the sea within the territorial limits of Queensland . . ."; "Land" as "any land in or within the territorial limits of Queensland, including land covered by water, as well as shoals, reefs and other land, whether of coral, rock, or other formation"; "Oyster bank" as "land lying between highwater mark and two feet below low water mark, and licensed or intended to be licensed as a catchment or maturing ground"; "Oyster ground" as including oyster banks and "any land below high water mark suitable for oyster culture, or where oysters are found".

of territorial waters by the use of straight baselines would enlarge the area of inland waters and therefore the territory of the States.

Dr. O'Connell has concluded that the Commonwealth Executive may not only increase the area of State inland waters but, assuming territorial waters to be State territory, may also extend the States, maritime boundaries by claiming areas of the high seas as Australian territorial waters.[60] "It is reasonbly clear", he writes, "that where the Commonwealth has defined the national boundary, either in specific instances by executive action or by general statements of its views on international law, an Australian court, provided there is no derogation from State rights, would be entitled to treat the definition as decisive".[61] A court might, he continues, take one of two views. It might regard the definition as extending State territory or territorial waters, or else "it might act upon the theory that State boundaries were frozen as at 1900 when only three miles of territorial waters were allowed"[62] and treat the additional territory or territorial waters as Commonwealth territory or territorial waters.

A further possibility considered by Dr. O'Connell is that of the Commonwealth "by general or specific declaration" drawing "the national boundary *within* a line claimed by the State as its boundary". Such a declaration would, he submits, be ineffective to divest a State of territory.[63]

In discussing the probable effect of Commonwealth declarations on territorial waters Dr. O'Connell has neglected to consider the constitutional limitations on alteration of State boundaries. The powers of boundary alteration formerly entrusted to the colonies by the Colonial Boundaries Act, 1895,[64] were transferred to the Commonwealth by section 8 of the Constitution Act. This means that from 1901 the consent of the Commonwealth Parliament is necessary for any Order in Council or Letters Patent altering Australian boundaries to become effective.

Authority to alter State limits is conferred by the Constitution upon the Commonwealth Parliament (s. 123) but for the alteration to be effective the consent of the Parliament of the State affected and "the approval of the majority of the electors of the State voting upon the question" must be given.[65] To suggest that an act of the Commonwealth Executive is

60 O'Connell, 231; see also 257.

61 *Ibid.* 257.

62 *Ibid.*

63 *Ibid.* 258.

64 58 and 59 Vic. c. 34. Acquisitions of the continental shelf adjacent to British colonies have been made by Orders in Council promulgated under this Act.

65 Quick and Garran maintained that the powers conferred upon the Commonwealth Parliament under section 8 of the Constitution Act enabled the Commonwealth to alter State boundaries and that in view of section 123 of the Constitution alteration of State boundaries by Order in Council or Letters Patent would be ineffective unless the Parliament of the State affected and a majority of electors in that State also gave their consent. (See J. Quick and R. R. Garran, *Annotated Constitution of the Australian Commonwealth* (Sydney, 1901), 379). Dr. Wynes, however, sees no inconsistency between section 123 and the Colonial Boundaries Act as it applies to Australia. His argument is that alteration of boundaries of the Commonwealth under the Act is not the same as alteration of State limits by the Commonwealth and that in assenting to an alteration of Commonwealth limits under the Act "the Commonwealth Parliament is not effecting any alteration but is merely complying with the

sufficient to increase or decrease State territory would be to make a mockery of this constitutional provision. The requirement of the approval of a majority of electors may make State boundary alteration unduly cumbersome but it seems unavoidable if the States are to be attributed with more territory than that which they possessed in 1901. If territorial waters were not in 1900 within colonial territory the consent of the State Parliaments and a majority of electors in each of the States would be necessary only if the Commonwealth's extended claim also affected the definition of inland waters. If territorial waters were State territory, the failure of State Parliaments and the electors to approve of an extension of territorial limits would give rise to the anomalous situation of the States and the Commonwealth having separate territorial waters. The implications for the regulation of fisheries could be quite serious if the High Court took the view that Australian waters referred to the seas beyond the territorial waters claimed by the Commonwealth but disclaimed by the States. The only way out of the dilemma would be to regard the addition to territorial waters as territory acquired by the Commonwealth in respect of which the Commonwealth Parliament might legislate under its power with respect to Commonwealth territories.

Conclusion

While the main object of this essay has been to answer some of the arguments developed by Dr. O'Connell regarding the legal status of territorial waters around the Australian coasts and the limits of State fisheries jurisdiction, it is not contended that the doubts which Dr. O'Connell has raised concerning the validity of commonly held assumptions are completely without foundation. Indeed, he has amply demonstrated that the existing definitions of Commonwealth and State fisheries jurisdiction are most unsatisfactory and that the question of ownership of the *solum* of territorial waters needs to be clarified.

In the foregoing pages the writer has attempted to elucidate reasons for treating the controversial decision in *R. v. Keyn* as less relevant to the interpretation of the Commonwealth fisheries power than Dr. O'Connell supposes. In terms of binding precedent there are cases decided before 1900 which tend to support a conclusion contrary to that reached in *R. v. Keyn* and which could be regarded by the High Court of Australia as of more persuasive authority. In addition, there are opinions of the Judicial Committee pronouncing on the effects of *R. v. Keyn* which provide convenient pegs on which to hang vindications of the claim of the Australian States that territorial waters are part of their territory. In

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conditions precedent to the exercise of power by a superior body. Moreover, the purposes of the Acts are different; section 123 has nothing to do with the Colonial Boundaries Act, it is altogether *alio intuito*": J. Anstey Wynes, *Legislative, Executive and Judicial Powers in Australia* (2nd ed. 1956), 151. While the co-existence of section 8 of the Constitution Act and section 123 is not entirely satisfactory, this writer takes the view that the Colonial Boundaries Act, as it applies to Australia, has to do with alteration of Commonwealth territorial limits. If such alteration purports to affect State limits also, the alteration in State limits would not become effective until the State Parliaments and State electors had approved of the alteration.

Chellikani's Case, Lord Shaw rejected *R. v. Keyn* as an authority on ownership of the *solum* of territorial waters. If the Judicial Committee in *A.-G. for British Columbia v. A.-G. for Canada*[66] entertained no doubts about what was settled in *R. v. Keyn* and its effect throughout the Empire, it would scarcely have avoided so carefully determination of the question of *dominium* in territorial waters, and it is unlikely that Lord Haldane would have referred to the subject as "unsettled". In his opinion, until the Powers could discuss and agree upon the meaning of territorial waters it was improbable that "the conflict of judicial opinion which arose in *R. v. Keyn* would be satisfactorily settled", or that "the question whether the shore below low-water mark to within three miles of the coast forms part of the domain of the Crown or is merely subject to special powers necessary for protective and public purposes" would be resolved.[67]

The issue in *R. v. Keyn* was presented not as one concerning the proprietary interests of the Crown but as one concerning criminal jurisdiction. In view of the fact that most of the judges considered the Court's primary task to be the interpretation of early statutes defining the Admiral's jurisdiction, it would seem perfectly legitimate to regard the reasoning of the majority as having no bearing on the problem of ownership of territorial waters and the subjacent *solum*. Although the original proprietary claims of the Crown to the narrow seas were abandoned, before the foundation of the Australian Colonies, any question about the territorial limits of the States may still be approached as one directly affecting the extent of Crown lands. If that is so, the cases on Crown lands below the foreshore become as pertinent if not more pertinent than *R. v. Keyn*. Those cases, more especially those decided about the time when the boundaries of the Australian colonies were fixed, together with the opinions and intentions of representatives of the United Kingdom executive during the nineteenth century, probably provide the best guide to the courts in the interpretation of the legislative and executive instruments defining colonial boundaries.

Although neither the Commonwealth nor the States have yet disputed the ownership of territorial seas, State fisheries legislation has in some cases brought tidal waters and the *solum* of the three-mile limit within the category of Crown lands. The Crown in the right of the Commonwealth has neither challenged nor explicitly affirmed this claim, but the Proclamation of 1953 declaring Australian sovereignty over the continental shelf expressly stated that the status of the *solum* of territorial waters was not to be affected. This reservation would have been redundant had the Commonwealth also asserted ownership of the *solum* of territorial waters. In the event of the Commonwealth subsequently claiming *dominium* of territorial waters and the subjacent sea-bed and subsoil, the States might plead, as did the State of California in *U.S. v. California*, that if the Crown in the right of the Commonwealth ever had proprietary rights in territorial waters it has since lost them by laches or estoppel.

66 [1914] A.C. 153.
67 *Ibid.* at 174-5.

California argued that because the federal government in some instances had acquired title to lands in the maritime belt from California and because the Department of the Interior had denied applications for federal oil and gas leases on the assumption that the submerged lands in question were owned by California, the federal government could not now assert paramount rights. The United States Supreme Court rejected the contention that the federal government's rights had been forfeited through laches, estoppel or adverse possession. The Court said:

> "Even assuming that Government agencies have been negligent in failing to recognize or assert the claims of the Government at an earlier date, the great interests of the Government in this ocean area are not to be forfeited as a result. The Government, which hold its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed peculiarly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches or failure to act".[68]

Although the High Court of Australia probably would not be prepared to decide a dispute over ownership of territorial waters according to the paramountcy of rights of the federal-government doctrine enunciated by the United States Supreme Court, the consideration mentioned by the Supreme Court with reference to the applicability of the rules of estoppel, laches and adverse possession might not be altogether irrelevant to the determination of the application of estoppel and laches to the Crown in the right of the Commonwealth. It has been stated that the Crown is not bound by estoppels but it appears that so general a proposition is unfounded.[69] While the Crown is not bound by estoppels by deed, it is bound by estoppels by record and by estoppels by conduct or representation, *i.e.*, equitable estoppel.

The Supreme Court of New South Wales has recognized that equitable estoppel can be applied against the Crown in respect of lands of the Crown, provided that the Crown's power of disposing of the land is not fettered by statute.[70] In the case at bar, the power of disposition was fettered but, on the authority of several Judicial Committee decisions,[71] the Court readily conceded that in the absence of statutory provisions prescribing how Crown lands could be alienated or disposed of the Crown would be estopped in equity by the representations or conduct of Ministers of the Crown.

While the arguments advanced in the preceding pages tend to support the powers of the States to legislate on fisheries in territorial waters and State ownership in the *solum* to a distance of three miles from low-water mark, the present position is still surrounded by sufficient doubt as to

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68 (1947) 332 U.S. 19, at 39-40.

69 See H. Street, *Governmental Liability* (1953), 156-61.

70 *A.-G. v. The Municipal Council of Sydney* (1919) 19 S.R.N.S.W. 46.

71 *Plimmer v. The Mayor etc. of Wellington* [1883-84] 9 A.C. 699; *A.-G. of Southern Nigeria v. Holt* [1915] A.C. 599; *A.-G. for Trinidad v. Bourne* [1895] A.C. 83.

make clarification through amendment of the Federal Constitution and more precise definition of State limits worthy of serious consideration. The Royal Commission on the Federal Constitution in 1927 heard evidence from a number of witnesses on the subject of regulation of sea fisheries, but the Commission recommended no changes in the Commonwealth fisheries power. One witness, A. I. Clark of Tasmania, submitted a memorandum drawing the Commission's attention to the difficulties of determining what were State limits. In his opinion "whether the limits of the State extend to the three-mile limit is a question which is quite unsettled".[72]

Now that the Constitution is once again subject to review, the time is ripe for a reassessment of the Commonwealth's and State's fisheries power both in the light of the policy of dividing fisheries regulation between Federal and State authorities, and in the light of the conflicting legal opinion on the interpretation of the powers of the Commonwealth and State Parliaments. In anticipation of the discovery of oil in economically exploitable quantities within territorial seas attention needs also to be given to the problem of ownership in the *solum* and the division of legislative authority over oil drilling operations. The Federal Government has already interested itself in exploratory ventures and legislative sanction has been obtained for the payment of subsidies to private enterprises engaged in the search for oil. For some years now the Commonwealth Bureau of Mineral Resources, Geology and Geophysics has provided scientific assistance to petroleum prospectors and although the Federal Government has no explicit power under the Constitution to regulate or control oil drilling operations it is unlikely that its interest in promoting development of Australian petroleum resources will diminish in the foreseeable future. Many of the policy considerations which have figured in the American tidelands cases have equal application in Australia. But whether the national interest requires central control of coastal fisheries and exploitation of the mineral resources of the sea-bed are not matters which can be discussed profitably in an article whose primary purpose is to examine the legal status of territorial waters in the Australian federation.

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72 Commonwealth of Australia, *Royal Commission on the Constitution of the Commonwealth: Report of Proceedings and Minutes of Evidence* (1927), 931.