THE TORRES STRAIT ISLANDS: SOME QUESTIONS RELATING TO THEIR ANNEXATION AND STATUS

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I

Questions relating to the Torres Strait Islands and the rights of their inhabitants have come before the High Court in the last decade.[1] In one of these cases the High Court examined the constituent instruments by which the islands were annexed to Queensland in the nineteenth century. That case, *Wacando v Commonwealth*,[2] established that Darnley Island, which is situated about 92 miles north-east of Cape York Peninsula, was part of the Colony of Queensland and therefore within its boundaries at federation. The ratio of *Wacando* centred on the validating provisions of the Colonial Boundaries Act 1895 (Imp). There was however disagreement between various Justices in that case as to the effect of Imperial letters patent and local legislation passed in 1878 and 1879 which raised questions as to British constitutional law and practice relating to the annexation of new territory and the modification of colonial boundaries. These issues will be examined below.[3]

In 1859, the Colony of Queensland was established by Letters Patent made under the New South Wales Constitution Act 1855 (Imp).[4] Clause 1 of those Letters Patent[5] defined the boundaries of the area separated from New South Wales and constituted as a separate colony under the name of Queensland. After describing the land area, the Letters Patent provided that the territory of the new Colony included "all and every the adjacent islands their members and appurtenances in the Pacific Ocean". These island limits were not delineated by either an eastern meridian of longitude or a northern parallel of latitude.

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1 *Wacando v The Commonwealth* (1981) 148 CLR 1 and *Mabo v Queensland and Another* (1988) 166 CLR 186. In the latter case, the High Court was concerned with s 3 of the Queensland Coast Islands Declaratory Act 1985 (Qld) which declared, *inter alia*, that upon the islands being annexed to Queensland, they were vested in the State Crown freed from all other rights etc. It was held that, on the assumption that the inhabitants of the Murray Islands (located in the north east region of the Torres Strait) could establish the traditional rights which they were claiming, the section of the State Act was inconsistent with s 10(1) of the Racial Discrimination Act 1975 (Cth). The issue of the existence of the land rights is still before the courts. At the time of writing the Supreme Court of Queensland is determining questions of fact remitted to it by the High Court.

2 (1981) 148 CLR 1.

3 *Infra* text at nn 47-53.

4 The power to separate the northern portion of New South Wales was first inserted in the Australian Constitutions Act 1842 (Imp) s 51. With a modification as to the southern boundary of the territory to be separated, it was continued in the Australian Constitutions Act 1850 (Imp) s 34 and in the New South Wales Constitution Act 1855 (Imp) s 7. Scheduled to that latter statute was the local New South Wales Constitution Act 1855 (Imp) pursuant to which responsible government was granted to the Colony. Section 46 of that Act contained a delineation of the boundaries of the Colony. The present boundaries are set out in the Constitution Act 1902 (NSW) s 4.

5 The Letters Patent of 1859 are to be found in *Acts and Laws Relating to the Constitution of the State of Queensland* (1989) 10.

This absence of a precise maritime boundary in the constituent instrument prompted debate as to whether any distance from the coast criterion (that is, a three mile limit) was implicitly embodied in the description of boundaries in the Letters Patent. This in turn led to discussion as to the extent of New South Wales boundaries in 1855.

The occasion for investigating the question arose when certain requests were made by persons resident in one or other of the Australian colonies for rights to extract guano — a valuable fertiliser — from small cays lying in the Barrier Reef area in the northern waters off the Colony and also further out in the Pacific Ocean. A request was made to the Colonial Office by the Queensland authorities to determine this question because they did not consider that the Colony had the jurisdiction to determine the extent of its maritime boundaries.[6] The advice of the Imperial Law Officers to the Colonial Office was delivered on May 26 1863.[7] That advice indicated that the definition of 'adjacency' was to be derived from the instruments defining the boundaries of New South Wales as at 1855, that is, at the time when responsible government was granted to that Colony by Imperial legislation.

The definition of the boundaries of New South Wales was to be found in Letters Patent containing the various Commissions of the Crown given to the Colonial Governors on their accession to office and at other times when changes were made to the boundaries of the territory over which they had jurisdiction. The particular Commission given to the New South Wales Governor of the time, Sir William Denison, on 8 September 1855 contained a description of the boundaries of the territory of New South Wales. The boundaries of the Colony were described in that Commission as follows:

> All that portion of Our territory of Australia or New Holland lying between the 129th and 154th degree of east longitude, and northward of the 40th degree of south latitude, including all the islands adjacent in the Pacific Ocean within the longitudes and latitudes aforesaid, and also including Lord Howe Island, being in or about 31 degrees 30 minutes south, and the 159th degree of east longitude save and except the territories comprised within the boundaries of the province of South Australia and the Colony of Victoria, as at present established.

It is interesting to note, however, that the boundaries of the Colony of New South Wales were also defined in the New South Wales Constitution Act 1855 (Imp) scheduled to the Imperial Act granting responsible government to that Colony. There was a divergence in the boundaries description in the Denison Commission compared with that set out in s 46 of the New South Wales Constitution Act 1855 (Imp). While the Commission refers to islands within the longitudes specified, the 129th and 154th degrees of east longitude, s 46 of the Act refers to islands adjacent in the Pacific Ocean without specifying longitudinal boundaries.

Moreover, there is another feature of the description of New South Wales boundaries that could also be significant. In both the 1855 Denison Commission and in s 46 of the New South Wales Constitution Act 1855 (Imp), there is no northern boundary, that is, the parallel of latitude, set or established for adjacent islands. In this respect, both the Denison Commission and the New

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6 D P O'Connell and A Riordan, *Opinions on Imperial Constitutional Law* (1971) 265-266.

7 *Ibid* 269-270.

South Wales Constitution Act 1855 (Imp) differ from the original and subsequent Commissions to New South Wales Governors. In the 1786 and 1787 Commissions issued to Governor Phillip, the limits of New South Wales were defined as follows:

> ... as extending from the northern Cape or extremity of the coast called Cape York, in the latitude of 10 degrees 37 minutes south to the southern extremity of the said territory of New South Wales or south Cape, in the latitude 43 degrees 39 minutes south, and of all the country inland to the westward as far as the 135th degree of longitude, reckoning from the meridian of Greenwich, including all the islands adjacent in the Pacific Ocean, within the latitude aforesaid of 10 degrees 37 minutes north and 40 degree 39 minutes south.[8]

It would appear that the extent of New South Wales maritime jurisdiction in the Pacific Ocean east of the coastline was in the early period very extensive. It certainly included Norfolk Island until its severance from New South Wales in 1844 although that island had been occupied from the earliest times.[9] Lord Howe Island, which had been settled in the 1830s, was included by name within the boundaries of the colony in 1855. However, by 1855, apart from Lord Howe Island, the boundaries of New South Wales would not have extended to any islands beyond the 154th meridian of longitude.

As to the northern boundary, it would appear that the boundaries of New South Wales did not include the Torres Strait Islands or at least not islands lying outside the three mile limit of the mainland.

The northern boundary was set at 10 degrees 37 minutes South (Cape York). Strangely, however, this northern limit disappeared from the description of boundaries in the Commissions issued to the Governors from 1848. The reason it disappeared was this: when in 1846 an attempt was made to establish a new colony of North Australia, the boundaries in the existing Commission to the New South Wales Governor were changed when territory north of the 26th parallel was separated from New South Wales to be included in the new Colony. When the North Australia proposal was abandoned, it was necessary to issue a fresh Letters Patent defining the boundaries of New South Wales. At this time no northern latitude was included, that is the 10 degrees 37 minutes boundary was omitted.[10] This, of course, led to later doubts on the status of the Torres Strait Islands lying north of Cape York. It could be argued that the omission had the effect of including at least some of these islands within New South Wales and later within Queensland when it was established.

We return now to the Law Officers' opinion of 1863. The issues discussed previously were crystallised in a statement tendered by Sir Frederick Rogers of the Colonial Office in his letter of instruction to the Law Officers where it was observed that:

> The original jurisdiction of the government of New South Wales was not bounded to the north by a parallel of latitude and that in that direction "adjacency" in the usual sense of the word is the only quality capable of

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8 *Historical Records of Australia* Series 1, Vol 1, 13. See generally, R D Lumb, *The Maritime Boundaries of Queensland and New South Wales* (University of Queensland Paper 1964) 4; A S Cumbrae-Stewart, The *Boundaries of Queensland* (University of Queensland Paper 1930) 5; and H Burmester, "Outposts of Australia in the Pacific Ocean" (1983) 29 Australian Journal of Politics and History 14.

9 *Historical Records of Australia* Series 1, Vol 1, 5.

10 *New South Wales Government Gazette* (1849) Vol 1, 117.

bringing an island within that jurisdiction, but that the Letters Patent of 1855 might well be alleged to furnish the definition of "adjacency" to the eastward of New Holland and to include within that term all islands to the westward of the 154th meridian of east longitude.[11]

The substance of the opinion delivered by the Law Officers was as follows:

1. The 1863 jurisdiction of the Governor of Queensland included all islands in the Pacific Ocean, in the Gulf of Carpentaria and in the Torres Straits, east of the 138th meridian of east longitude (the western land boundary of Queensland), and north of an imaginary line drawn from east to west through Point Danger (the southern boundary of Queensland), which were originally included in the Colony of New South Wales as defined in the Denison Commission.
2. All islands lying north of the 40th parallel of south latitude between the eastern coast of Australia as far as Torres Straits and the 154th meridian of east longitude were included within the Colony of New South Wales as at 1855. These islands were basically the islands of the Great Barrier Reef and islands further out in the Coral Sea. However, this statement was subject to a major qualification that, in order to give a title to Great Britain as against a claim by another country to any island within those limits which lay more than three miles from any territory in the actual occupation of Great Britain and were not included with any bays or indentations of the "British coasts",[12] the island should actually be taken possession of, or in some manner occupied by Britain. This qualification will be examined below.
3. All islands in the Gulf of Carpentaria were included within the boundaries of New South Wales in 1855.
4. All islands in the Torres Straits which from their position were to be regarded as dependencies of the mainland of Australia were included in the Colony of New South Wales in 1855. *Prima facie* this meant that all islands in Torres Strait within three miles of the mainland of Australia or within three miles of any other island then in British occupation or in British territorial waters would be dependencies of Australia and no islands beyond that distance which were not *de facto* occupied by Great Britain would possess that character.[13]

In a further explanatory opinion requested from the Law Officers by the Colonial Office in 1863, it was stated that the jurisdiction of Queensland extended (within certain limits as to north and south) to islands lying between the 138th and 154th degree of east longitude which were at the date of Denison's Commission in the *de facto* occupation of Great Britain, or situated within three miles of any island so occupied or within three miles of the Australian coast, but would not extend to islands lying outside those limits which had not been occupied by British subjects under British authority at the time of the Denison Commission.[14] The 8th day of September 1855 therefore became the critical date for determining jurisdiction over islands outside the three mile limit.

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11 D P O'Connell and A Riordan, *supra* n 6, 269.

12 This expression of course referred, not to the coasts of Great Britain, but to the coasts of British colonies.

13 D P O'Connell and A Riordan, *supra* n 6, 269-70. Of course the Great Barrier Reef extends well into Torres Strait. From a geographical point of view the distinction between Barrier Reef islands and Torres Strait islands is difficult to maintain.

14 *Ibid* 270-271.

It is clear therefore that at 1863 Imperial practice had defined the extent of Queensland boundaries both off the east coast, that is, in the Great Barrier Reef area, and off the north coast, that is, in the Torres Strait. Islands within the three mile limit were included within Queensland boundaries. Islands outside that limit were included only if they were occupied by British subjects as at 8 September 1855. It would appear that no islands in the Torres Strait or the Great Barrier Reef (although this is less certain) were so occupied even though castaways, explorers and adventurers may have set foot on those islands before 1855.

II

As was pointed out above, the opinion of the Law Officers given to the Colonial Office on the extent of Queensland boundaries followed a request from the Queensland authorities which itself was prompted by applications made to extract guano from various islands in the adjacent Pacific Ocean. But the New South Wales Governor had also been the recipient of such requests. These requests related not only to islands adjacent to Australia, but islands well out into the Pacific Ocean which could not on any definition be considered adjacent to Australia. The British Government's decision was that the power to issue licences or leases to such applicants should be vested in the Governor of New South Wales, presumably as the senior Australian Governor.

In 1863, Letters Patent were issued by Queen Victoria relating to the disposition of these islands.[15] The preamble to these Letters Patent was as follows:

> Whereas it may happen that guano and other fertilizing substances may, from time to time, be discovered on Islands and other places belonging to Us, Our heirs and successors, being within the limits herinafter described, but not within the jurisdiction of any Colonial Government....

The Letters Patent went on to authorise Sir John Young, the Governor of New South Wales, to make leases and other dispositions for a term of years of any such islands and to issue licences authorising the person or persons designated therein to take guano from the islands. The vastness of the area over which such powers could be exercised was indicated in the Letters Patent. The area over which the Governor's powers could be exercised covered the Indian and South Pacific Oceans. The boundaries on the north of this area were bounded by the 10th parallel of south latitude; on the east by the 170th meridian of west longitude; on the south by the Antarctic Circle; and on the west by the 75th meridian of east longitude. Any islands over which licences could be issued were to be owned by Great Britain and not be within the jurisdiction of any colonial government; that is, not within a colony's boundaries. The area in question was within the jurisdiction of the Australian Station; it was the area within which the Admiralty had 'patrolling' functions.[16]

Despite the grant of authority to the Governor of New South Wales to exercise a limited jurisdiction over islands in this vast area further questions arose as to the status of islands in respect of which British subjects resident in Australia wished to extract guano. The islands included Raine Island, Bell Cay and Bramble Cay, which were islands in the northern Barrier Reef region and Torres Strait. Correspondence between the various British officials involved in the

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15 *New South Wales Government Gazette* (1863) Vol 2, 2669.

16 D P O'Connell and A Riordan, *supra* n 6, 266.

discussions relating to the status of these islands indicated that they were not within the jurisdiction of any foreign government. However they belonged to the British Crown having been discovered by subjects of Her Majesty On that basis an inchoate title existed and they accrued to the Crown if it thought fit to take possession of them. The result of this further investigation was that in 1868 the previous jurisdiction of the Governor of New South Wales was confirmed in Letters Patent issued on 10 June 1868.[17]

From later opinions of the Law Officers and correspondence between British Government departments in the 1870s it appears that occupation was regarded as the main element in any claim by the British Crown to 'guano' islands. In 1877 a dispute arose between an American citizen and a British subject in relation to extraction of guano from the Lacepede Islands, which are situated within 15 miles of the Western Australian coast, and which were within the boundaries of that Colony as described in the Commissions issued to the Governors of Western Australia in 1830 and 1873. These islands, it appeared, were not occupied until 1876 when a Mr Geddes was licensed by the Western Australian Government to remove guano. Ten days later a Mr Roberts, who acted as an agent for an American citizen, a Mr Lord, came to the islands for the purpose of removing guano, ran up the United States flag and claimed possession in the name of the United States. He did so under an Act of Congress of 1856 which authorised any citizen of the United States who had discovered a deposit of guano on any island which was not within the lawful jurisdiction of any government and not occupied by the citizens of any other government to take peaceful possession and occupy the same. The view of the Law Officers[18] was that the island was already within the jurisdiction of and occupied by a subject of Great Britain when Mr Roberts arrived. The issuing of the licences confirmed that occupation. The Law Officers did add that:

> Since, in our opinion, the validity of a mere declaration to annex a territory is in the present state of international law extremely doubtful, we respectfully suggest that in all cases past and future actual possession should be taken, that if possible the place annexed should be occupied, and if occupation be impractical, that evidence by inscription or in some other way should be left of possession being taken, and that the unoccupied island should be visited as frequently as possible by Her Majesty's ships.[19]

In 1878, the captain and crew of a French naval vessel took possession of the Chesterfield Islands (lying to the west of New Caledonia, a French possession) even though it appeared that the islands had been discovered initially by Britain and that an act of ownership had been exercised by the grant of a guano licence to a British subject by the Governor of New South Wales. It should be noted that the Chesterfield Islands lie outside the 154th degree of east longitude. Despite the earlier acts of possession on the part of Great Britain, it was decided not to contest the French occupation.[20]

Further consideration of the status of guano islands was undertaken by the Foreign Office in the 1870s and 1880s. The effect of the changes in procedure which followed - which extended to islands in the Pacific Ocean outside

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17 *New South Wales Government Gazette* (1868) Vol 2, 3184.

18 D P O'Connell and A Riordan, *supra* n 6, 282-284.

19 *Ibid* 284.

20 The large island of New Caledonia to which these islands were adjacent had been annexed by France in the 1850s.

Australian colonial boundaries which had not already been claimed by the British Crown - was to ensure that before any possession taken by a British subject could amount to a claim of sovereignty on the part of the Crown, it was to be accompanied by the formality of the issue of a licence empowering the person to occupy the island for his or her own use and to display the British flag in proof of such occupation.[21]

III

We have seen that the 1863 opinion by the Law Officers on the extent of Queensland's boundaries and subsequent practice determined that islands in the Torres Strait outside the three mile limit were not part of Queensland unless occupied as at 1855 by British subjects. However the later opinions on guano licences suggested that an inchoate title to such islands would be perfected by the grant of a licence and the occupation of that island pursuant to that grant. In so far as the small number of islands in the Torres Strait which were the subject of applications were cays which were not occupied by indigenous people, no question of a contest with any local inhabitants arose. Since the majority of the islands of the Torres Strait were not the subject of guano licences, no inchoate title of the Crown to the islands occupied by the indigenous people on the basis of this type of sovereign claim could have arisen. The only inchoate title to these islands would be one arising out of discovery.

The conclusion must be that in 1872 (when the islands within 60 miles of the Queensland coast were annexed to that Colony) and in relation to islands adjacent to Queensland which had not become part of that colony by a process of annexation or occupation, the British Crown acted on the basis that the absence of foreign claims established that those islands were dependencies of the adjacent colony as a result of discovery and voyages of exploration.[22] They could be brought within the boundaries of that Colony by the formal process of annexation without first taking formal possession of each island in the name of the Queen.[23] The unstated assumption was that it would not be necessary to get the consent of the indigenous inhabitants of such islands because there was no organised political sovereignty or power on the islands. This is a matter that will be referred to below.

The fact that the Governor of New South Wales had dealt with Raine Island on the Barrier Reef close to the Queensland coast was the triggering factor for the Queensland authorities in the early 1870s to move for the annexation of islands within 60 miles of the coast. A 60 mile limit would bring within the Queensland jurisdiction all islands which had a degree of proximity to, and which could be properly administered from the colony, and would include most of the Barrier Reef area, a natural geographical feature appurtenant to Queensland. But how was this annexation to be accomplished? At this point questions relating to the prerogative of the Crown and colonial legislative competence arose. There was one relevant precedent in Colonial Office files which could be utilised in effecting such an annexation. In 1866 the Law Officers had been asked to advise on the annexation of a cluster of small islands off the northwest coast of the

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21 On international law principles relating to claims of sovereignty over small uninhabited islands see "The Clipperton Island Arbitration" (1932) 26 American Journal of International Law 390.

22 *Eg* by Cook in 1770, Bligh in 1792, Flinders in 1803 and Blackwood in 1844-1845.

23 D P O'Connell and A Riordan, *supra* n 6, 284.

Cape of Good Hope known as the Penguin Islands which had guano deposits.[24] These islands had been made subject to British possession through the formal actions of one of Her Majesty's navy vessels. The Colonial Office wished to ascertain by what method they could be annexed to the Cape colony. The view of the Law Officers, Cairns and Bovill, was that the annexation and modification of the Cape boundaries could not be accomplished except by Act of the Imperial Parliament, although they did offer a practical method of empowering the Crown to issue guano licences by appointing the Governor of the Cape as Governor of the Penguin Islands with authority to perform those acts.[25]

This opinion caused some consternation in the Colonial Office as it appeared that, in other cases, annexation of adjacent territory to an existing colony had been effected by the prerogative, that is, by the Crown acting through Letters Patent or Order in Council supplemented by local legislation accepting the annexation. In particular, the question of the validity of the annexation of an area called 'Nomansland' to the Colony of Natal came under question. A new opinion was therefore sought from the Law Officers.[26] (The former opinion, it turned out, was the view of the late Attorney General Sir Hugh Cairns rather than that of the Solicitor General Sir William Bovill!) The new opinion by Sir John Rolt and Sir William Bovill stated that the Penguin Islands could be annexed by the royal prerogative in conjunction with an Act of the local legislature, with the Governor of the Cape being appointed as Governor of the Penguin Islands with authority to cede or surrender the islands to the Cape Colony.[27]

In the next two decades, the Rolt-Bovill opinion became the standard precedent for annexing territory adjacent to an existing self-governing territory. Thus when the question was presented to the Law Officers in 1872 as to the proper method of annexing islands lying within the 60 miles from the coast of Queensland, the Penguin Islands precedent was accepted.

The 1872 Letters Patent[28] appointed the Governor of Queensland to be Governor of all islands within 60 miles from the coast of the said Colony, that is, to the east in the Barrier Reef area and to the north in Torres Strait. It empowered him to make leases and grant licences in relation to minerals and guano and to revoke or confirm existing licences or leases.[29] The Governor was also authorised to surrender the islands to the Colony of Queensland on a request being made by resolution or otherwise of the two Houses of the legislature. From the date of such transfer the said islands would be deemed to be annexed to, and form part of, the Colony of Queensland. These Letters Patent were issued on 30 May 1872. On 22 August 1872 the Governor of Queensland, Lord Normanby, signed a Deed of Transfer by which the islands were transferred to the Colony of Queensland pursuant to the authority granted by the Letters Patent.[30]

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24 *Ibid* 273-274.

25 *Ibid* 273.

26 Sir John Rolt had become the new Attorney-General on the death of Sir Hugh Cairns.

27 D P O'Connell and A Riordan, *supra* n 6, 274-275.

28 *Acts and Laws*, *supra* n 5, 57-59.

29 This was to enable him to accept a surrender of licences or leases previously granted by the Governor of New South Wales and to issue new instruments in their place.

30 *Supra* n 5, 60-61.

It is interesting to note therefore that in the short period of time between the issue of the Letters Patent and the Deed of Transfer, the islands within 60 miles of the Queensland coast could be described as a Crown Colony under the administration of the Governor of Queensland but with a separate status from the adjacent Colony which had of course representative institutions. The actual appointment of the Governor to administer the islands was an act of administrative control which was presumably based on the previous acts of sovereignty exercised over some of those islands by the British Crown, bolstered by discovery voyages over the Torres Strait in the earlier part of the century. It was not considered necessary to take possession of these islands individually. In 1872 therefore the inchoate title matured into a title based on effective control by the establishment of an administrative system. It was not considered necessary to gain the consent (for example by cession) of the indigenous inhabitants of those islands in the Strait which were inhabited. The basis for this view was that, as compared with other places in the Pacific (such as Fiji), there was no organised system of government in the islands.

From 1872 to 1878, a jurisdiction over certain islands in the Torres Strait (*outside* the 60 mile limit) was exercised under the Pacific Islanders Protection Act 1872 (Imp) and Pacific Islanders Protection Act 1875 (Imp). Originally entitled the Kidnapping Act, this legislation was designed to prevent and punish criminal outrages upon the natives of islands in the Pacific Ocean. Such jurisdiction was exercisable over British subjects on islands in the Western Pacific which were not within Her Majesty's dominions nor within the jurisdiction of any civilised power.[31] The exercise of such jurisdiction did not amount to a claim of sovereignty over the islands.[32]

In 1877 an Order in Council under the legislation was made specifying that jurisdiction could be exercised over islands not within the limits of Fiji, Queensland or New South Wales nor within the jurisdiction of any civilised power.[33] Under that Order in Council administrative arrangements were set in place in 1878 for the exercise of jurisdiction in the Darnley and Murray Islands in the Torres Strait.[34]

In 1878 Letters Patent were issued authorising annexation of all islands within the Great Barrier Reef off the east coast of Queensland and extending to all islands in the Torres Strait within a line set out in the Letters Patent.[35] The Letters Patent were to take effect after local legislation was enacted. The preamble to those Letters Patent commenced:

> Whereas it is expedient that certain islands in Torres Straits, and lying between the continent of Australia and the island of New Guinea....[36]

The preamble referred to all islands included within a line drawn from Sandy Cape northward to the southeastern limit of the Barrier Reef, then following the line of the Great Barrier Reefs to their northeastern extremity in the latitude of 9′ degrees south, then in a northwesterly direction embracing East Anchor and Bramble Cays. The line then extended in a southwest direction to sweep across

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31 Pacific Islanders Protection Act 1875 (Imp) s 6.

32 *Ibid* s 7.

33 *Report of the Western Pacific Royal Commission*, (1883) para 16.

34 *Ibid* para 38.

35 *Supra* n 5, 64-65.

36 *Id.*

the coast of Papua embracing all islands in the region, ending at Deliverance Island near the meridian of 138 degrees of east longitude (the maritime extension of a straight line from the western land boundary of Queensland).

Unlike the 1872 Letters Patent, the 1878 Letters Patent did not authorise the Governor to become Governor of the Barrier Reef and Torres Strait Islands. It empowered him by proclamation to declare the islands to be annexed to and form part of the Colony at a time when the legislature of the Colony passed a law providing that the islands should become part of the Colony. This Act - the Queensland Coast Islands Act 1879 (Qld)[37] — was passed, and assented to on 24 June 1879. Section 1 of the Act stated:

> from and after such day as His Excellency the Governor of Queensland shall by such proclamation under his hand and the public seal of the Colony as is authorised by the said Letters Patent mention and appoint for that purpose, the Islands described in the Schedule hereto shall be annexed to and become part of the Colony of Queensland and shall be and become subject to the laws in force therein.

The islands were annexed from 1 August 1879 by a proclamation issued on 18 July 1879.[38]

The extension of Queensland boundaries beyond 60 miles was to ensure that law and order prevailed throughout the whole area of Torres Strait and on islands on the outer fringe of the Great Barrier Reef. There was an urgent need to protect the inhabitants of those islands from violence both by white adventurers and other indigenous peoples of the area. In addition it appeared the Queensland Government was concerned with the evasion of its revenue and immigration laws as a consequence of the islands not being under an effective administration.[39]

Nevertheless there is some ambiguity in the boundary description to be found in the Letters Patent and followed in the schedule to the Queensland Coast Islands Act of 1879 (Qld). In *Wacando v Commonwealth*[40] Gibbs CJ said:

> However, the line drawn by the Letters Patent includes many islands which do not lie within Torres Strait - it commences at Sandy Cape on the north coast of Fraser Island more than 1,000 miles from Torres Strait and follows the line of the Barrier Reef northward. It is unnecessary to resolve the question whether the intention expressed in the Letters Patent was that only islands which were both in Torres Strait and within the defined line were to be annexed or whether for the purposes of the Letters Patent, 'Torres Straits' was given an enlarged and artificial meaning to include all the waters within the defined line. Darnley Island is within Torres Strait and within the line drawn by the Letters Patent, and on any view is one of the islands to which the Letters Patent apply. Another difficulty created by these Letters Patent arises from the fact that the line which they draw is, at some places, and over a considerable distance, much closer to the coast than 60 miles. It is not clear whether there are any islands outside the line drawn by the Letters Patent of 1878 but within 60 miles of the coast, but the intention of the Letters Patent of 1878 was to annex additional islands rather than to relinquish dominion over islands already within the

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37 43 Vic No 1 (Qld).

38 *Supra* n 5, 68-69.

39 A S Cumbrae-Stewart, *supra* n 8, 11.

40 (1981) 148 CLR 1.

> Colony, so that if there are any islands between the two boundary lines it would appear that they were intended to remain within the Colony.[41]

In 1894 the old question of the validity of annexation by royal prerogative resurfaced. The Kermadec Islands had been annexed to New Zealand in 1887 by this method. The Chief Justice of the Colony had expressed doubts as to that procedure. The Imperial Law Officers reported:[42]

> It would seem, then, that, in principle at any rate, where an Imperial Act has established a constitution within certain boundaries, neither a Colonial legislature, nor Her Majesty by virtue of Her prerogative, nor both combined, can so extend the boundaries of the Colony as to include other territory, in the sense of making that territory parcel, to all intents and purposes, of the Colony which by Imperial Act has a constitution.[43]

This of course led the Colonial Office to ask the Law Officers to reconsider earlier views on annexation. The Law Officers reported that the Penguin Islands amongst others had been effectively annexed to the Colony of Cape of Good Hope but reiterated their view as to colonial legislative competence and the effect of the royal prerogative. They ended their report with the reflection that even if annexation was irregular at the outset, it could acquire validity under international law if it had been followed by a *de facto* incorporation of the territory into the Colony over a long period of time although each case would fall to be determined according to its own circumstances.[44]

On 31 May 1895 a circular was issued by Downing Street to Queensland, referring to the Kermadec Islands opinion. One paragraph of that circular stated that that reasoning applied also in the case of Queensland because the islands in question, not having been part of the Colony of New South Wales, were not covered by the statutory authority by which Her Majesty was empowered to separate the northern portion of the Colony and to form a new colony from the portion so separated. Consequently the islands that were effectively placed under the Government of Queensland did not become completely fused with, and for all purposes, part of the Colony.[45]

It was therefore decided that an Imperial validating Act should be passed to cover the various annexations effected by the "irregular" method. This Act was the Colonial Boundaries Act 1895 (UK). Section 1 of that Act provided:

> (1) Where the boundaries of a colony have, either before or after the passing of this Act, been altered by Her Majesty the Queen by Order in Council or Letters Patent, the boundaries as so altered shall be, and be deemed to have been from the date of the alteration, the boundaries of the colony.
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> (2) Provided that the consent of a self governing colony shall be required for the alteration of the boundaries thereof.
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> (3) In this respect self governing colony means any of the colonies specified in the Schedule to this Act.

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41 *Ibid* 10. Indeed, it was not until the signing of the Torres Strait Treaty in 1978 that it was determined that certain small islands near Papua-New Guinea (Kawa, Mata Kawa, Kussa) were not included within the islands annexed in 1879. See generally, H Burmester, "The Torres Strait Treaty: Ocean Boundary Delimitation by Agreement" (1982) 76 American Journal of International Law 321, 325.

42 D P O'Connell and A Riordan, *supra* n 6, 294-296.

43 *Ibid* 295.

44 *Ibid* 298.

45 *Ibid* 299.

Colonies named in the Schedule included Queensland and New South Wales.

As we have seen, in *Wacando v Commonwealth*[46] the High Court held that the effect of these Letters Patent was to validate the boundaries of Queensland from the date of the their coming into effect, namely 1872 and 1879. There was a difference of opinion amongst the judges whether the Letters Patent themselves, apart from the effect of the Colonial Boundaries Act 1895 (Imp) were valid. One question in the case was the effect of the Australian Colonies Act 1861 (Imp). The preamble to that Act recited earlier imperial legislation of 1850 and 1855 which gave power to Her Majesty by Letters Patent to define the limits of the Colony of New South Wales and to erect into a separate colony or colonies any territories which were reputed to be or hereafter might be comprised within the said Colony of New South Wales. Section 2 of the Act provided:

> It shall be lawful for Her Majesty by such Letters Patent as aforesaid to annex to any colony which is now or may hereafter be established on the continent of Australia any territories which in the exercise of the powers hereinbefore mentioned might have been erected into a separate colony.

It was argued by the Commonwealth Government in *Wacando*[47] that this section was a source of power for the Crown to make the Letters Patent of 1872 and 1878 in so far as the islands, being territories which might have been erected into a separate colony, could be validly annexed to any existing colony. However the marginal note to s 2 referred to the power to annex to existing colonies *now* part of New South Wales. This suggested that any territories so annexed must be part of New South Wales and not potentially, as it were, part of that Colony. Chief Justice Gibbs held that the words of s 2 should be given their ordinary meaning: thus, the marginal note should not restrict that ordinary meaning. Consequently, the Letters Patent of 1878 were authorised under the Australian Colonies Act 1861 (Imp).[48] Justice Aickin agreed with the judgment of Gibbs CJ.[49] Of the other judges who considered the matter, Mason J and Wilson J disagreed with this interpretation. Justice Mason said:

> The terms in which authority was given by s 2 to annex any territories which in exercise of those powers might have been erected into a separate colony rather indicate that the power to annex was limited to territories which might be detached from New South Wales under those powers and that it did not extend to territories which might have been incorporated in New South Wales but were not so incorporated.[50]

If no statutory authority preceding 1872 and 1878 was to be found for the Letters Patent one would therefore have to rely for their validity, apart from the effect of the Colonial Boundaries Act 1895 (Imp), on the opinion of the Law Officers, Rolt and Bovill, that the Crown could by letters patent with the assent of the local legislature, redefine the boundaries of a colony with representative institutions by including within those boundaries adjacent territory. On this particular matter, two of the justices in *Wacando*, Gibbs CJ and Mason J, in their analysis of the Law Officers' opinions, considered that it was an erroneous view that a colonial representative legislature did not have power on the basis of

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46 (1981) 148 CLR 1.
47 (1981) 148 CLR 1.
48 *Ibid* 16.
49 *Ibid* 28.
50 *Ibid* 23; see also Wilson J at 29.

extra-territorial incompetence to extend the boundaries of the colony.[51] This, however, left the broader principle embodied in the Cairns and later opinions that where a constitution had been granted to a colony by legislation of the Imperial Parliament, boundaries could not be altered by the procedure followed in 1872 and 1878, that is, the prerogative and local legislation procedure. It would require an Act of the Imperial Parliament for this to be accomplished. As Gibbs CJ pointed out, the basis of this view was understandable because the effect of the Imperial Act would be both to supersede the prerogative and to render void any colonial law repugnant to such Act.[52] On the other hand, Mason J considered that there would be no repugnancy between the Queensland Coast Islands Act of 1879 (Qld) and earlier Imperial statutes. He pointed out that the Queensland legislature would have power under s 2 of the Constitution Act 1867 (Qld) to incorporate within the colony additional territory annexed by Her Majesty.[53] If one excludes the extra-territorial ground as a ground of challenge to such legislation, the only question then becomes one of repugnancy. The view of the Law Officers which appears to be followed by Gibbs CJ in this respect is that such repugnancy existed in that the original boundaries had been established by or pursuant to Imperial legislative authority. The view of Mason J denies this.

Summing up, if the view as to the validity of procedure used in 1872 and 1878 leads to a conclusion that the islands were invalidly annexed, there was a period of time from 1872 (in relation to islands within 60 miles of the coast) and from 1878 (in relation to other islands in the Great Barrier Reef and Torres Strait) when the Queensland Colonial Government would have exercised *de facto* but not *de jure* authority over the area. However, as the Law Officers' opinion in relation to the Kermadec Islands suggests, an exercise of authority over a long period would probably, under the rules of international law, have validated the occupation. But from 1895 onwards, such doubts were erased by the effect of the 1895 Act which validated the annexation.

IV

It is well settled that New South Wales (and including any territory which later became a separate colony) falls within the category of a settled colony even though its origins were as a penitentiary.[54] Halsbury states that colonies are treated for the purposes of constitutional law as either settled or conquered/ceded. Every colony must be assigned to one of these two classes; the classification is one of law, and once made by practice or judicial decision will not be disturbed by historical research.[55] Halsbury continues:

> The basis of distinction is the stage of civilisation considered to have existed in the territory at the time of acquisition: if there is no population or no form of government considered civilised and recognised in international law, possession is obtained by settlement; where there is an organised society to

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51 *Ibid* 14, 20-21.

52 *Ibid* 14.

53 *Ibid* 24.

54 *Cooper v Stuart* (1889) 14 App Cas 286; *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 204.

55 *Halsbury's Laws of England* (4th ed 1974) Vol 6, para 1017.

> which international personality is attributable, acquisition rests on cession or conquest.[56]

As to the nature of settlement Halsbury states:

> Settlement may take three main forms. First, occupation of territory may be authorised by the Crown, possession taken in the name of the Crown, and settlers introduced. Secondly, the Crown may recognise as British territory settlements made by British subjects without previous authority. Thirdly, uninhabited islands or areas may be formally annexed.[57]

As to cession it is noted that it may be made by a civilised state, by tribal chiefs or by the inhabitants of the territory.[58] Annexation in the face of an organised society considered civilised will be treated as a case of cession (not settlement) even before or in the absence of cession by international formalities.[59]

When one considers the status of individual territories acquired by the British Crown in the nineteenth century, the distinction becomes less clear. It is not simply one of distinguishing between territories occupied by hunter/gatherers, that is by nomadic inhabitants and those occupied by agricultural peoples.[60] Nor in order to classify a territory as conquered/ceded must it be taken or transferred from a sovereign having a recognised international status at the time when that event occurs.[61] O'Connell states:

> [i]t seems that the capacity to be party to a treaty of cession is not the degree of civilisation in question but whether or not the community concerned fulfils the conditions of territory, population and administration laid down by international law for the conducting of international transactions, and these conditions are by no means stringent.[62]

In the case of the Torres Strait Islands, there was no act of cession and no military force was used to subdue the inhabitants of these islands. If the Halsbury statement is correct, the Crown must have proceeded on the basis that in so far as there was no organised system of government throughout the islands, the annexation was not of an organised society and therefore the colony was to be treated as a settled colony. The conduct of the Crown in relation to the particular territory is a dominant consideration.[63]

In this respect, the acquisition of sovereignty over British New Guinea is a relevant precedent. In an opinion of the Law Officers to the Colonial Office in 1885,[64] it was said that the proclamation of British sovereignty in that territory took place in the following circumstances. The native chiefs, attending the ceremony where the Protectorate was proclaimed, accepted through the Commodore a staff of office bearing the Queen's head; but, although they were willing to recognise a Protectorate, they did not do any act equivalent to

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56 *Id.*

57 *Ibid* para 1018.

58 *Ibid* para 1019.

59 *Id. Cf* J G Starke, *Introduction to International Law* (9th ed 1984) 160, n 3.

60 K McNeil, *Common Law Aboriginal Title* (1989) 118, referring to the colonies of Sierra Leone and the Gold Coast, which are classified as settled although lands were cultivated by local inhabitants.

61 *Eg* by a "paramount chief" as in the case of Basutoland. See R O Roberts-Wray, *Commonwealth and Colonial Law* (1966) 277-278.

62 D P O'Connell, *International Law* (2nd ed 1970) Vol 1, 440.

63 K McNeil, *supra* n 60, 133.

64 D P O'Connell and A Riordan, *supra* n 6, 419-420.

surrendering their country to a magistrate. The question then posed to the Law Officers was whether territory added to the Queen's dominions by a proclamation without the assent of the inhabitants might be considered as being acquired by conquest. The Law Officers adhered to a previous opinion given in 1884[65] that in so far as there was no native power within the area capable of ceding jurisdiction to the Queen, the annexation was proper and the acquisition was to be regarded as a settlement of the territory.[66]

Even if the Torres Strait Islands were considered to fall within the category of a ceded colony which, as I have argued, does not conform to the facts preceding or occurring after the annexation, it is necessary to consider the effect of the doctrine of absorption, that is, of the incorporation of those islands into the mainland territory of Australia. In *R v Kojo Thompson*[67] the West African Court of Appeal considered the status of the Colony of the Gold Coast and whether it was a British settlement under the British Settlements Act 1887 (Imp). The Court held that the trading posts on the coast of that Colony were settlements but other parts of the Colony which had been later acquired by cession or simple annexation had been treated as one with the settled Colony. Therefore the whole Colony had obtained the character of a settled Colony. Applying this precedent to the Torres Strait Islands, it may be concluded that, on the Letters Patent taking effect, these islands, whatever their status before or at annexation, were from the date of incorporation into the Colony of Queensland to be treated as part of the settled Colony of Queensland.

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65 *Ibid* 417.

66 *Ibid* 418-419.

67 (1944) 10 WACA 201.