THE CONTINENTAL SHELF

By R. D. LUMB*

I. *The continental shelf doctrine in international law.*

The development of international law in the field of the exploration and exploitation of the mineral resources of the sea-bed is one of the remarkable features of the post-Second World War era. It reflects both the technological advances which have in recent years led to the opening up of the mineral riches of the sea-bed and many years of detailed work by legal experts in the International Law Commission culminating in the Convention on the Continental Shelf in 1958.

International law, of course, has not been created in the way in which national law has been. The deliberate acts of lawmaking by legislatures are absent in the international arena. In this arena the law is created mainly by agreement between nations — the multilateral treaty — or by custom which is the development of a consensus by the conduct of nations which make up the international community. The evolution of the Continental Shelf doctrine according to which a coastal state is recognised as having an exclusive right to explore and exploit the resources of the sea-bed adjacent to its coastline was based initially on custom before becoming the subject of international agreement, and the consensus achieved thereby came about more rapidly than many other rules of international law. If the sovereign rights of the coastal nation had not been recognised, the petroleum resources off a nation's coastline would have been regarded as open to exploitation by any nation which had the capital and technical expertise to take on the task. There were some authorities who favoured this latter solution. To their mind, just as all nations had a right to fish in the areas outside the territorial waters zone, so too the exploitation of the resources of the sea-bed outside these waters should be open to common exploitation, the resources being *res communis*. But the difficulties which this solution would have created are at once obvious: no country would be prepared to stand idle while the drilling rigs of other countries were set up to appropriate the vast amounts of mineral wealth which might lie beneath its adjacent continental shelf. Accordingly, after long discussion and debate by the experts, agreement was reached that the resources of the shelf should be exclusively under the control of the adjacent coastal nation, the principle of contiguity being adopted as the basis of this exclusive control. It is difficult to see how any other solution would have worked, particularly in the light of the fact that many states had already unilaterally asserted their right of exclusive control.

The draft convention of the experts which emanated from the Inter-

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national Law Commission had, however, to be approved by the members of the United Nations and at the Conference on the Law of the Sea held under U.N. auspices at Geneva in 1958 the matter was further debated and agreement was reached on a Convention on the Continental Shelf which was then opened for signature and later ratification. This Convention must now be regarded as establishing the consensus on which control of the submarine resources of the Shelf is based. Articles 1 and 2 of the Convention are the paramount clauses. Article 1 defines the extent of the shelf, while Article 2 deals with the nature of the rights which are held by the coastal nation over the area. The term "continental shelf" is defined as referring (a) to the sea-bed and subsoil of the submarine areas adjacent to the coastline but outside the area of the territorial sea to a depth of 200 metres (100 fathoms), or beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the sea-bed and subsoil of similar submarine areas adjacent to the coasts of islands. While the 100 fathom line is usually delineated on charts and maps as showing the outer edge of the Continental Shelf (at which depth the "continental slope" begins) this is only a convenient approximation to the actual geological features of a particular shelf. The fall away to the ocean depths may occur at a lesser or a greater depth. In Shepard's *Submarine Geology*[1] the following facts are presented:

1. The Continental Shelf has an average width of 40 nautical miles.
2. The average depth at which the greatest change of slope occurs at the shelf margin is 72 fathoms.
3. The average depth of the flattest portion of the shelves is about 35 fathoms.
4. Hills with a relief of 10 fathoms or more are found in about 60 per cent of profiles crossing the shelves.
5. Depressions, 10 fathoms or more in depth, were indicated in 35 per cent of the same profiles. Many of these are basins, but others may represent longitudinal valleys.
6. The average slope is 0° 07′, being somewhat steeper in the inner than in the outer half.

In order to acquire an adequate picture in one's mind of the features of the shelves and ocean depths one must envisage these areas as a continuation of the dry land mass with valleys, mountains and plains covered by water. There has been much work done in recent years on mapping these areas and the work done by various oceanographic bodies, particularly the Scripps Institute, is yearly adding to our knowledge of the hitherto hidden features of underwater topography. But much more work remains to be done particularly in the Pacific and Indian Ocean areas in which Australia has a vital interest, not only

[1] Second Edition, 1963, at p. 257.

from the point of view of mineral exploration, but also for defence reasons. If discoveries of petroleum continue to be made around our coastline they must be given adequate protection from any submarine attacks by a hostile country. Such protection of course is strengthened when the detailed features of the sea-bed are mapped.

It must be pointed out that the *geological* features of the sea-bed do not determine *legal* status. A geologist, of course, would have no means whereby to distinguish the boundaries of internal waters, territorial waters and continental shelf proper. The law (both national and international) must be able to make these clear-cut distinctions and custom, as well as treaties, must be examined in order to determine these boundaries. The various maritime zones adjacent to the dry land mass are tidelands, internal waters, territorial waters, fisheries and contiguous zones and the continental shelf proper. In the Australian federal structure, tidelands (which are lands covered at high tide) are subject to the control of the States as are internal waters (which are waters within bays, estuaries and the like). There are interesting problems associated with the demarcation of internal waters and the baseline from which the territorial sea commences. The Convention on the Territorial Sea and Contiguous Zone sets out the criteria for delimiting internal waters. One of the important provisions of that Convention is Article 7 which provides that a line may be drawn across a bay where the distance between the natural entrance points does not exceed twenty-four miles. There are also provisions allowing lines to be drawn joining the coastline with fringing islands so that intervening waters may be enclosed as internal waters. In the case of bays which comply with the criteria specified in Article 7, the effect of their designation as internal waters is this: a coastal nation is not obliged to afford to the vessels of other nations the right of maritime passage which exists in the case of territorial waters.

The outer limit of internal waters marks the beginning of territorial waters. The Convention of the Territorial Sea provides that the sovereignty of a coastal state extends to its territorial sea including the sea-bed and subsoil. The extent of the territorial sea is not defined. This is one of the major weaknesses of the Convention which reflects the failure to co-ordinate the various national claims extending from three miles to twelve miles and in some cases beyond. The three mile limit is of course the traditional limit with its seventeenth century rationale as being the range of a cannon shot. Many nations have now rejected this limit although Australia, the United Kingdom and the United States, amongst other nations, still adhere to the traditional limit, although recognizing an exclusive fisheries zone of twelve miles. But for mineral exploration purposes the three mile limit is the boundary so far as Australia is concerned between the territorial sea-bed subject to its

sovereignty, and the continental shelf which extends therefore from a line three miles from the coastline to a line where the superjacent waters are of a depth of 200 metres.

The "legal" continental shelf is not within the full sovereignty of the coastal nation. The waters lying above it may be used for fishing and navigation purposes by the vessels of other nations. The Convention on the Continental Shelf grants to the coastal nation exclusive rights over the sea-bed for the purposes of exploration and exploitation. Nevertheless it is gradually being accepted that a nation may prohibit other uses of its continental shelf, e.g. "pirate broadcasting". However, it is still legally inaccurate to say that Australia or any other nation owns its adjacent continental shelf, nor can its territorial boundaries be regarded as encompassing the shelf. The coastal nation may exercise its rights of exploration and exploitation through its own organs or it may grant licences to private companies subject to the conditions set out in its national legislation. In this case, once the mineral resources are extracted they become the property of the licensee.

In determining the degree of control which a nation may exercise over its shelf, recourse must be made to Article 5 of the Convention on the Continental Shelf. This Article sets out the various protected interests in the shelf area which a coastal nation (and its licensees) must observe while exercising the rights of exploration and exploitation. The dominant paragraph is the first paragraph of Article 5, which provides that such exploration or exploitation must not result in "any unjustifiable interference with navigation, fishing or the conservation of the living resources of the sea, nor result in any interference with fundamental oceanographic or other scientific research carried out with the intention of open publication".

The recent Australian Petroleum (Submerged Lands) legislation gives effect to this Article by providing that a permittee or licensee shall carry out operations in a manner that does not interfere with: (a) navigation and fishing, the conservation of the resources of the sea and sea-bed, or any operations of another person being lawfully carried on by way of exploration for, recovery of or conveyance of a mineral or by way of construction or operation of a pipeline "to a greater extent than is necessary for the reasonable exercise of the rights and performance of the duties of that first-mentioned person". (s. 124)

The interests of mineral explorers must be balanced against the interests of other users of the continental shelf and the seas above it. At the present time this problem is not one of great magnitude in Australia but it is a serious one in the North Sea where the continental shelves are surrounded by land masses and where conflicts of interest between navigation and fishing on the one hand and mineral explor-

ation on the other may become more serious with further intensive development. However, it would be wise for explorers of the Australian Shelf to give some attention to the problem at this stage now that the first drilling platforms are being erected in Bass Strait and when future exploitation programmes are planned.

I have not the technical expertise to offer any significant comment upon these issues. In a recent article[2] the opinion is expressed that the presence of a well or installation once in place in a location does not have any more adverse effect on marine life than any other inanimate object in the sea although it may affect the taking of fish particularly if there is a cluster of installations within 500 metre safety zones which are permitted by the Convention on the Continental Shelf. However, the use of certain types of dynamite charges in the course of seismological surveys could have an adverse effect on marine life. There is also the problem of preventing the discharge of noxious substances from drilling rigs and platforms.

Preventive measures to some extent must be based on the evaluations of the companies involved and so far as the Australian shelf is concerned it is to be hoped that consultations will be held with the various State and Commonwealth Departments (such as the Fisheries Departments of the States and the Commonwealth Departments of National Development and Primary Industries) to decide upon the appropriate techniques which will ensure that no unreasonable interference with marine life occurs. Under the joint legislation there is provision for the giving of directions and the making of regulations on these matters and it is quite likely that certain uniform standards will be agreed upon in the future.

In the debates in the Queensland Parliament on the State Petroleum (Submerged Lands) Bill some members expressed considerable concern as to the effects of drilling in the Barrier Reef area. There have been moves already to declare the Barrier Reef a marine park. The views of conservationists must certainly be taken into account when programmes of exploration and exploitation in such areas are being planned.

If one looks to the distant future, it will be necessary also to consider aesthetic factors. A small number of drilling platforms will not disfigure a coastline but a large number may. The engineer and marine architect have the task here of devising installations and equipment in such a way that the maritime areas adjacent to the coastline will not be cluttered up with unsightly features. The seas of the future are going to be used for a multitude of purposes and it would not be too rash to predict that it will be necessary at some stage to have a code of rules relating to all areas of the shelf just as we have a code of building and local government regulations governing activities on *terra firma.*

[2] Young, "Off-Shore Claims and Problems in the North Sea", 59 A.J.I.L. (1965), 505.

With respect to navigation, Article 5 paragraph 6 of the Convention provides that neither installations nor surrounding safety zones may be established where interference would be caused to the use of recognised sea lanes essential to international navigation. Some of the problems in this context are outlined in the article cited earlier. "First, are recognised sea lanes to be regarded as immutably fixed, as most mariners would prefer, or may they be subject to reasonable relocation on due notice in order to facilitate exploitation by the coastal state of resources found to underlie their original course? Again, how wide must such a sea lane be? This also involves maritime safety and efficient exploitation, for even with directional drilling techniques, there are limits to the size of an area that can be probed from installations located outside it. Third, precisely what kinds of warning arrangements are suitable for installations, particularly those on the edge of a sea lane? The very requirement that such installations carry warning devices becomes a possible source of confusion, because a multiplicity of lights and sounds can be not only distracting itself but can obscure standard navigational buoys and beacons."[3] The writer states that the problem is a serious one in the Gulf of Mexico where in 1964, 1590 of 4783 fixed installations on the shelf were located in or near shipping lanes. In Australia this will be a matter to be brought within the regulations made under the joint legislation. Until these are made, directions may be issued by the recognised authorities to protect any navigational rights which might be unreasonably interfered with by exploitation activities.

II. *Extent of jurisdiction over areas outside the 200 metre line.*

I want now to return to the question of the extent of the continental shelf and in the course of my discussion of this matter I shall refer to certain aspects of the joint legislation. The 200 metre line was not selected as the terminating outer line of the shelf as Article 1 of the Convention refers to the shelf as extending to that line *or* beyond that line to where the depth of the superjacent waters admits of the exploitation of the resources of the sea-bed. Consequently, as technological development proceeds, the "legal" shelf will extend outwards beyond the 200 metre line. The question has been asked whether this means that those nations which have the technological know-how will be able to extend their jurisdiction to the continental slope and even beyond, while those nations without the technological know-how will have to be satisfied with jurisdiction terminating at 200 metres until they develop the means of developing the outer areas adjacent to their coastlines. The sensible answer to this question would be to favour a world-wide uniform extension of shelf jurisdiction as technology advances. This answer is, of course, in accordance with commercial and political

[3] Young, *op. cit.* at pp. 519-520.

realities. Most off-shore petroleum programmes are conducted by international consortia and companies which have leases on a number of Shelves and it would be a strange situation indeed if the underdeveloped nations were to be denied the benefit of discoveries made as the result of the capital investment and technical expertise of the developed nations.

Nevertheless, at some stage an outer limit will be reached where the area to be exploited is no longer adjacent to a particular coastline. These are the ocean depths. What nations will have rights to exploit these areas? Petroleum is not the only mineral which may be found in these depths. Traces of many other basic minerals have already been found. Methods of exploiting these resources are now being developed by the scientists and there is the possibility of "harvesting" such deposits without relying on the platforms which are now being used. (Various types of special submarines are in the testing stage.) At the present time there are no detailed rules of international law to regulate deep-sea mining apart from the general provisions of the Convention on the High Seas (signed also at Geneva in 1958). Article 2 of this Convention enshrines the principle of customary international law. "The High Seas being open to all nations, no state may validly purport to subject any part of them to its sovereignty. Freedom of the High Seas is exercised under the conditions laid down by these articles and by other rules of international law. It comprises, inter alia, both for coastal and non-coastal states:

(1) Freedom of navigation;
(2) Freedom of fishing;
(3) Freedom to lay submarine cables;
(4) Freedom to fly over the High Seas.

These freedoms, and others which are recognised by the general principles of international law, shall be exercised by all states with reasonable regard to the interests of other states in their exercise of the freedom of the High Seas".

So far as deep sea mining is concerned, it can be said that in the light of the basic freedoms over the high seas recognised by the Convention on the High Seas, there would be no right on the part of any country or body which had discovered mineral deposits on the sea-bed of the ocean to mark out the claim effectively, so as to prevent other countries or bodies "cashing in" on such a discovery by drilling, for example, in immediately adjacent areas. The only qualification, of course, would be that no other country or its nationals could interfere with the actual drilling structures, vessels, pipelines or other structures which were being used by the successful operator. This situation at the present time constitutes an obstacle to commercial exploitation of the deep sea areas because any state the nationals of which made a success-

ful discovery would soon find that the site of the discovery would be encroached upon by other operators and would not be in a position to rebut the argument that under present international law the freedom of the seas permitted such encroachment. There may be something in present customary international law to justify a protest, for example on the basis of "abuse of rights", but that would be a very slender basis for pursuing a claim to exclusive control over an area in which a discovery was made. Again some attempt might be made on the basis of the Convention on the Continental Shelf to establish "safety zones" around a particular area where a discovery was made and the principle of "occupation" might be utilized as some support for this claim but the legality of this procedure would be subject to grave doubt.

There is no doubt then that in order to provide for the effective utilization of many types of minerals in the subsoil of the oceans a new international convention must be negotiated. Such a convention while embodying some of the features of the Continental Shelf (e.g. safety zones) would have to contain provisions for determining the issue of licences of exploration and exploitation of designated mineral resources for establishing a system of regulation of production. At the same time, in the light of the "open-ended" definition of the term "continental shelf" in the Convention on the Continental Shelf some attempt will have to be made to determine a boundary between the continental shelf (over which the coastal state has exclusive jurisdiction) and the ocean areas which will be subjected to international control.

It has been suggested that the United Nations should be given exclusive control over the mineral resources of the oceans and that the revenue derived from licence fees and royalties should accrue to it. Such an independent source of revenue would assist the United Nations Organization to carry out its basic functions of peace-keeping without having to rely on levies from individual nations which are often not forthcoming. The solution may, however, be too idealistic. One can imagine the problems involved in reaching agreement on fees, royalty rates, etc., and the conflicts between the major nations in jockeying for rights over "choice" areas.

More sensible is the suggestion that the matter should be isolated from international politics by setting up a specialized international agency which, although related to the U.N., would have a separate existence with its own constitution and board of directors. There are already a number of maritime bodies in existence that are concerned with regulating the catching of fish in the various oceans of the world and it would be worthwhile to explore the possibility of creating a world-wide organisation, or organisations based on a regional setting, to control the allocation of the resources of the sea-beds of the world's

oceans. Such an organisation would receive applications for licences, determine fees and royalties, and supervise the activities of licencees. Recently, a committee of the International Law Association was set up to draft recommendations along these lines.

It is interesting to note that the joint legislation of the Commonwealth and States dealing with the petroleum resources of the Australian shelf extends into the deep ocean areas. It adopts the definition of the term "continental shelf" in Article 1 of the Convention on the Continental Shelf and, in schedules to the Commonwealth Act and the individual State Acts, there are to be found a delineation of the water boundaries in terms of meridians of longitude and parallels of latitude which extend for a considerable distance into the Pacific and Indian Oceans. A study of the maps which accompany the governmental agreement shows that the outer limit off Western Australia extends to the 110th meridian of longitude (east) and the 44th parallel of latitude (south) while the area adjacent to the State of Tasmania extends to Antarctic regions. These outer limits, of course, have no operative effect until technology permits exploitation in areas deeper than the 200 metre line. For practical purposes, therefore, the 200 metre line is the present limit of the Australian continental shelf, although there are small pockets of continental shelf in the Coral Sea and Indian Ocean (that is, areas within 200 metre lines) which are separated from the main continental shelf by water areas of greater depth. These come within Australian jurisdiction either as insular shelves or on the basis of adjacency. If agreement is reached at a later stage on a code to regulate deep sea mining the outer limits as defined in the schedules to the legislation will have to be re-drawn.

Mention may also be made of the fact that the outer boundaries of the shelf off the Northern part of the Australian continent have been drawn so as to take account of the median line principle embodied in Article 6 of the Convention on the Continental Shelf. This Article envisages that normally demarcation of the boundaries of a shelf which borders more than one country will be based on an agreement between those countries. In the absence of agreement, the median line principle is to be applied (where there are no special circumstances which might require a departure from this principle).

There has been no agreement between Australia and Indonesia on this matter. It is possible that if such an agreement was reached in the future some points on the northern boundary will have to be changed but the present boundary seems to be an equitable division of jurisdiction between Australia and Indonesia (including West Irian). As between Queensland and Papua the shelf boundary follows the old territorial line (to be found in the Queensland Coast Islands Act of 1879). Here the median line principle has been departed from because

of special circumstances (i.e. the fact that the Torres Strait Islands are subject to Queensland sovereignty).

It is possible that when Papua New Guinea achieves independence, further discussions on this boundary will take place.

III. *Jurisdiction over the Continental Shelf in a federal system.*

Even before the doctrine of the continental shelf had become established in international law, the position in those countries which had a federal structure was affected by constitutional disputes on the competence of the central or provincial legislatures to grant licences for exploration of the sea-bed.

In the United States, of course, litigation on this matter has taken place over the last twenty years. In three major cases decided between 1947 and 1950[4] it was held that the federal government and not the States held paramount authority over the sea-bed adjacent to the coastline. (This covered both territorial waters and the continental shelf but not inland waters.) The effect of these decisions was partially abrogated by the Submerged Lands Act of 1953 which allowed the maritime states to claim jurisdiction over the sea-bed within their boundaries at the time of their admission to the Union. In the case of the majority of States these were the waters and sea-bed within the three mile limit (although in the case of Texas and Florida it was subsequently held that the jurisdiction extended to one marine league, a wider maritime boundary having been recognised for those States before admission to the Union). Federal jurisdiction over the continental shelf was confirmed in the same year by the Outer Continental Shelf Lands Act.

Because of the division of legislative jurisdiction different rules and regulations apply to drilling operations within the three mile limit and outside it and subsequent litigation has centred around the method of determining the baselines which distinguish inland waters from the territorial sea-bed and continental shelf. Some of the states had claimed the right to delineate these baselines in a manner which was not recognised by the federal authorities. (Such a baseline, of course, affects the commencing line of the continental shelf proper.)

In the most recent dispute it was decided by the Supreme Court that the criteria for delineating the coastline were to be taken from the Convention on the Territorial Sea. The following propositions are to be found in the Court's judgment:

1. The phrase "coastline" means the line of low water on the mainland or islands and on low-tide elevations lying wholly or partially within the territorial sea and this constitutes both the seaward limit of inland waters and the inner boundary of the territorial sea.

[4] U.S. v. California, 332, U.S. 19 (1947).
U.S. v. Louisiana, 339, U.S. 699 (1950).
U.S. v. Texas, 339, U.S. 707 (1950).

2. Inland waters mean the waters which are *landward* of this baseline, and include any rivers or streams flowing directly into the sea landward of a straight line drawn across the mouths of such rivers or streams.
3. Inland waters include bays which comply with the criteria specified in Article 7 of the Convention. (A maximum line of 24 miles may be drawn to include the waters within the bays subject to the exception of "historic" bays which may have more extensive entrance points, i.e. in excess of 24 miles. A historic bay is defined as a bay over which a country has asserted and maintained authority with the acquiescence of foreign nations.)

Before I examine the relevance of this decision to the Australian legal position, I wish to say something about the recent decision of the Canadian Supreme Court which was handed down in November of last year.[5] This case involved a dispute between the Dominion of Canada and the Province of British Columbia as to rights over the sea-bed adjoining British Columbia. One of the important issues in that case was the legal position at the time when British Columbia joined the Confederation in 1871, this being the crucial date for determining the extent of the colony's powers at the time it became part of the larger political unit. The Canadian Supreme Court followed the famous British case of *R. v. Keyn*[6] in holding that British law at that date did not recognize the territory of the realm as extending beyond the low-water mark and that therefore territorial waters were outside the realm. This principle of law applied not only to the mother country but also to the colonies and therefore prevented any historic claim on the part of British Columbia based on pre-Confederation rights to a three mile limit. Control of the territorial sea-bed was vested in the Dominion Government which had been a party to the Convention on the Territorial Sea. "The sovereign state," the Court stated, "which has the property in the bed of the territorial sea adjacent to British Columbia is Canada. At no time has British Columbia, either as a colony or as a province, had property in these lands, and Canada has exclusive legislative jurisdiction in respect of them either under section 91(1)(a) of the British North America Act or under the residual power in section 91. British Columbia has no legislative jurisdiction since these lands in question are outside its boundaries."[7]

With respect to the continental shelf off British Columbia, it was decided by the Court that Canada and not the Province had exclusive jurisdiction over this area since it was the only body with authority to claim the rights recognized by the Convention on the Continental Shelf.

[5] In the matter of a reference by the Governor in Council concerning the ownership of and jurisdiction over off-shore mineral rights. P.C. 1965 — 750 dated 26th April, 1965.
[6] 1876, 2 Ex. D., 63.
[7] Transcript, p. 27.

"There is no historical, legal or constitutional basis upon which the Province of British Columbia could claim the right to explore and exploit or claim legislative jurisdiction over the resources of the Continental Shelf."[8]

There is no doubt that the judgment is characterized by what might be called a strong centralist flavour and the reactions of some of the Provincial Premiers to the decision were immediate and to the point. The Premier of British Columbia probably expressed the feelings of a number of the Premiers when he said, "We have no intention of separating from the rest of Canada but we expect Ottawa to transfer the off-shore resources to the Province of British Columbia". It was suggested in a Canadian newspaper editorial immediately after the decision that discussions should proceed to achieve some accommodation of Dominion and Provincial interests and that the legal decision handed down by the Supreme Court would not be regarded as a final determination of the overall political issue.[9]

The Federal and State Governments in Australia, of course, have every reason to be pleased that after several years of negotiations agreement was reached between the Commonwealth and States on the exploitation of the resources of the sea-bed within territorial waters and the continental shelf. As the Minister for National Development said in his Second Reading Speech on the Commonwealth legislation, "In Australia the Governments of the Commonwealth and States believe that they have overcome these problems (i.e. as to constitutional competence) without recourse to litigation between Governments. To achieve this result they have mutually agreed that without abating any of their constitutional claims and that without derogating from their respective constitutional powers, they would enact uniform and complementary legislation providing for a Common Code to apply uniformly throughout off-shore areas including both the territorial sea and continental shelf".[10] The Minister added that internal (inland) waters would not be brought within the operation of the legislation. Subsequently there was an announcement in Parliament by the Attorney-General that steps were being taken to establish baselines in accordance with the Geneva Convention on the Territorial Sea.

The case of *U.S. v. California,*[11] referred to previously, points to the possibility of differences occurring between States and the Commonwealth over these lines. In that case the State of California claimed to use lines to increase the areas of inland waters which the U.S. Govern-

[8] *Ibid.*, p. 33.
[9] *The Globe and Mail,* November 8.
[10] Commonwealth Parliamentary Debates (House of Representatives), 1967, p. 1943.
[11] 332 U.S. 19 (1947).

ment was not willing to recognize. It is not clear at this stage whether the Commonwealth will proceed jointly with the States in this matter. Until these baselines are determined there will be certain areas around the coastline on which there will be some doubt as to whether they are subject to exclusive state mining codes or to the joint code.

What will be the impact of the Canadian case on the constitutional issue which is "in abeyance"? It may well strengthen the arguments of those who have supported Commonwealth jurisdiction over both the territorial sea-bed and the Continental Shelf, particularly in the light of the court's acceptance of the authority of *R. v. Keyn.*[12] However, on the part of those who support the State's claim to the territorial sea-bed, attention would be drawn to the significant differences between the Canadian and Australian constitutional systems. There is no section in the Commonwealth Constitution corresponding to these sections of the Canadian Constitution on which the Court relied for upholding the federal claim to the territorial sea-bed and the States have claimed to exercise a jurisdiction extending back to the nineteenth century to regulate fishing in these waters — a matter which is subject to federal power under the Canadian Constitution. Finally it could be said that while in Canada the crucial time for determining provincial claims was pre-1876, the crucial date in an Australian context is 1900's when the position as to claims over the territorial sea-bed had become more certain.

I therefore can see no compelling reason for departing from the view expressed elsewhere[13] that the States have legislative jurisdiction over the resources of the territorial sea-bed. On the other hand, the Commonwealth has jurisdiction over the resources of the continental shelf. The joint legislation has at least temporarily put this question into abeyance although a Senate Select Committee was set up at the end of last year to enquire into this matter. We must therefore await the presentation of its report for an authoritative opinion on the question.

[12] 1876, 2 Ex. D., 63.
[13] Lumb, "The Law of the Sea and Australian Off-shore Areas".