MARITIME CRIME

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[Jurisdiction over crimes committed at sea has long been an obscure area of law in Australia. The English Admiralty jurisdiction over offences committed below the water mark was adapted by a series of Imperial statutes in the nineteenth century to cater for the circumstances of the Australian colonies, but this process resulted in much ambiguity and uncertainty in the law: e.g. it is not entirely clear whether the former colonial courts were to try offences at sea according to local law or the law of England. In this article Dr Saunders examines a recent complementary legislative scheme involving the Commonwealth and States which will extend State laws to crimes committed on the seas connected with a State and assesses it in both its historical and constitutional context.]

I INTRODUCTION

In the latter half of 1978 complementary legislation was introduced into the Commonwealth and Victorian Parliaments to prescribe the law applicable in proceedings in Australia for offences committed at sea. The Crimes at Sea Act 1979 (Cth), which had been introduced in the Senate on 22 August 1978[1] by the Attorney-General, Senator Durack, received assent on 22 March 1979. The Crimes (Offences at Sea) Act 1978 (Vic.) passed through the Victorian Parliament and received assent on 19 December 1978. Neither has yet been proclaimed. Complementary legislation is expected in the other States[2] and has been passed in the Northern Territory.[3]

The legislation is the first stage of an intergovernmental co-operative scheme designed to apportion responsibility for the offshore areas between the Commonwealth and the States in such a way as to invest in the States the authority over the territorial sea which they were widely supposed to possess before the decision of the High Court in *New South Wales v. Commonwealth*.[4] In that case the Court held that the territory of the States ends at the low water mark, with the consequence that the operation of State legislation beyond that point is extraterritorial and depends for its validity on an adequate connection with the peace, order and good government of the State itself. The validity of Commonwealth legislation

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1 Australia, *Parliamentary Debates*, Senate, 22 August 1978, 241.

2 The Offshore (Application of Laws) Act 1977 (W.A.) might be relied upon instead in that State. But *cf.* Acts Interpretation (Amendment) Act 1976 (Vic.); Constitution Act 1975 (Vic.), ss. 17 and 85.

3 The Criminal Law (Offences at Sea) Act 1978 (N.T.). Hereinafter a reference to the States should be taken to include a reference to the Northern Territory unless otherwise indicated.

4 (1975) 135 C.L.R. 337.

for the sea below the low water mark was upheld as an exercise of the external affairs power, section 51(29) of the Commonwealth Constitution, either on the basis that it sought to exercise rights recognized in international conventions to which Australia is a party or on the basis that the area in question was physically outside the territory of Australia and therefore constituted, literally, an 'external affair'.

The details of the rest of the scheme, which were settled at the recent Premiers' Conference on 28 and 29 June 1979, are not yet publicly available. It is known to involve transfer of title to the territorial sea bed to the States and the extension of State legislative power to the three mile limit pursuant to section 51(38) of the Commonwealth Constitution.[5] The participation of the States in the enactment of the crimes at sea legislation is a gesture of recognition towards State rights offshore and as such is consistent with the philosophy of the scheme as a whole. Nevertheless it also creates legal problems which typify the confusion caused by the tangle of conflicting judicial pronouncements, distorted history and accepted practice which constitutes the present regime offshore.

The purpose of the crimes at sea legislation is to extend the criminal laws of a State to crimes committed at sea with which the State is connected in one of a number of specified ways. The division of responsibility adopted for the enactment of these provisions is based on the premise that State power extends to offences committed in the coastal sea[6] or on an Australian ship during a voyage between places in the State, despite the element of extraterritoriality. Consequently the Crimes (Offences at Sea) Act 1978 (Vic.) operates directly to extend the criminal laws of Victoria to such offences.[7] An interesting concession to the potential delicacy of the matters dealt with and the concentrated mixture of Commonwealth and State interests offshore appears in section 8, which provides that proceedings in relation to an offence other than an offence against fisheries legislation committed on or from a foreign ship shall be taken only with the consent in writing of the Attorney-General, which shall not be given

> unless he is satisfied, after consultation with the Attorney-General of the Commonwealth, that the case is an appropriate one for the taking of the proceedings and . . . the Attorney-General shall have regard to the provisions of Article 19 of the Convention on the Territorial Sea and Contiguous Zone referred to in the *Seas and Submerged Lands Act* 1973 of the Commonwealth.

The Commonwealth Act will extend the criminal laws of the respective States to other offences committed in circumstances presumably deemed

[5] Letter to the editor from the federal Attorney-General, Senator Durack, *The Australian* (Sydney) 19 July 1979.

[6] Defined in the Crimes (Offences at Sea) Act 1978 (Vic.), s. 3(1) as
(a) the territorial sea adjacent to the State; and
(b) the sea on the landward side of the territorial sea adjacent to the State that is not within the limits of the State — and includes the airspace over and the sea-bed and sub-soil beneath any such sea.

[7] S. 6.

outside the present scope of State legislative power: on an Australian ship connected[8] with the State either in the course of a voyage from a place within the State to a place outside the State[9] or to a place in a foreign country;[10] on a foreign ship beyond the territorial sea in the course of a voyage to Australia[11] if the offender subsequently enters the State;[12] on a foreign ship beyond the territorial sea by an Australian citizen whose most recent domicile was in the State concerned;[13] in an area beyond the territorial sea but adjacent to the relevant State in which the regulations declare Australia to have jurisdiction at international law with respect to a particular matter;[14] or an offence by an Australian resident in prescribed waters beyond the territorial sea adjacent to the State.[15] Proceedings in relation to acts committed on a foreign ship are again subject to the controlled consent of the Attorney-General — in this case the Commonwealth Attorney-General.[16] Other necessary safeguards for the preservation of international comity are also inserted.[17]

The combined effect of the Acts, unless successfully challenged, will be to clarify and rationalize for Australia a particularly obscure area of law: the nature of and limitations on jurisdiction in relation to offences committed below the low water mark exercised by the courts of former British colonies. The origins of the confusion lie in the application of Admiralty jurisdiction as adapted by nineteenth century British legislation to colonial circumstances, since overlaid by conflicting practices and judicial doctrines developed to accommodate growing Australian independence from the United Kingdom and divergence from its substantive law. The anomalies which can be produced by the present law are illustrated by three comparatively recent cases.

The first is *William Holyman and Sons Pty Ltd v. Eyles*,[18] a decision of the Supreme Court of Tasmania in 1947. It concerned a prosecution in relation to the deaths of a number of horses on a British ship on a journey between Melbourne and Launceston but outside territorial waters at the

[8] As defined in s. 6(2).
[9] S. 6(1)(a) and s. 6(3).
[10] S. 6(1)(c).
[11] S. 7(1)(a)(i); s. 7(1)(a)(ii) extends State law to offences committed on a foreign ship engaged in fishing within the Australian fishing zone but beyond the territorial sea.
[12] S. 7(3).
[13] S. 8(a).
[14] S. 10.
[15] S. 11.
[16] S. 7(5) and (6).
[17] S. 7(4) provides that it is a defence if a person 'establishes that the act constituting the offence would not have constituted an offence against the law of the country of which he is a national if the act had taken place in that country'. S. 7(6) requires the Attorney-General to withhold his consent to proceedings under s. 7 where another country has jurisdiction under international law in relation to the foreign ship, 'unless he is satisfied that the government of that country has consented to the institution of the proceedings'. The requirement does not apply to proceedings for an offence against a law relating to fisheries (s. 7(5)) or to an act of a 'piratical character' (s. 7(7)).
[18] [1947] Tas. S.R. 11.

relevant time. The condition of the horses is described in such grisly detail in the report that it comes as no surprise that the accused were found to have contravened legislation for the protection of animals. The first remarkable feature of the case is the Court's finding that the legislation applicable, pursuant to the Admiralty Offences (Colonial) Act 1849 (Imp.),[19] was the Protection of Animals Act 1911 (Eng.). A still more remarkable feature is the further finding that the appropriate punishment was that laid down in the Cruelty to Animals Prevention Act 1925 (Tas.), as the local legislative formulation of the offence most nearly equivalent to the offence under the English Act. This latter consequence was held to follow from yet another statute dealing with Admiralty jurisdiction, the Courts (Colonial) Jurisdiction Act 1874 (Imp.).[20] The matter would have been even more complex had the offence been committed within the three mile territorial sea adjacent to either Victoria or Tasmania, within which, according to the Tasmanian Court, the law of the adjacent State applied. This reasoning is inconsistent with the subsequent decision of the High Court in *New South Wales v. Commonwealth.*[21] It also lacks foundation in terms of the statutes themselves.

The second case, *Oteri v. The Queen*,[22] is a Privy Council decision delivered in 1976. The issue involved was the existence and nature of jurisdiction exercised by the District Court of Western Australia with respect to a theft committed on the high seas 22 miles from the coast of Western Australia by Australian citizens on a ship normally operated out of Fremantle and licensed under Western Australian legislation. The Privy Council held that the jurisdiction exercisable by the District Court was Admiralty jurisdiction and that the law applicable was the law of the United Kingdom presently in force. These conclusions were reached on the basis of an interpretation of the 1849 and 1874 Imperial Acts similar to that of the Supreme Court of Tasmania in *Holyman's* case.[23] The result was described by the Privy Council as follows:

> It may at first sight seem surprising that . . . two naturalized Australian citizens whose home was in Fremantle should find themselves subject to English criminal law upon leaving that port to fish within a few miles of the coast in a vessel owned by Australian citizens; or, put in another way, that Parliament in the United Kingdom when it passes a statute which creates a new criminal offence in English law is also legislating for those Australian passengers who cross the Bass Strait by ship from Melbourne to Launceston.[24]

The third case is remarkable for its reasoning rather than its outcome. *R. v. Bull*[25] is a decision of the High Court of Australia delivered in 1974. It concerned the existence and nature of the jurisdiction of the Supreme

[19] 12 & 13 Vict., c. 96.
[20] 37 & 38 Vict., c. 27.
[21] (1975) 135 C.L.R. 337.
[22] (1977) 51 A.L.J.R. 122.
[23] [1947] Tas. S.R. 11.
[24] (1977) 51 A.L.J.R. 122, 124.
[25] (1974) 131 C.L.R. 203.

Court of the Northern Territory over an offence under the Customs Act 1901 (Cth) allegedly committed below the low water mark but within the three mile limit. Pursuant to section 15(1) of the Northern Territory Supreme Court Act 1961 (Cth) the Court had the same jurisdiction in relation to the Territory which the Supreme Court of South Australia had on 1 January 1911. The latter was invested with jurisdiction

> in all cases whatsoever as fully and amply in this Province and its dependencies as Her Majesty's Court of King's Bench, Common Pleas, and Exchequer, at Westminster, or either of them, lawfully have or hath in England.

It possessed further a grant of federal jurisdiction pursuant to section 39(2) of the Judiciary Act 1903 (Cth) in the following terms:

> The several Courts of the States shall within the limits of their several jurisdictions, whether such limits are as to locality, subject-matter, or otherwise, be invested with federal jurisdiction, in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon it. . . .

The problem for the Court was whether, assuming the territory of the former colonies ended at the low water mark, the federal jurisdiction vested in their courts by the Judiciary Act extended to offences committed in the territorial sea, in the light of the fact that it was expressly restricted to the limits of the jurisdiction otherwise exercisable by them. In other words, apart from its investiture with federal jurisdiction, did the Supreme Court of, in this case, South Australia, have jurisdiction to try offences committed in the territorial sea according to local law?

The majority of the Court, McTiernan, Menzies, Gibbs, Stephen and Mason JJ. held on a variety of grounds that the jurisdiction of the Supreme Court of the Northern Territory extended to the offence in question. All except Gibbs J. held that the jurisdiction was ordinary not Admiralty jurisdiction. Barwick C.J. dissented. He held that the only jurisdiction exercisable by colonial courts over offences committed at sea was Admiralty jurisdiction pursuant to the Imperial Acts of 1849 and 1874. He construed these Acts as requiring the application of English law, albeit the imposition of local colonial punishments. No other legislation purported to invest the colonial courts with general jurisdiction to hear offences committed at sea according to local law; he left open the question whether such legislation could be, or could have been, enacted by local legislatures. It followed that the Judiciary Act did not invest the Supreme Court with jurisdiction with respect to federal offences committed below the low water mark.

Two members of the majority, Stephen and Mason JJ., agreed with Barwick C.J. on the interpretation of the Imperial Acts, but held that the colonial courts had also possessed a jurisdiction with respect to customs offences committed offshore exercisable according to local law which would support the existence of jurisdiction in this case. Menzies and Gibbs JJ. also upheld the jurisdiction of the Supreme Court, but primarily on the ground that the Imperial Acts invested colonial courts with jurisdiction to try offences committed at sea according to local law and subject

to the imposition of local penalties. The fifth member of the majority, McTiernan J., upheld the jurisdiction of the Court on the basis that the Supreme Court of South Australia had been invested with the jurisdiction of the common law courts, which had exercised Admiralty jurisdiction in criminal matters since the sixteenth century. The few conclusions that can be drawn from this disparity of views will be examined later against the background of Admiralty jurisdiction. It should be noted here that a statutory majority[26] of the Court favoured the interpretation of the Imperial statutes attributed to them in *Holyman*[27] and *Oteri*,[28] although that majority was itself divided on the consequence which followed.

A proper evaluation of the present law requires an analysis of the development of Admiralty jurisdiction in England and its adaptation by nineteenth century Imperial legislation to colonial circumstances.

II ADMIRALTY JURISDICTION

Admiralty jurisdiction was originally, to quote Holdsworth, 'wide and vague'.[29] It embraced both civil and criminal matters. As the result of conflicts with the jurisdiction of seaport towns it was restricted by two early statutes in the reign of Richard II: 13 Ric. II, c. 5 and 15 Ric. II, c. 3. The latter referred to

> the great and grievous complaint of all the commons made to our Lord the King in this present Parliament, for that the Admirals and their deputies do encroach to them divers jurisdictions, franchises, and many other profits pertaining to our Lord the King, and to other lords, cities and boroughs, other than they were wont or ought to have of right.

It provided that

> of all manner of contracts, pleas and quarrels, and all the other things rising within the bodies of the counties, as well by land as by water, and also of wreck of the sea, the Admiral's Court shall have no manner of cognizance, power, nor jurisdiction.

Such matters were to be 'tried, determined, discussed, and remedied by the laws of the land'. The Admiral retained jurisdiction over

> the death of a man, and of a maihem done in great ships, being and hovering in the main stream of great rivers, only beneath the [bridges] of the same rivers [nigh] to the sea, and in none other places of the same rivers, the Admiral shall have cognizance. . . .

In 1536 criminal jurisdiction was partially removed from the Admiralty by the Offences at Sea Act 1536.[30] It appears from the preamble[31] that the reason for this was the ineffectiveness of Admiralty procedures to deal with criminal matters, as a result of which various types of offenders at sea escaped unpunished. The Act provided that

[26] Barwick C.J., Stephen and Mason JJ.
[27] [1947] Tas. S.R. 11.
[28] (1977) 51 A.L.J.R. 122 (P.C.).
[29] Holdsworth W., *A History of English Law* (7th ed. 1956) Volume 1, 548.
[30] 28 Henry VIII, c. 15.
[31] See also Holdsworth, *op. cit.* Volume 1, 550.

> [a]ll treasons, felonies, robberies, murthers [*sic*] and confederacies hereafter to be committed in or upon the sea, or in any other haven, river, creek or place where the Admiral or Admirals have or pretend to have power, authority or jurisdiction, shall be enquired, tried, heard, determined and judged, in such shires and places in the Realm, as shall be limited by the King's commission or commissions to be directed for the same, in like form and condition, as if any such offence or offences had been committed or done in or upon the land.

Under the Act commissions were to be directed to the Admiral and other 'substantial persons' to

> hear and determine such offences after the common course of the laws of this Realm, used for treasons, felonies, murthers, robberies and confederacies of the same, done and committed upon the land within this Realm.

The civil jurisdiction which remained with the Admiral subsequently became the subject of controversy and conflict with the common law courts. Its development provides a more precise guide to the respective limits of the jurisdiction of the Admiral and the common law courts. The eventual compromise was that the Admiral had jurisdiction below the low water mark and the common law courts above. The area between the high and low water mark was apportioned as follows:

> . . . when the sea flows, and has *plenitudinem maris*, the Admiral shall have jurisdiction of everything done on the water, between the high water mark and low water mark, by the ordinary and natural course of the sea . . . and yet when the sea ebbs, the land may belong to a subject, and everything done on the land when the sea is ebbed shall be tried at the common law. for it is then parcel of the county.[32]

The Offences at Sea Act 1536[33] transferred criminal jurisdiction only with respect to treason, felonies, robberies, murders and confederacies, from the Admiral to specially appointed commissioners. The process was completed by the Offences at Sea Act 1799,[34] which required all other offences committed on the seas to be treated in the same manner: it provided that

> [a]ll and every offence and offences, which shall be committed upon the high seas out of the body of any county of this Realm shall be, and they are hereby declared to be offences of the same nature respectively, and to be liable to the same punishments respectively, as if they had been committed upon the shore.

The cumbersome procedure of special commission was finally replaced in 1844 by the Admiralty Offences Act 1844,[35] which provided for 'Her Majesty's Justices of Assize or others of Her Majesty's commissioners by whom any Court shall be holden under any of Her Majesty's commissions of oyer and terminer or general gaol delivery' to have all the powers previously given by special commission.

The last stage in the development of Admiralty jurisdiction in England which it is relevant to mention is the Territorial Waters Jurisdiction Act 1878.[36] This Act was passed to deal with the decision of the majority in *R.*

[32] *Sir Henry Constable's Case* (1601) 5 Co. Rep. 106a, 107a; 77 E.R. 218, 220 f. (K.B.).
[33] 28 Henry VIII, c. 15.
[34] 39 Geo. III, c. 37.
[35] 7 & 8 Vict., c. 2.
[36] 41 & 42 Vict., c. 73.

v. *Keyn*[37] that no English court had jurisdiction to try a foreigner charged with committing an offence within three miles of the English coast on a foreign ship. The preamble of the Act strongly countered the decision of the Court, reciting that

> the rightful jurisdiction of Her Majesty, Her heirs and successors, extends and has always extended over the open seas adjacent to the coasts of the United Kingdom and of all other parts of Her Majesty's dominions to such a distance as is necessary for the defence and security of such dominions.

Section 2 of the Act provided as follows:

> an offence committed by a person, whether he is or is not a subject of Her Majesty, on the open sea within the territorial waters of Her Majesty's dominions, is an offence within the jurisdiction of the Admiral, although it may have been committed on board or by means of a foreign ship, and the person who committed such offence may be arrested, tried and punished accordingly.

Under section 3 proceedings brought in the United Kingdom pursuant to the Act against a person not a subject of her Majesty required the consent of one of her Majesty's Principal Secretaries of State. 'Territorial waters' were defined in section 7 as

> such part of the sea adjacent to the coast of the United Kingdom, or of the coast of some other part of Her Majesty's dominions, as is deemed by international law to be within the territorial sovereignty of Her Majesty; and 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 of Her Majesty's dominions.

An 'offence' was defined in the same section as 'an act neglect or default of such a description as would, if committed within the body of a county in England, be punishable on indictment according to the law of England for the time being in force'. The opening words of the interpretation section qualified the meanings assigned to these terms with the phrase 'unless there is something inconsistent in the context'.

The transferral of criminal jurisdiction from the Admiralty, which was fully accomplished by the Act of 1799, and the acquisition of an increasing number of British possessions overseas created procedural problems for the determination of criminal cases, Admiralty in origin. With the exception of piracies, felonies and robberies, all offences at sea could be tried only in England, with the result that many offenders were not brought to justice. This coincided with a general movement in the nineteenth century towards co-operation between and co-ordination of English, colonial and foreign courts.[38] The first change relevant for present purposes was made by the Offences at Sea Act 1806,[39] which provided for the appointment of special commissioners 'in any of His Majesty's islands, plantations, colonies, dominions, forts or factories' to hear

> [a]ll treasons, piracies, felonies, robberies, murders, conspiracies, and other offences of what nature or kind soever, committed upon the sea, or in any haven, river, creek, or place, where the Admiral or Admirals have power, authority or jurisdiction. . . .

[37] (1876) 2 Ex. D. 63 (C.C.R.).
[38] Holdsworth, *op. cit.* Volume 14, 347 f.
[39] 46 Geo. III, c. 54.

It can be seen that it provided for the colonies a procedure similar to that existing in England under the Offences at Sea Act 1536.[40] The offences were to be 'enquired of, tried, heard, determined and adjudged, according to the common course of the laws of this Realm used for offences committed upon the land within this Realm, and not otherwise. . . .' The preamble described the purpose of the Act as not only to remedy deficiencies in Admiralty procedure, but also to attain the result 'that one uniform course of trial may be had' for all such offences committed upon the seas. At this stage therefore the exercise of jurisdiction of this kind in the colonies undoubtedly was subject to English laws and penalties.

The Australian Courts Act 1828[41] dealt with, *inter alia*, the administration of justice in New South Wales and Van Diemen's Land. Section 4 of the Act provided for the exercise of criminal jurisdiction, Admiralty in origin, by the Supreme Courts of the two colonies. The jurisdiction described was identical to that exercised by the commissioners pursuant to the Offences at Sea Act 1806.[42] It differed however in the description of the way in which the jurisdiction was to be exercised:

> all persons convicted of any of the offences so to be enquired of, heard and determined in the said Courts respectively, shall be subject and liable to and shall suffer all such and the same pains, penalties, and forfeitures as by any law or laws now in force persons convicted of the same respectively would be subject and liable to in case the same had been committed and were respectively enquired of, tried, heard, determined and adjudged, in England; any law, statute, or usage to the contrary notwithstanding.

It is not obvious from the wording of the Act that the jurisdiction invested in the Supreme Courts by this section was required to be exercised according to the law of England as a matter of substance, as well as in relation to the punishment to be imposed. This was probably insignificant at the time, in view of section 24, which provided that

> all laws and statutes in force within the realm of England at the time of the passing of this Act . . . shall be applied in the administration of justice in the Courts . . . so far as the same can be applied within the said Colonies.

The substantial similarity between the laws of England and its colonies during the whole of the nineteenth century probably explains the vagueness of successive enactments relating to colonial jurisdiction in Admiralty on this point.

A similar ambiguity exists in the Admiralty Offences (Colonial) Act 1849,[43] investing other colonial courts with criminal jurisdiction in Admiralty matters. The Act in its preamble declared the necessity to make 'further and better provision for the apprehension, custody and trial . . . of persons charged with the commission of such offences on the sea, or in any such haven, river, creek or place. . . .' It was enacted in section 1 that if

[40] 28 Henry VIII, c. 15.
[41] 9 Geo. IV, c. 83.
[42] 46 Geo. III, c. 54.
[43] 12 & 13 Vict., c. 96.

any person within a colony was charged with the commission of any of these offences within the general jurisdiction of the Admiral, 'Magistrates, Justices of the Peace, public prosecutors, juries, Judges, Courts, public officers, and other persons in such colony' were to exercise the same jurisdiction with respect to such offences

> as by the law of such colony would and ought to have been had and exercised or instituted and carried on by them respectively if such offence had been committed, and such person had been charged with having committed the same, upon any waters situate within the limits of any such colony, and within the limits of the local jurisdiction of the Courts of criminal justice of such colony.

A likely interpretation of this provision would require the offence to be tried according to the law of the colony. This interpretation is rendered less likely as a matter of logic by section 2 of the Act, which provided that any person convicted before the court of such an offence should be

> subject and liable to and shall suffer all such and the same pains, penalties, and forfeitures as by any law or laws now in force persons convicted of the same respectively would be subject and liable to in case such offence had been committed, and were enquired of, tried, heard, determined, and adjudged, in England, any law, statute, or usage to the contrary notwithstanding.

It is also relevant to note section 4 of the Act, which provided that it should not 'affect or abridge the jurisdiction of the Supreme Courts of New South Wales and Van Diemen's Land' as provided in the Act of 1828. It is improbable that the combined Acts were intended to produce a situation in which the courts of the two older colonies were required to apply English law in exercising Admiralty jurisdiction whereas the courts of other colonies applied colonial law. Whether an advantageous balance now is best achieved by construing them both as requiring the application of English law is doubtful, particularly in view of the legislation which followed.

The reservation in favour of English law in respect of the appropriate punishment caused difficulty which became evident in *R. v. Mount*.[44] That decision gave rise to the enactment of the Courts (Colonial) Jurisdiction Act 1874.[45] The Act recited that 'doubts have arisen as to the proper sentences to be imposed upon conviction' of persons charged with certain crimes or offences under jurisdiction conferred on courts in the colonies. Section 3 of the Act provided:

> When by virtue of any Act of Parliament now or hereafter to be passed, a person is tried in a court of any colony for any crime or offence committed upon the high seas or elsewhere out of the territorial limits of such colony and of the local jurisdiction of such court, or if committed within such local jurisdiction made punishable by that Act, such person shall, upon conviction, be liable to such punishment as might have been inflicted upon him if the crime or offence had been committed within the limits of such colony and of the local jurisdiction of the court, and to no other, anything in any Act to the contrary notwithstanding: Provided always, that if the crime or offence is a crime or offence not punishable by the law of the colony in which the trial takes place, the person shall, on conviction, be liable to such punishment (other than capital punishment) as shall

[44] (1875) L.R. 6 P.C. 283.
[45] 37 & 38 Vict., c. 27.

> seem to the court most nearly to correspond to the punishment to which such person would have been liable in case such crime or offence had been committed in England.

It is possible to construe the effect of this Act in combination with the earlier Acts mentioned as requiring offences at sea to be tried in colonial courts according to the law of England, but punished with the penalty prescribed for the most nearly comparable colonial crime. This construction was adopted by the Supreme Court of Tasmania in *Holyman's* case,[46] the Privy Council in *Oteri*,[47] and a majority of the High Court in *R. v. Bull.*[48] It undeniably has the weight of authority in its favour. An almost equally plausible construction, particularly in view of nineteenth century assumptions about the continued identity of English and colonial law, is that the Acts invest colonial courts with Admiralty jurisdiction in criminal matters to be exercised according to colonial law as regards both substance and the penalty to be imposed. This construction also has the merit of convenience. It was adopted by two members of the High Court, Menzies and Gibbs JJ., in *R. v. Bull.*[49] As will be seen, the choice between these two interpretations has a bearing on the validity of the Crimes (Offences at Sea) Act 1978 (Vic.) and of the other State Acts when passed.

The Territorial Waters Jurisdiction Act 1878[50] merely added to the confusion. The effect of this Act in relation to offences committed within the territorial waters of the United Kingdom has been noted already. So far as the colonies were concerned, the following points were relevant. First, the Act confirmed jurisdiction over foreigners in the territorial waters of all dominions, not just of the United Kingdom. However, whereas the exercise of such jurisdiction within the United Kingdom required the consent of a Secretary of State, section 3 provided that the exercise of the jurisdiction within any of the dominions required 'the leave of the Governor of the part of the Dominions in which such proceedings are proposed to be instituted'. The role of the Governor was to decide whether it was 'expedient that such proceedings should be instituted'. Secondly, as has been mentioned, section 7 defined the term 'offence' as

> an act neglect or default of such a description as would, if committed within the body of a county in England, be punishable on indictment according to the law of England for the time being in force.

It is not necessarily the case that this required an offence committed by a foreigner within the territorial sea of a dominion to be adjudged according to the law of England. An inference to the contrary is supplied by the opening words in section 7 — 'unless there is something inconsistent in the context' — coupled with the provision for the Governor's consent in section 3. Further, the provisions of the 1874 Act were, unusually,

[46] [1947] Tas. S.R. 11.
[47] (1977) 51 A.L.J.R. 122.
[48] (1974) 131 C.L.R. 203.
[49] *Ibid.* 247, *per* Menzies J.; 262, *per* Gibbs J.
[50] 41 & 42 Vict., c. 73.

expressed to be prospective in operation and arguably influence the interpretation of the later Act. If this interpretation of the Act leads to the result that a foreigner could be tried in the court of one colony according to the law of that colony for an offence committed in the territorial waters of another colony, or even of England itself, it should not be dismissed on that account. The requirement for gubernatorial consent presumably would have been effective to avoid conflict over the exercise of jurisdiction whilst retaining the facility for an offence to be tried in the place where the offender was apprehended. Legislation for crimes at sea inevitably creates a potential for conflict with other jurisdictions which must be avoided by some such device. More sophisticated procedures to this end are provided in section 7 of the Crimes at Sea Act 1979 (Cth).[51]

The thesis that nineteenth century Imperial statutes should be construed to empower former colonial courts to try offences committed at sea according to local law gains support from the following extract from Webb's *Imperial Law*:[52]

> The Criminal jurisdiction [of the Admiralty] was subsequently vested in the Supreme Court of the colony, by the Statute 4 Geo. IV, c. 96, s. 3[53] (re-enacted by 9 Geo. IV, c. 83, s. 4),[54] over offences committed within the admiral's jurisdiction, and in other places in the Southern Seas not subject to His Majesty or to any European state of power; virtually repealing 46 Geo. III, c. 54.[55] Under the Act 12 & 13 Vict. c. 96[56] all persons charged with offences committed on the Sea or in places within the jurisdiction of the Admiralty, may be dealt with in the same manner as if the offences had been committed on waters within the local jurisdiction. The Act 37 & 38 Vict. c. 27[57] regulates the sentences proper to be passed in such cases.[58]

III THE CONSTITUTIONAL BASIS OF THE LEGISLATION

The effectiveness of Commonwealth legislation to apply State laws in areas in which they would not otherwise run has been questioned in the past, either because the Commonwealth lacks constitutional power to support a plenary extension of State law,[59] or because the extended laws become 'federalized' and subject to constitutional restrictions on federal

[51] *Supra* 160 n. 17.
[52] Webb T. S., *Imperial Law and Statutes in force in the Colony of Victoria* (2nd ed. 1892) 69 f.
[53] An Act for the 'better Administration of Justice in New South Wales and Van Diemen's Land' (1823) (Imp.).
[54] Australian Courts Act 1828 (Imp.).
[55] Offences at Sea Act 1806 (Imp.).
[56] Admiralty Offences (Colonial) Act 1849 (Imp.).
[57] Courts (Colonial) Jurisdiction Act 1874 (Imp.).
[58] Webb, *op. cit.* 69 f.
[59] See for example the difficulties raised by the application of laws provision in the 'mirror' Petroleum (Submerged Lands) legislation, discussed in Chapter 16 of the *Report from the Senate Select Committee on Offshore Petroleum Resources* (1971). The legislation purported to extend State law to the adjacent offshore areas in respect of certain matters only, for reasons which Professor D. P. O'Connell in evidence before the Committee identified as follows:

> If you extend all the law I imagine the Act would be invalid because it would be an excessive exposition of extraterritorial legislative competence on the part of a State, and if you attempted to do it by Commonwealth law you would probably exceed the powers of the Commonwealth Parliament under the stated heads of the Constitution in section 51. (para. 16.32)

power.[60] It is unlikely that either of these problems will affect the Commonwealth crimes at sea legislation. The generous interpretation given to the external affairs power contained in section 51(29) of the Commonwealth Constitution by the majority in *New South Wales v. Commonwealth*[61] appears to allow plenary Commonwealth legislation offshore, thus disposing of the first problem. The second is avoided in the legislation itself. The constitutional restrictions on federal power which are relevant in this context all relate to federal jurisdiction, in particular the requirement of trial by jury for indictable offences contained in section 80 of the Commonwealth Constitution, and the separation of judicial power. Both are accommodated in the Act.[62]

The State Act rests on a shakier basis. Two problems are raised: the first is whether it is within the extraterritorial legislative competence of the State; the second is whether it is repugnant to Imperial legislation having paramount force and therefore void, pursuant to section 2 of the Colonial Laws Validity Act 1865 (Imp.).[63]

The test for the validity of extraterritorial State legislation has been stated to be whether 'it is connected, not too remotely, with the State which enacted it, or, in other words, if it operates on some circumstance which really appertains to the State'.[64] More specifically, it has been said that

> it is within the competence of the State legislature to make any fact, circumstance, occurrence or thing in or connected with the territory the occasion of the imposition upon any person concerned therein of a . . . liability. It is also within the competence of the legislature to base the imposition of liability on no more than the relation of the person to the territory. The relation may consist in presence within the territory, residence, domicil, carrying on business there, or even remoter connections.[65]

The effect of the application of this test is sometimes unpredictable but it is certainly more straightforward when the operation of the legislation is confined to the territorial sea. There are a number of statements in recent cases which suggest that the nature of the territorial sea itself supplies the necessary nexus with the adjacent State.[66] In the context of the immediate problem, at least three members of the High Court in *R. v. Bull*[67] held

[60] See the discussion in Lane P. H., 'The Law in Commonwealth Places — A Sequel' (1971) 45 *Australian Law Journal* 138 with respect to the Commonwealth Places (Application of Laws) Act 1970.

[61] (1975) 135 C.L.R. 337.

[62] In particular, by ss. 13(3) and 17.

[63] 28 & 29 Vict., c. 63.

[64] *Pearce v. Florenca* (1976) 135 C.L.R. 507, 517, *per* Gibbs J.

[65] *Broken Hill South Ltd v. Commissioner of Taxation (N.S.W.)* (1937) 56 C.L.R. 337, 375, *per* Dixon J., quoted by the Privy Council in *Thompson v. Commissioner of Stamp Duties* [1969] 1 A.C. 320, 335 f., quoted in *Pearce v. Florenca* (1976) 135 C.L.R. 507, 517, *per* Gibbs J.

[66] *Pearce v. Florenca* (1976) 135 C.L.R. 507, 519, *per* Gibbs J.; 522, *per* Stephen J.; 522, *per* Mason J.; *Robinson v. Western Australian Museum* (1977) 51 A.L.J.R. 806, 815, *per* Gibbs J.

[67] (1974) 131 C.L.R. 203, 263, *per* Gibbs J.; 269 ff., *per* Stephen J.; 282, *per* Mason J. McTiernan and Menzies JJ. accepted the existence of such a power by implication: see in particular *ibid.* 245, *per* Menzies J. Barwick C.J. expressly reserved

that the former colonies, now States, had power to extend their jurisdiction to the territorial sea, although their remarks related particularly to jurisdiction with respect to customs offences, which traditionally has been recognized to have a peculiar status in the territorial sea. It should be noted that the conclusion that legislation with respect to the territorial sea has an automatic nexus with the adjacent State is often supported by reference to nineteenth century practice, pursuant to which the colonies assumed jurisdiction and legislative competence to the outer limit of the territorial sea.[68] It would be equally possible to draw from this widely acknowledged practice the conclusion that the territory of the colonies included the three mile territorial sea and that their competence to enact valid extraterritorial legislation was minimal. This conclusion would be consistent with a range of nineteenth century decisions in which colonial legislation was held invalid or read down on the ground of extraterritoriality despite an apparently close connection between the legislation and the colony concerned.[69] It would also be more logical. If the territory of the colonies ended at the low water mark, there is no particular reason why their legislation should be valid within the three mile limit but invalid beyond it, as was considered to be the case in the nineteenth century,[70] and is assumed in the Crimes (Offences at Sea) Act 1978 (Vic.).

Issues of basic principle aside, it appears on the balance of authority that legislation of a State with respect to offences committed in the territorial sea adjacent to that State or on an Australian ship engaged on a voyage between two places in the State is within the State's extraterritorial legislative competence. One caveat should be mentioned. In *Robinson v. Western Australian Museum*[71] a statutory majority of the High Court consisting of Barwick C.J., Jacobs and Murphy JJ., with Gibbs, Stephen

the question: *ibid.* 225 and 231. Interpretation of the decision is complicated by the fact that at the time it was delivered it had not yet been decided that the territory of the States ends at the low water mark.

[68] See for example *R. v. Bull* (1974) 131 C.L.R. 203, 270 f., *per* Stephen J.; 281 f., *per* Mason J.

[69] For example *Ray v. McMackin* (1875) 1 V.L.R. (L.) 274 (F.C.); *R. v. Barton* (1879) 1 Q.L.J. (Supp.) 16 (F.C.); *Re Victoria Steam Navigation Board, Ex parte Allan* (1881) 7 V.L.R. 248 (F.C.).

[70] *Re Victoria Steam Navigation Board, Ex parte Allan* (1881) 7 V.L.R. 248. The Federal Council of Australasia was invested with jurisdiction in a number of specific matters to deal with the inconvenience caused by the fact that the jurisdiction of individual colonies ended abruptly at the three mile limit: Federal Council of Australasia Act 1885 (Imp.), s. 15(a)-(g). The point is made by Mr Samuel (as he then was) Griffith in the Address-in-Reply to the Governor's speech at the First Session of the Federal Council of Australasia in 1886 in reference to the power of the Council with respect to 'fisheries in Australasian waters beyond territorial limits':

> At present legislation on the subject can only be enforced while the ships are in port, or are engaged in their operations within three miles of the shore, but while at sea, where they are practically while engaged in fishing, the law is inoperative. We in these colonies know what we want, and the Federal Council has now the power to legislate on the subject without appealing to the convenience or leisure of the Imperial Parliament to pass our suggestions into law.

Federal Council of Australasia, *Official Record of Debates*, 1886, 15.

[71] (1977) 51 A.L.J.R. 806.

and Mason JJ. dissenting, denied the valid operation of the Maritime Archeology Act 1973 (W.A.) in relation to a seventeenth century Dutch wreck lying on the seabed 2.87 miles from the coast of Western Australia. Two members of the majority, Barwick C.J. and Murphy J., based their decisions on the ground, *inter alia*, that the Act was not within the extraterritorial legislative competence of the State.[72] Barwick C.J. said:

> the limitation . . . of wrecks 'lying below low-water mark in the territorial waters of the State' does nothing to connect the law as to the wrecks with the territory of Western Australia or with its government, just as the fact that the *Gilt Dragon* happens now to lie within three nautical miles of the coastline of Western Australia has no bearing, in my opinion, on the validity of the laws here under attack, or upon the resolution of this case.[73]

The case demonstrates that for at least two members of the present High Court the fact that a State Act operates in the territorial sea is not in itself conclusive of its validity. The significance to be attached to these views no doubt will be worked out in later cases.

A more serious cause for concern as to the validity of the Crimes (Offences at Sea) Act 1978 (Vic.) lies in the possibility that it is repugnant to the Admiralty Offences (Colonial) Act 1849 (Imp.)[74] as modified by the Courts (Colonial) Jurisdiction Act 1874 (Imp.),[75] or the Territorial Waters Jurisdiction Act 1878 (Imp.).[76] The currently accepted interpretation of these statutes is that they confer on State courts jurisdiction with respect to offences at sea to be exercised according to the law of England. It is likely, to say the least, that a State Act which provided for offences at sea to be tried according to State law would be repugnant to these statutes in some respects and therefore inoperative pursuant to section 2 of the Colonial Laws Validity Act 1865 (Imp.).[77] This point was not raised by those members of the court in *R. v. Bull*[78] who conceded that the States could extend their jurisdiction into the territorial sea.[79] Once again, it may be significant that that case concerned jurisdiction with respect to customs offences. The extension to the territorial sea of all State law, both statutory and common law alike, provides a greater risk of repugnancy to Imperial legislation than would an extension for a more limited local purpose.

IV CONCLUSION

The foregoing analysis provides a background against which the offences at sea legislation can be understood and its validity assessed. More importantly, it emphasizes the confusion which exists and has existed in this area, now compounded by the decision of the High Court that the

[72] *Ibid.* 811 f., *per* Barwick C.J.; 831, *per* Murphy J.
[73] *Ibid.* 812.
[74] 12 & 13 Vict., c. 96.
[75] 37 & 38 Vict., c. 27.
[76] 41 & 42 Vict., c. 73.
[77] 28 & 29 Vict., c. 63.
[78] (1974) 131 C.L.R. 203.
[79] *Supra* 170 n. 67.

territory of the States ends at the low water mark.[80] Whilst the confusion stems partly from the antiquity of the legislation concerned, it can be traced also to cases in which historical principles and legal reasoning have given place to contemporary convenience. *R. v. Bull*[81] itself is an example of this. The process by which it has been accepted that the low water mark rather than the fluctuating tide mark delineates the jurisdiction of the common law courts and the Admiralty is another. Such an unreliable measure would of course be inconvenient to mark the boundary of the realm — which makes it all the more unlikely that it was expected to do so.

The distinction between the criminal jurisdiction historically exercised by the common law courts and the Admiral respectively was maintained in England throughout the nineteenth century notwithstanding the fact that it was exercised in practice by the common law courts alone. In *R. v. Bull*[82] some members of the Court blurred this distinction, although there was no express legal justification for doing so. The most obvious example is McTiernan J., who upheld the jurisdiction of the Supreme Court of South Australia below the low water mark on the basis of his interpretation of its ordinary jurisdiction, which was expressed to be co-extensive with that of the common law courts in England.[83] Stephen and Mason JJ. interpreted the Imperial Acts as conferring Admiralty jurisdiction on colonial courts to adjudicate over crimes at sea in accordance with English law, but recognized an additional ordinary jurisdiction exercisable by such courts pursuant to local customs legislation.[84] They wisely did not pursue the question of the jurisdiction exercisable by colonial courts offshore in matters with respect to which their authority had not been extended by specific local legislation. Had they done so they would have been obliged to choose between a conclusion that the jurisdiction of the colonial courts was derived from the Imperial statutes, *i.e.* that it was Admiralty jurisdiction and that it must be or must have been exercised according to English law; or a conclusion that in some way colonial courts had an ordinary jurisdiction exercisable in the territorial sea according to local law as a necessary corollary of their jurisdiction exercisable on land. The latter conclusion, which is infinitely more attractive, would again have confused the historical distinction between common law and Admiralty jurisdiction. Menzies J.,[85] like Gibbs J.,[86] held that the Imperial Acts require the application of colonial, not English law. It was not necessary for either of them to decide whether the colonies themselves had extended their jurisdiction offshore, and neither of them purported to do so. Confusingly,

[80] *New South Wales v. Commonwealth* (1975) 135 C.L.R. 337.
[81] (1974) 131 C.L.R. 203.
[82] *Ibid.*
[83] *Ibid.* 241.
[84] *Ibid.* 271 f., *per* Stephen J.; 282 f., *per* Mason J.
[85] *Ibid.* 247.
[86] *Ibid.* 263.

however, Menzies J. also suggested that the jurisdiction exercised by local courts below the low water mark was ordinary rather than Admiralty jurisdiction, presumably as an extension of the ordinary jurisdiction exercisable on land.[87]

Only Barwick C.J. rigidly maintained, in the face of temptation, the distinction between Admiralty and common law jurisdiction. He agreed with Stephen and Mason JJ. that the Imperial Acts required adjudication according to English law,[88] but denied that contemporary South Australian statutes extended the jurisdiction of the State beyond the low water mark, without deciding whether it would be possible for them to have done so.[89] Although correct in strict law, the inconvenience of this conclusion is obvious, and the attempts by other members of the Court to avoid it understandable. Had the Chief Justice's view commanded majority support, all offences ever committed below the low water mark of the Australian coastline should have been heard according to English law, and should continue to be so heard in the absence of a valid Australian law to the contrary.[90] The problem of the enactment of such a law by a State has been noted already.

It is submitted that a preferable approach to the problem would be that of Gibbs J. in *R. v. Bull*.[91] It will be remembered that in his view the combined effect of the 1849 and 1874 Imperial statutes was to give the colonies power to try and punish offences at sea according to colonial law. Although such an interpretation possibly departs from the original intention of the legislature it is open on the face of the statute itself. The original interpretation simply reflects the fact that nineteenth century English and colonial law were almost identical in substance, although beginning to diverge in respect of the punishment imposed.

The result of the adoption of this view would be to acknowledge the jurisdiction of State courts to deal with offences committed at sea according to State law. Dispute as to the relevant law to be applied could be resolved according to the customary principles of conflicts of laws. The jurisdiction exercised would historically be Admiralty jurisdiction and would rest on a foundation of Imperial law, although this would be relatively unimportant. This approach would isolate the problem of

[87] *Ibid.* 245 and 247.
[88] *Ibid.* 229.
[89] *Ibid.* 230 f.
[90] The difficulty is expressly raised by Menzies J.:
I am not disposed to think that in trying Plomp for the murder of his wife by drowning her in the sea off the coast of Queensland, and in treating the offence as one against the Criminal Code of Queensland without regard to whether the killing took place above or below low water mark, the Supreme Court of Queensland was in error, nor was this Court in error in *Plomp v. The Queen* [(1963) 110 C.L.R. 234], in confirming the conviction upon the offence as charged.
(1974) 131 C.L.R. 203, 245.
[91] *Ibid.* Also of Menzies J., in so far as his construction of the Imperial Statutes agrees with that of Gibbs J.

jurisdiction, without interfering with the vexed question of legislative power offshore. To the extent that the States can validly create offences offshore, the principles, procedures and punishments applicable would be the same in both cases.[92]

[92] In December 1978 the New South Wales Parliament passed an Act requesting the Commonwealth Parliament to remove the restrictions on State legislative power arising from ss. 2 and 3 of the Colonial Laws Validity Act 1865 (Imp.): Constitutional Powers (N.S.W.) Act 1978. Similar legislation was introduced into the Victorian Parliament in May 1979: Constitutional Powers (Request) Bill 1979. Both contemplate Commonwealth legislation pursuant to s. 51(38) of the Commonwealth Constitution. Apart from the question of its constitutional validity, this device would provide a neater and speedier solution to the problems discussed above. Implementation of the rest of the offshore scheme, which also rests in part on s. 51(38), might have a similar effect.