COMMENT

FOREIGN FISHERMEN IN THE TERRITORIAL WATERS OF THE NORTHERN TERRITORY, 1937

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In 1937, several Japanese pearling vessels were arrested and seized by a patrol boat, operated by the Northern Territory Administration, because they had been found in territorial waters adjacent to an aboriginal reserve. At least eight actions were brought before Wells J. in the Supreme Court of the Northern Territory by the owners of the vessels in respect of these seizures. These actions resulted in two verdicts in favour of the Japanese owners, while the remainder were settled out of court, also in favour of the Japanese. The two judgments which were handed down by Wells J. are unreported, despite the widespread contemporary publicity given to the entire incident, and the importance of the issues which arose for consideration before the Court. Although it would be misleading to overstress the importance of the decisions as judicial precedents, they are nonetheless valuable and interesting because many of the issues which were considered by the Court are still relevant in the current controversy over offshore sovereignty in the Australian federal system. Although the High Court in December 1975 finally decided[1] that the Commonwealth, as opposed to the States, has sovereignty over offshore areas beyond low water mark, the detailed application of this ruling still needs to be worked out, especially with regard to internal waters, offshore islands and islets, and waters enclosable by the application of the old common law rules. Several of the conclusions in these cases also provide some useful historical evidence of the law as it was understood at the time of the litigation.

Background

Australia has always had to contend with the problem of foreign fishermen who exploit fishery resources of local waters in competition with local fishing interests. The Australian pearling industry, especially, had in the past to contend with intense competition from pearl fishermen coming from various parts of Asia. Clashes of interest between local and Asian pearlers have been frequent in several localities and, in some instances, legislation has been enacted with the thinly disguised object of protecting local interests.[2] In the ten years or so before the start of the Second World War, Japanese pearling fleets fished the grounds off the north coast of Australia in ever increasing numbers, to the detriment of local fishermen, and in excess of desired conservation levels. At that

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[1] *N.S.W.* v. *The Commonwealth* (1975) 8 A.L.R. 1.

[2] *E.g.* The Sharks Bay Pearl Shell Fishery Act 1886 (W.A.) which set up a licensing scheme for the Shark Bay locality, which was administered in such a way as to exclude Asian pearlers from holding licences. Note also the Immigration Restriction Act 1897 (W.A.).

time, it was thought that international law permitted local fishery jurisdiction over foreigners within three miles of the coast, or within certain bays and gulfs where the closing lines did not exceed 6 or 10 miles, otherwise jurisdiction in excess of these limits could be justified only if an historic claim to a larger area of the sea, or seabed, could be made out. No such claim was made by Australia in respect of the coastal waters of the Northern Territory (except possibly in Van Diemen Gulf).[3] Thus, especially along the coastline of the Northern Territory, little direct control could be exercised over foreign pearl fishermen as nearly all pearling grounds lay outside territorial waters.

In addition to the risk of conflict between local and foreign pearlers, there was the problem caused by fishermen, both Australian and Japanese, who landed on aboriginal reserves ostensibly to replenish water supplies but, in doing so, seriously disrupted the welfare of their inhabitants. On one notorious occasion in 1934, the Japanese crews of two Darwin luggers were massacred by local aborigines at Caledon Bay. In order to restrict entry to these reserves, but partly also because it provided an indirect means of controlling the activities of Japanese pearl fishermen working the pearling grounds off the Northern Territory, the following amendment to the Aboriginals Ordinance 1918-1936 (N.T.) was enacted in 1937:

> 19AA.—(1.) Any person (not being the Administrator, the Chief Protector, a Protector, a Police Officer, an authorized officer or an aboriginal) who enters in a vessel the territorial waters adjacent to a reserve for aboriginals or is found in a vessel within such territorial waters shall be guilty of an offence against this Ordinance, unless he was authorized by a Protector or Police Officer to enter or be therein, or he satisfies a Protector or a Police Officer that his entry or being therein was necessary for the protection of life.
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> (2.) Any vessel in which any such person enters the territorial waters adjacent to a reserve for aboriginals or is found within such territorial waters and any goods found on any such vessel shall be forfeited to the King unless that person was authorized by a Protector or Police Officer to enter or be therein or he satisfies a Protector or Police Officer that his entry or being therein was necessary for the protection of life.
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> (3.) The person in charge of any vessel within the territorial waters adjacent to a reserve for aboriginals shall be guilty of an offence if, on being approached by or hailed or signalled from any vessel in the service of the Commonwealth having hoisted the Commonwealth Ensign or the Customs Flag, he fails, without

[3] See further, Edeson, "The Validity of Australia's Possible Maritime Historic Claims in International Law" (1974) 48 A.L.J. 295, 303. After the Second World War, the emergent concept of the continental shelf gave Australia the authority to claim a wider control over coastal pearl fishing—Pearl Fisheries Act 1952-1953 (Cth) and the Proclamation in the *Commonwealth Gazette* 10 September 1953 (No. 56). This action encountered strong protest from the Japanese Government, and the two Governments agreed to submit the dispute to the International Court of Justice. A *modus vivendi* was agreed upon by the parties in 1954, to be without prejudice to their respective rights. The dispute was never litigated.

reasonable excuse (proof whereof shall lie upon him), to bring the vessel to for boarding.

. . .

(5.) When any vessel or any goods thereon have been seized as forfeited, the seizing officer shall give notice in writing of the seizure and the cause thereof to the person in charge of the vessel, and any vessel or goods so seized shall be deemed to be condemned, unless that person or the owner of the vessel or goods, within one month after the date of seizure, gives notice in writing to the Administrator that he claims the vessel or goods.

(6.) Whenever any vessel or goods have been seized under this section, and notice of a claim thereto has been given to the Administrator in pursuance of sub-section (5.) of this section, the Administrator may—

(a) if he is satisfied that the offence was committed through inadvertence or that, owing to exceptional circumstances, the commission of the offence was unavoidable, direct that the vessel or goods be delivered to the claimant;

. . .

(9.) In any prosecution for an offence against this section the averment of the prosecutor that any person or vessel entered or was found within the territorial waters adjacent to a reserve for aboriginals shall be *prima facie* evidence of that fact.

(10.) In any proceedings under this section, the onus of proof that any person was authorized by a Protector or Police Officer to enter or be within the territorial waters adjacent to a reserve for aboriginals or that he satisfied a Protector or Police Officer that his entry or being therein was necessary for the protection of life shall lie upon that person.

(11.) In this section, the term "vessel" means any ship, boat or any other description of vessel used for any purpose on the sea or in navigation.

As this section applied in territorial waters adjacent to reserves, which was presumed to suggest the traditional three mile limit, it became the basis on which the Commonwealth government, through its officers in the Northern Territory, attempted to control foreign pearl fishermen along the Northern Territory's coastline. Fishing fleets found it advantageous, sometimes necessary, to enter these waters in order to hire aboriginal divers or guides, or to obtain fresh water supplies. The actual fishing effort however took place outside the three mile limit where nearly all of the pearling grounds were located. Thus, control over these waters adjacent to a reserve gave the Commonwealth considerable scope to control pearling. On the other hand, the fact that the legislation, on the face of it, had nothing to do with controlling *foreign* pearlers, but was used indirectly to achieve this end, was an underlying theme throughout the judicial proceedings, and did little to endear the Judge to the action taken by the Commonwealth. That it was the intention of the Commonwealth authorities in the Northern Territory to utilise this section to achieve this indirect end is clear in written instructions issued

to Captain Haultain, who was the captain of the *Larrakia*, the Commonwealth government's vessel which was used to police the waters of the Northern Territory. These instructions were:

> Confidential
> Captain Haultain
> Commanding P.V. *Larrakia.*
>
> I have been informed that there are nine vessels in the vicinity of Haul Round Island, but do not know their nationality. You should proceed there with despatch, date and time of arrival being left to your judgement. If these vessels are of foreign origin, and are in territorial waters, you will conform to the conditions laid down in the Ordinance recently promulgated, the contents of which you are aware.
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> You should proceed to the largest, or most important of these vessels, board her, inform the master of his infringement of the Ordinance, arrest the vessel and bring her into Darwin under guard. You must be careful not to provoke a conflict of arms, and must only use them in case of attack or deliberate flouting of your orders.
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> (signed) C. L .A. Abbott
> Administrator.[4]

In due course, several vessels were detained in pursuance of section 19AA, two of these detentions resulting in the decisions which are the subject of this discussion. The remainder were released by the Commonwealth after it became apparent that the Court would find for the plaintiffs.[5] The precise events leading up to these arrests, and the difficulties encountered by law enforcers in these remote areas, are vividly described in the book *Watch Off Arnhem Land* by C. T. G. Haultain, who not only made the seizures, but who was one of the defendants in these cases. The entire incident, including the decisions of Wells J. in favour of the Japanese pearlers, aroused considerable interest at the time both in the national press,[6] and in the Senate and House of Representatives. Although this Article is concerned primarily with the judicial phase of the incident, other aspects merit further research.[7]

Haruo Kitaoka v. *The Commonwealth, Abbot and Haultain*[8]

On 10 June 1937, Captain Haultain, in command of the *Larrakia*, seized and detained two Japanese pearling vessels which he had found

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[4] Reproduced in Haultain, *Watch Off Arnhem Land* (1971) 138.

[5] *The Argus* 14 October 1938.

[6] For a contemporaneous article covering much of the events, see the *Sydney Morning Herald* 7 and 8 December 1938.

[7] In this respect, it is a pity to note that Cabinet Papers regarding this incident cannot be located: Neale (ed.), *Documents on Foreign Policy 1937-1949* Vol. 1 60-61.

[8] Case No. 14 of 1937, Northern Territory Supreme Court. This is the more important of the two judgments and it is now reprinted in full in an appendix in Haultain, *op. cit.* 247. (Subsequent references to this case in this Article are to the page number(s) of the transcript of Wells J.'s judgment, and this is followed by the corresponding reference to the judgment as reprinted in Haultain, *op. cit.*) Case No. 21 of 1937, discussed *infra* p. 223 is still not readily available. See

in a locality known as Boucaut Bay, adjacent to the Arnhem Land Reserve in the Northern Territory. Captain Haultain was carrying out the instructions (set out above) that he had received from the Administrator of the Territory (C. L. A. Abbott) and he purported to act under section 19AA of the Aboriginals Ordinance 1918-1937 (N.T.) *i.e.*, on the ground that the pearlers and their vessels were found within territorial waters adjacent to an aboriginal reserve. The two vessels, the *Takachiho Maru No. 3*, and the *Seicho Maru No. 10* were escorted to Darwin. On arrival, the *Seicho Maru No. 10* was released and ordered to leave Darwin almost immediately,[9] taking the crews of both ships, while the other ship was detained under the provisions of the Aboriginals Ordinance 1918-1937 (N.T.) (hereinafter referred to as the "Aboriginals Ordinance" or "the Ordinance").

A request to the Administrator of the Northern Territory to release the vessel under section 19AA(6) of the Ordinance having been turned down, an action was brought in the Northern Territory Supreme Court by the plaintiff, the owner of the vessel,[10] for trespass and conversion and damages arising out of the seizure and detention of the vessel, its goods and chattels. The defendants pleaded that the seizure of the vessel, its goods and chattels, was lawful under section 19AA, although at no stage had they sought to prosecute anyone for an offence against that section.[11]

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generally, Commonwealth Archives CRSA 432, 38/146; Charteris, *Chapters on International Law* (1940) 90-91. Several judgments which have dealt with important or interesting issues of offshore sovereignty or jurisdiction have remained unreported, *e.g. R.* v. *Wilson* (1875) discussed in O'Connell (ed.), *International Law in Australia* (1965) 265 (also noted The *South Australian Register* 17 and 19 June 1875). Other examples are *R.* v. *Robinson* Case No. 112 of 1971, Supreme Court of W.A. noted in (1971) 10 University of Western Australia Law Review 175, *Massie* v. *McKenzie* [1973] Tas. Digest 21 (Tasmanian Supreme Court).

[9] It was considered advisable to release this vessel because it had come into territorial waters in bizarre circumstances: originally, the mother ship of a pearling fleet was found in territorial waters, along with the *Takachiho Maru No. 3*, and arrested by Captain Haultain. However, because of engine difficulties aboard the *Larrakia*, and because the mother ship was so large that it would have been impossible to escort her back to Darwin while keeping close to the coast, the mother ship was released by Captain Haultain on condition that another vessel of the fleet sailed into territorial waters in order that it could be arrested. This was the *Seicho Maru No. 10*.

[10] The plaintiff's right to bring the action was challenged by the defendants, the doubt arising from the fact that under Japanese law, a company could not be registered as the legal owner of a vessel. Wells J. decided that, as the action was brought in the Northern Territory, he must "proceed in accordance with the lex fori. I think that the evidence establishes that the position of the plaintiff under our law is that he is the legal owner of the vessel, holding as trustee for the company; . . . that . . . he is entitled to sue as plaintiff . . ." p. 5; Haultain, *op. cit.* 250. The defendants also argued that the action should have been brought by the company, referring to *Rey* v. *Lecouturier* [1908] 2 Ch. 715 but this too was rejected by the Judge, p. 6; Haultain, *op. cit.* 250.

[11] Wells J. in fact stated in the case that a conviction for an offence under s. 19AA was not a condition precedent to forfeiture; and that liability to forfeiture flowed from the committal of the offence: p. 6; Haultain, *op. cit.* 250.

The definition of the term "territorial waters"

The first important legal issue that Wells J. had to consider was how the term "territorial waters" in section 19AA of the Aboriginals Ordinance should be defined, no definition of the term being provided by the Ordinance itself. Although the precise solution adopted by the Judge is largely of historical interest today, his approach merits consideration as being possibly still relevant, for it is unusual for such a term to be explicitly defined in the relevant legislation, nor is it uncommon for an enactment to be silent as to whether it applies in territorial waters, or other maritime zones.

Wells J. commenced his discussion of this aspect of the case by referring to the wellknown decision of *Attorney-General for British Columbia* v. *Attorney-General for Canada*[12] in which the Privy Council commented upon the undesirability of any municipal tribunal having to pronounce on the nature and extent of jurisdiction over marginal waters until an international conference was held to decide the matter.[13] He regretted the fact that he should have to define the term, and even more that such a "vague and indefinite"[14] term as "territorial waters" should be used in a penal statute which provided for the forfeiture of a vessel and goods in the event of an offence being committed. Accordingly, Wells J. decided to apply the wellknown common law principle of interpretation that penal statutes ought to be construed restrictively.

Wells J. found that there was "no definite and binding authority whatever"[15] as to the meaning of the words "territorial waters" in a legislative enactment, though it was apparent from several dicta of British courts and from books on international law that the term referred to and included two separate classes of waters, which, he said, were:

(a) a marginal belt of water adjacent to the sea shore, the extent of which has not yet been determined at international law, but which under British law may now be taken to be definitely accepted as three nautical miles from low-water mark; and the nature of the dominion over which is still undetermined both at international law and under British law; and

(b) the waters of bays, gulfs, estuaries, rivers and creeks of the type which under the common law of England were regarded as part of the realm of England and subject to the full and complete sovereignty of the Crown.[16]

Wells J. then touched upon the nature and extent of jurisdiction in territorial waters. He thought that there appeared to be agreement that three nautical miles was the proper limit of territorial waters. The materials that he referred to in arriving at this conclusion were varied, and included some judicial decisions,[17] the Territorial Waters Jurisdiction Act 1878 (U.K.) and British Imperial policy (in particular the

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[12] [1914] A.C. 153.

[13] *Id.* 174.

[14] P. 4; Haultain, *op. cit.* 249.

[15] P. 7; Haultain, *op. cit.* 250.

[16] P. 7; Haultain, *op. cit.* 251.

[17] *Attorney-General for British Columbia* v. *Attorney-General for Canada* [1914] A.C. 153; *Secretary of State for India* v. *Sri Raja Chellikani Rama Rao* (1916) 32 T.L.R. 652; *Chapman & Co. Ltd* v. *Rose* [1914] St. R. Qd. 302.

British American Liquor Treaty 1924 and the diplomatic correspondence leading up to it). In addition Wells J. referred to the reply of the Commonwealth Government to the Questionnaire of the Committee of Experts for the Progressive Codification of International Law, in preparation for The Hague Codification Conference 1930, in which a three mile breadth for territorial waters was supported. He also commented that Australian government policy did not diverge from Imperial government policy on this point. Without going further than these predominantly "British" materials, Wells J. said:

> It is no doubt true that up to the present time there has been no agreement amongst the Nations such as would make the three-mile marginal belt an accepted principle of international law. But what we are considering here is not the meaning of the term "territorial waters" at international law, but its meaning, qua extent of the marginal belt adjacent to the sea-shore, in an enactment of an Australian legislative authority. The claim of the Commonwealth Government referred to above is in conformity with the views on the subject expressed by the Courts and with the established practice of British diplomacy, and I think should be adopted as the proper delimitation of the extent of the marginal belt forming part of the "territorial waters" referred to in s. 19AA of the Aboriginals Ordinance.
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> For the purpose of this case, I consider it unnecessary to do more than define the extent of "territorial waters" of this class and I intentionally refrain from touching upon the question of the nature and extent of the sovereignty exercised over this marginal belt of sea by the State whose shores are washed by it.[18]

The reliance of the Judge on both Imperial policy and Commonwealth policy is a reflection of the continuing importance of Imperial policy up to the Second World War in Australia's international relations. More important, though, is His Honour's view that statements of government policy, albeit mentioned in conjunction with judicial decisions in this instance, were relevant in determining the scope of such terms as "territorial waters". At a later point in his judgment, when dealing with the definition of bays, he again referred to the Commonwealth's reply, and said: "I think that in construing the meaning of [territorial waters] in an enactment of a legislative authority which derives its powers of legislation from and is under the supervision of the Commonwealth Parliament, considerable weight should be attached to this statement."[19] It is not clear, however, exactly how much reliance he would have placed on solely executive declarations of policy, for example, policy revealed by a treaty signed and ratified by the Commonwealth executive but not incorporated by legislation, or policy declarations made by Ministers, such as statements in Parliament.[20] The reliance of the Judge on the Commonwealth's reply does have certain dangers for it is possible

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[18] P. 10; Haultain, *op. cit.* 253.

[19] P. 19; Haultain, *op. cit.* 261.

[20] Note the statement by the Attorney-General (then Mr Bowen, Q.C.) to the House of Representatives concerning Australia's territorial sea baselines. H.R. Deb. 1967, Vol. 57, 2444-2445.

that such statements could be made in the expectation that they formed the basis of further negotiations or discussions.

Also, later in his judgment, Wells J. rejected a certificate tendered by the Commonwealth Government (in which it set out the extent of territorial waters it claimed) on the ground that the Commonwealth was a party to the action.[21] Despite this, he does not appear to rule out altogether the possibility of such a certificate being accepted where the Commonwealth was not a party.[22]

It was not necessary to the decision for His Honour to consider whether *R.* v. *Keyn*,[23] in deciding that criminal jurisdiction could not be exercised over foreigners on foreign ships within three miles of the English coast, also decided *inter alia*, that at common law the realm does not extend beyond low water mark. He did, however, comment in passing that the Territorial Waters Jurisdiction Act 1878 (U.K.), which was enacted because of the jurisdictional gap exposed by *R.* v. *Keyn*, adopted the three mile limit "for certain purposes".[24] He would not appear to support the view that the Act achieved the result of bringing territorial waters within the realm.

His Honour's discussion of the nature and extent of the coastal state's interest in the territorial sea is, viewed from a modern standpoint, not especially helpful. In recent times, especially in the federal systems of Australia, Canada and the United States, this question has become interlocked with the problem of distributing sovereignty and jurisdiction in offshore areas between the central and local units of a federation, while in Australia and Canada, the effect of the Territorial Waters Jurisdiction Act 1878 (U.K.), the correctness of *R.* v. *Keyn*, or simply determining what it in fact decided, have become critical issues.[25]

At a later point in his judgment His Honour did make some useful comments about the baseline from which the territorial sea is to be measured, a point which in fact became crucial to the outcome of the case.[26] He said:

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[21] P. 16; Haultain, *op. cit.* 258. Discussed further, *infra* pp. 217-219.

[22] *E.g.* as in *The Fagernes* [1927] P. 311 where the Home Office certificate was regarded as binding by the English Court of Appeal in an action between private parties. Wells J. in fact quoted extensive passages from this case without adverse comment. For the more recent view that the ratification of a treaty by the Crown can conclusively determine the area of territorial waters see *Post Office* v. *Estuary Radio Ltd* [1968] 2 Q.B. 740, 756 *per* Diplock L.J.; see also *R.* v. *Kent Justices; ex parte Lye* [1967] 2 Q.B. 153. In both these cases, the delimitation of the territorial sea was considered to fall within the Crown's prerogative (and therefore determined by the Territorial Waters Order in Council 1964). Note however, the important dissent of Salmon L.J. in the latter case who considered that the term "territorial waters" in the Wireless Telegraphy Act 1949 (U.K.) should be construed to mean those waters to which the territorial sovereignty of the Crown extended in 1949: [1967] 2 Q.B. 153, 178-183.

[23] (1876) 2 Ex. D. 63.

[24] P. 9; Haultain, *op. cit.* 252.

[25] *U.S.* v. *California* (1947) 332 U.S. 19; *Reference re Ownership of Off-Shore Mineral Rights* (1967) 65 D.L.R. (2d) 353; *N.S.W.* v. *The Commonwealth* (1975) 8 A.L.R. 1.

[26] The methods of measurement used in this case are discussed *infra* pp. 221-222.

> I have adopted low-water mark as the starting point from which the extent of three nautical miles is to be measured in deference to the universal acceptance of this starting point—no doubt due, so far as English authorities, at any rate, are concerned to the old decisions which held that the territorial limits of the Realm of England ended at low-water mark. Low-water mark, particularly on the gently shelving shores, so common on the coast-line of the Northern Territory, may vary very greatly from tide to tide, and be very difficult to determine. I have adopted the qualification "at mean spring tide" from the claim submitted by the Commonwealth Government to the League of Nations Committee of Experts. . . This qualification restricts the variability of the starting point, but leaves it just as hard to determine in a particular case. Absolute high-water mark would be an invariable, and also the most easily determinable, starting point; but to adopt this would be contrary to all accepted opinion on the subject.[27]

His choice of *mean* low-water mark is interesting, because although a low water line is used by most nations as the normal baseline for measuring the territorial sea, there is still today no uniformity as to which of several possible low water lines should be adopted. The Geneva Convention on the Territorial Sea and the Contiguous Zone 1958, stipulates that "the normal baseline for measuring the territorial sea is the low water line along the coast as marked on large scale charts officially recognised by the coastal state" (Article 3). This, it seems, leaves each country free to select whichever of the low water lines that it prefers. His Honour's adoption of the mean low water line from the Commonwealth's reply in 1929 accords with the more recent practice of the Commonwealth too, for the mean low water line has been adopted in the Petroleum (Submerged Lands) Act 1967-1974 (Cth),[28] and in two proclamations issued under section 7 of the Seas and Submerged Lands Act 1973 (Cth).[29]

The practical effect of this choice is to extend quite significantly in some areas the coastal state's jurisdiction, nowhere more so than in the northern waters of Australia where large tidal variations are common. At present, maps are being prepared which will show the mean low tide line,[30] but this is a long and complicated task. If a vessel is seized for an offence committed by its occupants in a coastal zone, the normal baseline from which the zone is measured is the mean low water line, and if the *locus* of the offence is close to the outer limit of the zone, then the precise location of this low water line will be crucial to the outcome of the case. If the coastal state has not made available maps which clearly indicate this line, then it is questionable whether it should proceed with prosecutions in borderline situations. This, it will be seen, is an important lesson to be drawn from the outcome of the cases under discussion, and

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[27] Pp. 30-31; Haultain, *op. cit.* 268.

[28] Second Schedule ("Areas Adjacent").

[29] *Australian Government Gazette* 31 October 1974 (Nos 89A, 89B).

[30] Note the maps already published regarding portions of the N.S.W., Victorian and Tasmanian coastline: n. 29 *supra.*

the related cases which were ultimately settled out of court in the plaintiffs' favour.

Was Boucaut Bay within Territorial Waters?

The most valuable part of the judgment in *Haruo Kitaoka* today is the discussion whether Boucaut Bay was a juridical bay, thereby coming within territorial waters, for it was necessary to consider, at one stage of the case, the meaning of the term "bays and gulfs" as it is used in various statutory and executive instruments which define the boundaries of the Northern Territory and South Australia. The comments of the Judge are also indirectly relevant in determining which waters may be regarded as coming within State limits where the instruments defining their boundaries are silent as to the extent of the maritime boundary.[31]

These matters arose because the vessel had been arrested in Boucaut Bay and when it seemed that the Commonwealth would not succeed in convincing the Court that the plaintiff's vessel had been within three miles of the coast, it tried to argue that Boucaut Bay was an historic bay which would have permitted the exercise of jurisdiction beyond the three mile limit.

Wells J. discussed first the definition of "bays" at common law and in international law. He could find "no definite and established rule" in the views of text writers, nor could he point to any "definite rule" laid down by a British court.[32] After reviewing several cases,[33] academic discussions,[34] the Bases for Discussion drawn up by the Committee of Experts, and the Commonwealth's reply[35] (to which he accorded "considerable weight")[36] Wells J. concluded:

> It is not my intention to attempt to formulate any definite rule which would apply to bays generally. I think the correct view is that as the matter stands at present, each particular case must be considered on its own merits, with reference to such guidance as can be derived from the decisions of the Courts and the opinions and suggestions of the text-writers.[37]

This conclusion today seems almost intolerably vague, and it is only understandable in the context of the time the case was decided, for the

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[31] In fact, most of them are silent on this point. See generally, McLelland, "Colonial and State Boundaries in Australia" (1971) 45 A.L.J. 671; Edeson, "Australian Bays" [1968-1969] Australian Yearbook of International Law 5, 14-18.

[32] P. 10; Haultain, *op. cit.* 253.

[33] These were: *R.* v. *Cunningham* (1859) Bell 72, 169 E.R. 1171; *The Fagernes* [1926] P. 185 and [1927] P. 311; *Direct U.S. Cable Co.* v. *Anglo-American Telegraph Co.* (1877) 2 App. Cas. 394; *North Atlantic Coast Fisheries Arbitration* (1910) 11 United Nations Reports of International Arbitral Awards 167.

[34] These were: Hurst, "The Territoriality of Bays" [1922-1923] British Yearbook of International Law 42; Grey (ed.), Pitt Cobbett, *Cases on International Law* (5th ed. 1931); Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927).

[35] Vol. II, Codification Conference, Bases of Discussion 1929, 117.

[36] P. 19; Haultain, *op. cit.* 261.

[37] Pp. 19-20; Haultain, *op. cit.* 261.

authorities, official and otherwise, were in some disarray. Tests for determining whether or not a particular indentation constituted a juridical bay had varied between an all embracing geographical test, a maximum closing line rule (with 6, 10, or 12 miles as the most popular distances) and, more recently, suggestions for a strict mathematical test. In fact it did not matter that His Honour adopted such a vague test, for, relying on oral evidence, and a British Admiralty Chart, he described Boucaut Bay to be:

> a long, curved indentation in the coast line, having a breadth on a straight line measured between its extremities, False Point on the East and Skirmish Point on the West, of something over 23 miles. Its greatest penetration into the land is about 6½ miles, and that only in one very small portion forming a subsidiary indentation. Its waters are shallow in depth, somewhere about half its area being within the three fathom line. Practically the whole of its shores are low-lying and sandy. Its headlands, if they can be described as such, are low-lying sandy points, and there is no suggestion of a defined entrance to the bay; it might, in fact, be accurately described in the words used by Pitt Cobbett as "a long curvature of the coast with an open face". It affords no sheltered anchorage for ships of even moderate tonnage, although the evidence shows that there is some slight shelter for small boats from the south-easterly winds which prevail in those regions at certain times of the year. It affords no natural facilities for defence from attack from either sea or land.[38]

Wells J. concluded that Boucaut Bay "appears to be lacking in every one of the characteristics which have been suggested as indicia of a 'territorial bay' ".[39] His conclusion is undoubtedly correct when the bay's configurations and dimensions are considered against any of the older tests, and in modern international law, too, his conclusion would be regarded as correct. Article 7(2) of the Convention on the Territorial Sea and the Contiguous Zone defines a "bay" in general terms as being "a well marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast". Boucaut Bay, on the Judge's description, would only be a "curvature". Furthermore, Article 7(2) lays down a semi-circle test of configuration, that "an indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of a semi-circle whose diameter is a line drawn across the mouth of that indentation". Given that Boucaut Bay penetrates the coast by 6½ miles at the most, and that the mouth is at least 23 miles wide, it also clearly could not fulfil the requirements of the semi-circle test.

Wells J. then turned to consider the effect of the term "bays and gulfs" which is found in the various instruments defining the boundaries of South Australia and the Northern Territory. The question arose because the Commonwealth, realising that it would not succeed in

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[38] P. 20; Haultain, *op. cit.* 261.
[39] *Ibid.*

establishing that the seized vessel was within three miles of the shore, and that Boucaut Bay was not a juridical bay in the normal sense, then argued that there had been "a series of legislative enactments with reference not particularly to Boucaut Bay, but to all the bays and gulfs adjacent to the shores of the Northern Territory, and of South Australia, of whatever extent and configuration, which amount to an assertion of territorial dominion over such bays and gulfs, and . . . bring all of them within the 'historic bay' doctrine as expounded and applied in the *Conception Bay Case*".[40] This the defendants admitted, would have placed the delimitation of the entire coastal waters of the Northern Territory and South Australia in a separate category from the delimitation of coastal waters in the remainder of the Commonwealth, a proposition which the judge found to be both "startling" and "novel".[41]

In support of their proposition, the defendants referred to several sources. They first referred to an enclosure to a despatch from Captain Bremer at Port Essington to the Secretary of State for Colonies, dated 20 September 1824, which read:

> The North Coast of New Holland or Australia contained between the meridians of 129° and 135° East of Greenwich, with all the bays, rivers, harbours, creeks etc. in, and all the islands lying off, were taken possession of in the name and in the right of His Most Excellent Majesty, George IV, King of Great Britain and Ireland, and His Majesty's colours hoisted at Port Essington, on the 20th September, 1824, by James Gordon Bremer, Companion of the Most Honourable Military Order of the Bath, Captain of His Majesty's ship the Tamar, and Commanding Officer of His Majesty's Forces employed on the said coasts.[42]

Wells J. noted on the assurance of the plaintiff's counsel, the point not being disputed by the defendants, that the usual form of taking of possession referred only to "lands, rivers, creeks, and islands adjacent". In fact this is not entirely accurate, for Captain Cook, when he laid claim to eastern Australia, claimed possession of land between certain latitudes and longitudes together with "all the bays, harbours, rivers, and islands".[43] It was, however, the practice in the Commissions issued under Letters Patent to Australian Colonial governors to refer (in addition to the lines of latitude and longitude) to the coastal boundary of the colonies, if at all, only in vague terms such as "the coast" or "bounded by the sea". Only with respect to South Australia and the Northern Territory was it indicated that bays and gulfs were to form part of the adjacent Colony or Territory.

Reference was next made to the Letters Patent of 6 July 1863, which were issued under the Australian Colonies Act 1861 (U.K.) and which

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[40] Pp. 20-21; Haultain, *op. cit.* 261.

[41] P. 21; Haultain, *op. cit.* 261.

[42] P. 22; Haultain, *op. cit.* 262. This enclosure is reproduced in *Historical Records of Australia* (1922) Vol. 5 (Series III) 780-781. The taking of Port Essington was an early, unsuccessful, attempt to settle part of Northern Australia.

[43] Captain Cook's Voyages, cited in Rusden, *History of Australia* (2nd ed. 1897) Vol. 1, 12.

annexed the Northern Territory (formerly part of New South Wales) to South Australia. These read:

> We do hereby annex to Our said Colony of South Australia, until We think fit to make other disposition thereof, or of any part or parts thereof, so much of Our said Colony of New South Wales as lies to the northward of the 26th parallel of South latitude and between the 129th and 138th degree of East longitude, together with the bays and gulfs therein, and all and every of the islands adjacent to any part of the mainland within such limits as aforesaid with their rights, members and appurtenances.[44]

In addition, the Court was referred to several other statutes and instruments which contained a reference to "bays and gulfs".[45]

The defendants submitted that Captain Bremer's act of possession referred to *all* bays without restriction as to configuration or extent, and regardless of whether or not they were bays according to the common law. This intention, they claimed, was confirmed by the various statutory and executive instruments which used the term "bays and gulfs", which also indicated a continuous assertion of territorial dominion over areas such as Boucaut Bay sufficient to bring it within the historic bay doctrine of the *Conception Bay Case*.[46]

Wells J. rejected this line of reasoning. He said:

> There is no doubt that these words are capable of bearing the construction here contended for. But in my opinion they are equally capable of the more restricted meaning of bays and gulfs which would at common law be regarded as part of the King's dominions. When we look at the surrounding circumstances, I think it is clear that they were in fact used in this restricted sense. I do not think it is reasonable to attach a wider meaning to the words which appear in the Letters Patent of 1863 than to the same words appearing in Captain Bremer's form of taking possession. It has already been noted that when Captain Bremer took possession of this new territory it became part of the existing Colony of New South Wales, the coastal limitations of which were admittedly subject to the common law rules as to the territoriality of bays, and it is very difficult to imagine the British Crown creating the anomalous position which would have been brought about by the addition to New South Wales of territory whose coastal limitations were to be determined on an entirely different basis.[47]

This conclusion has to be assessed in its context. Boucaut Bay was not a juridical bay according to any definition recognised either in

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[44] P. 22; Haultain, *op. cit.* 262.

[45] These were: Letters Patent of 1887, constituting the office of Governor of South Australia, The Northern Territory Surrender Act 1907 (S.A.), Northern Territory Acceptance Act 1910-1919 (Cth), The Imperial Act constituting the Province of South Australia (4 and 5 Wm. 4 c. 95 1834), The Northern Territory Crown Lands Act 1890 (S.A.) and The Fisheries Act 1904 (S.A.). Note though that an earlier Fisheries Act of 1878 (S.A.) only referred to "bay, estuary or other inlet of the sea" in its definition of waters for the purposes of the Act.

[46] P. 24; Haultain, *op. cit.* 263.

[47] P. 24; Haultain, *op. cit.* 263-264.

international law or by the common law before (or since) the case was decided. It would have been absurd to conclude that any locality named as a bay (or gulf) could be regarded as coming within the territorial limits of the Northern Territory or South Australia but not elsewhere in Australia simply because the relevant instruments referred to "bays and gulfs". His Honour's view that this term should include those waters which could be enclosed by the common law rules seems reasonable, and it enjoys support in some individual judgments in recent decisions of the High Court.[48] His view that the delimitation of the Northern Territory and South Australia ought not to be determined on a different basis to the other colonies of Australia may, however, be questioned: it is arguable that as the various other statutory or executive instruments defining the boundaries of the remaining colonies are silent on the maritime boundary, then, because the specific reference to "bays and gulfs" is to be found in Northern Territory and South Australian instruments, different criteria may well apply. In the case of large gulfs such as the Gulfs of St. Vincent and Spencer, and possibly also Van Diemen Gulf, these could be enclosed by virtue of the boundary definitions only, whereas such large expanses of water could not have been enclosed in other colonies where the possibly more restrictive common law rules constituted the sole basis for inclusion within colonial limits.[49]

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[48] *Bonser* v. *La Macchia* (1969) 122 C.L.R. 177, 196 *per* Barwick C.J.; 226, 233 *per* Windeyer J.; *R.* v. *Bull* (1974) 131 C.L.R. 203, 225 *per* Barwick C.J. S. 6 of the Seas and Submerged Lands Act 1973 (Cth) declares and enacts that sovereignty in respect of the territorial sea is vested in and exercisable by the Crown in the right of the Commonwealth. S. 10 declares and enacts that sovereignty in respect of internal waters is vested in and exercisable by the Crown in the right of the Commonwealth, though from this claim, s. 14 saves to the States any waters of the sea which are waters of or within any bay, gulf, estuary, river, creek, inlet, port or harbour and which were on 1 January 1901 within the limits of the State. How these waters are to be determined and delimited is not indicated in the Act, although "historic" bays and waters may be declared by the Governor-General. In *N.S.W.* v. *The Commonwealth* (1975) 8 A.L.R. 1 the validity of this Act was considered by the High Court. The judgments mostly deal with the status of the territorial sea and areas further seaward in the Australian federal system. While they are consistent with the view that the common law rules for determining waters which are *intra fauces terrae* applied to the colonial boundary definitions, and in large part determined, colonial maritime limits in 1900, only one judge, Jacobs J., dealt with this question at any length (at 99-111). While the decision of the High Court has resolved the status of the territorial sea, and other maritime regimes further seaward, in the Australian federal system in favour of the Commonwealth, the problems of delimiting internal waters for the purpose of measuring the territorial sea and delimiting those waters which were within colonial limits in 1900 await more detailed consideration. The latter in particular is an especially obscure topic. The case is discussed by Goldsworthy, "Ownership of the Territorial Sea and Continental Shelf of Australia: An Analysis of the Seas and Submerged Lands Act Case (State of New South Wales and Ors v. The Commonwealth of Australia)" (1976) 50 A.L.J. 175. Note also the recent decision of *Pearce* v. *Florenca* (1976) 9 A.L.R. 289 in which the High Court held State fishery legislation operating in the territorial sea to be not inconsistent with the Seas and Submerged Lands Act 1973 (Cth).

[49] In *Bonser* v. *La Macchia* (1969) 122 C.L.R. 177, 226 *per* Windeyer J. in the context of discussing the federal fishery power (s. 51(x) of the Constitution) thought that waters within territorial limits were "inland waters, rivers and lakes,

Wells J. supported his conclusion that Boucaut Bay was not part of the Northern Territory by referring to British practice with regard to bays. He said:

> I think it may be taken to be an historical fact also, that for some time prior to the issue of the Letters Patent of 1863, Great Britain had accepted, in her diplomatic practice, the principle of delimiting territorial bays within narrow limits.[50]

He also noted that, in North American waters, Britain had made rather more extensive claims with respect to bays which were the subject of a dispute with the United States. However, he considered that these British claims were based on the interpretation of the Treaty of 1818 with the United States (which did not allow U.S. fishermen the right to fish within "bays" along parts of the Canadian and Newfoundland coast) rather than on any general extensive claim with regard to bays.

Finally, the defendants raised the argument that Boucaut Bay was within the limits of the Northern Territory on the basis of the *Conception Bay Case*.[51] They submitted that the decision (in holding that Conception Bay was within the territorial limits of Newfoundland), required merely a legislative assertion of territorial dominion over the bay, and that this applied to any bay regardless of size or configuration where such an assertion existed. This was satisfied in the present case by the various instruments which referred to "bays and gulfs" as being part of the Northern Territory or South Australia.

This line of reasoning was rejected by Wells J. on two grounds. The first was that the Privy Council restricted its opinion to the issue whether there was territorial dominion over an indentation with the configurations and dimensions of Conception Bay, a locality which it had described as a "well marked" bay. Accordingly, the decision could not apply so as to include Boucaut Bay which lacked this important characteristic.[52] The second ground was that, in the *Conception Bay Case*, the Privy Council found that there was an unequivocal assertion of exclusive dominion, acquiesced in by other states, whereas, with Boucaut Bay, there was nothing more than a "mere vague and ambiguous" claim.[53]

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and seawaters within gulfs, estuaries, and similar inlets". Later he said: "It is worth noticing too that the Province of South Australia included 'all and every the islands adjacent thereto and the bays and gulfs thereof': 4 and 5 Wm. IV c. 95. Spencer Gulf and St. Vincent's Gulf are therefore to be deemed to be intra fauces terrae." (at 233).

[50] P. 24; Haultain, *op. cit.* 264. In support of this conclusion, he referred to the adoption of 10 mile closing lines for bays in the Anglo-French Fisheries Convention 1839 and Regulations of 1843, the unratified Anglo-French Convention of 1859, the Anglo-French Convention of 1867, the North Sea Fisheries Convention of 1882, the Anglo-Danish Fisheries Convention 1901, and the statement by the Under Secretary for Foreign Affairs in the House of Commons in 1907 on the Moray Firth dispute with Norway, in which a six mile closing line for bays was advocated, though by custom, treaty or special conventions, a wider limit was possible.

[51] *Direct U.S. Cable Co.* v. *Anglo-American Telegraph Co.* (1877) 2 App. Cas. 394.

[52] Pp. 26-27; Haultain, *op. cit.* 265.

[53] P. 27; Haultain, *op. cit.* 266.

Without disagreeing with the conclusion that Boucaut Bay is not covered by the term "bays and gulfs" in the relevant statutory and executive instruments, it is nonetheless arguable that the *Conception Bay Case* does lend some support to the view that a mere legislative assertion of territorial dominion over a juridical bay is sufficient to warrant its enclosure, for the Privy Council did take the view that the existence of Imperial legislation declaring it to be part of British territory was "conclusive" as to its status before a British tribunal.[54] The legislation, and the treaty to which effect was being given, referred to, *inter alia*, "bays". Thus, it is possible to argue that, in Australian law, any locality which can be regarded juridically as a bay or gulf along the coast of South Australia or the Northern Territory is capable of enclosure on the basis of the reference to "bays and gulfs" in the various statutory and executive instruments.[55]

The Executive Certificate

In the context of his discussion concerning bays, and immediately after a consideration of the English Court of Appeal decision in *The Fagernes*,[56] Wells J. said:

> During the hearing of the present case, a certificate was tendered by Counsel for the defendants from the Attorney-General for the Commonwealth, setting out the extent of the territorial waters claimed by the Commonwealth. This certificate was tendered as being conclusive evidence on the point and was objected to by Counsel for the plaintiff. In the peculiar circumstances of this case, the Commonwealth itself being one of the defendants, I refused to admit the certificate on the basis on which it was tendered.[57]

In *The Fagernes*, the Court of Appeal accepted an executive certificate submitted by the Home Office which stated that a spot in the Bristol Channel was not within the limits of the "territorial sovereignty" of the Crown. Two members of the Court, Atkin and Lawrence L.JJ. considered that the certificate was binding on the Court.[58] Bankes L.J. thought that the certificate ought not to bind the Court, as it had been sought by the Court, and he hinted that it did not concern an appropriate subject for it to be binding on the Court. He did, however, think that the Court ought to be guided by it.[59]

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[54] (1877) 2 App. Cas. 394, 420.

[55] This would seem to be the view of Windeyer J. in *Bonser* v. *La Macchia* (1969) 122 C.L.R. 177, 217. See also nn. 48-49 *supra*. On the other hand, the United States Supreme Court in *U.S.* v. *California* (1965) 381 U.S. 139, 174 has stated that "a legislative declaration of jurisdiction without evidence of further active and continuous assertion of dominion over the waters is not sufficient to establish [a] claim". In this case, California had claimed, *inter alia*, certain bays as historic because its State constitution, enacted in 1849, described the sea boundary of the State as including all bays along its Pacific coast. A similar conclusion was reached in *U.S.* v. *Louisiana* (1969) 394 U.S. 11, 24 where the Court commented: "it is universally agreed that the reasonable regulation of navigation is not alone a sufficient exercise of dominion to constitute a claim to historic inland waters".

[56] [1927] P. 311.

[57] P. 16; Haultain, *op. cit.* 258.

[58] [1927] P. 311, 324, 329-330 (respectively).

[59] *Id.* 323.

Apart from this reservation by Bankes L.J., and the decision of Wells J. in the present case, judicial authority seems to have clearly favoured the view that executive statements concerning the extent of the maritime territory are binding because they are part of the prerogative power of the Crown in matters of maritime boundary delimitation;[60] and these statements, or other manifestations of this prerogative power, are not rendered ineffective, it would seem, where the Crown is itself a party to a case.

His Honour's reason for rejecting the executive certificate, namely that the Commonwealth was itself a party to the action, might be criticised for failing to appreciate the importance of maritime delimitation in governmental foreign policy-making, and this, according to the more recent judicial utterances, comes within the scope of governmental prerogative power, with the consequence that the Commonwealth would have an interest wider than that of a mere litigant. On the other hand, His Honour's decision to reject the certificate is commendable in as much as he displayed a healthy awareness of the possible abuses which unqualified powers of executive certification can lead to.[61]

The exact contents of the certificate submitted by the Commonwealth are not disclosed in the judgment, though it would seem that it did not claim more than was consistent with the view of the Commonwealth Government expressed in its reply in 1929 to the Questionnaire of The Hague Codification Conference. This would seem to follow from the Judge's earlier statement that he was adopting this view for the purposes of the present case,[62] together with his comment that, had the certificate been accepted by the Court, "it would certainly have saved the Court a great deal of time and trouble; and from what was said concerning its contents during the argument as to its admissibility, its admission probably would not have been at all prejudicial to the plaintiff, in view of the way in which the evidence on the most important question of fact afterwards developed".[63] His Honour was no doubt referring to the fact

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[60] See particularly, *R.* v. *Kent Justices; ex parte Lye* [1967] 2 Q.B. 153; *Post Office* v. *Estuary Radio Ltd* [1968] 2 Q.B. 740. For criticisms of the use of these certificates, see McNair, (1928) 44 L.Q.R. 3 (Casenote); Edeson, "The Prerogative of the Crown to Delimit Britain's Maritime Boundary" (1973) 89 L.Q.R. 364.

[61] Note the comments of Blain J. in *R.* v. *Kent Justices; ex parte Lye* [1967] 2 Q.B. 153, 192.

[62] P. 10; Haultain, *op. cit.* 253.

[63] P. 16; Haultain, *op. cit.* 258. Despite searches in the records of the Northern Territory Supreme Court, the original certificate has not been located. A draft copy has, however, been found by the Attorney-General's Department, Canberra, which is unsigned though dated, and is quite probably a copy of the original, or if not, it probably does not differ from the original in any material respect. This copy reads: "After consultation with the Minister for the Interior of the Commonwealth of Australia I, Alexander John McLachlan, a Minister of State for the Commonwealth acting for and on behalf of the Attorney-General of the Commonwealth, hereby certify that the Commonwealth recognises that for general purposes territorial waters extend to three nautical miles from low water mark on the coast of the Northern Territory of the Commonwealth of Australia, and for the same distance from low water mark on the coast of any island in the possession of the Commonwealth of Australia (including the coast of bays and

that the Commonwealth did not satisfactorily prove that the plaintiff's vessel had been within three miles of the shore, and because, as seems highly likely, no wider claim was made by the Commonwealth in its certificate, its acceptance by the court would have made no difference.

The Legislative Power with respect to the Northern Territory

Certain submissions by the plaintiff made it necessary for Wells J. to consider whether, if at all, the legislative competence of the Commonwealth with respect to the Northern Territory was restricted. Several, overlapping, submissions were made, the first of which was that the legislative authority responsible for the enactment of the Aboriginals Ordinance lacked the power to make laws which operated in territorial waters or beyond, that its laws could operate only within the Territory itself and over waters within the Territory, though excluding a marginal belt of territorial waters.[64] The plaintiff supported this contention on two grounds: (a) the decision of *Macleod* v. *Attorney-General for New South Wales*,[65] and (b) the nature of the delegation of the power to legislate for the Northern Territory. With regard to *Macleod's Case*, Wells J. considered that "even if the doctrine in that case might at one time have been stated widely enough to support such a proposition, it must now be taken to have been very much modified and, in fact, restricted to the interpretation of the section of the N.S.W. Crimes Act with which it deals, by reason of the decision of the Judicial Committee of the Privy Council in *Croft* v. *Dunphy*".[66]

Wells J. also rejected the second ground on which the plaintiff's submission was based. After referring to section 122 of the Constitution, section 13 of the Northern Territory (Administration) Act 1910 (Cth), *Porter* v. *R.*,[67] and section 21 of the Northern Territory (Administration) Act 1910-1933 (Cth) (which gave the Governor-General the power to make ordinances "having the force of law in and in relation to the Territory"), Wells J. concluded:

> I am of opinion that the power to make ordinances having the force of law "in and in relation to the Territory" can be and should

gulfs, the headlands of which are more than six miles apart) and does not claim for the purpose of the cases in relation to Japanese luggers, now pending in the Supreme Court of the Northern Territory, any wider limit. Dated this FOURTEENTH day of APRIL, 1938."

[64] The Plaintiffs fortified this point by reference to the principle of *ut re magis valeat quam pereat* (it is better for a thing to have effect than to be made void), which they suggested required that the term "territorial waters" in s. 19AA of the Aboriginals Ordinance should be construed as consisting of these waters within the Territory only in order to ensure that the section was not *ultra vires*. The Judge did not comment on this possible application of the principle as he found that the section was clearly within the legislative powers of the Territory.

[65] [1891] A.C. 455.

[66] P. 28; Haultain, *op. cit.* 267. He then quoted the wellknown passage from the case which affirmed the right of the Dominion Parliament to legislate within the areas of its legislative competence as fully as any sovereign state (*Croft* v. *Dunphy* [1933] A.C. 156, 163).

[67] (1926) 37 C.L.R. 432.

> be interpreted just as widely as a power to legislate "for the peace, order and good government" of a state which is the form used in the British North America Act 1867, and that the principles enunciated in the judgment in *Croft* v. *Dunphy* with respect to legislation of the Canadian Parliament apply to the legislation with which we are here concerned. This legislation is part of the Aboriginals Ordinance, and is designed and intended for the protection of and to promote the welfare of the aboriginal inhabitants of the Territory, and it cannot be contended that this is not a subject on which the legislative authority for the Territory can competently legislate. The fact that evidence has been given in this case which strongly suggests that s. 19AA has not been administered so as to give effect to the purpose for which it was enacted, but to achieve some other object which may or may not be within the competency of the legislative authority, does not touch the validity of the legislation itself.[68]

The plaintiff also submitted that, if section 19AA applied to foreigners and foreign vessels, it would amount to a denial of the right of innocent passage through territorial waters recognised in international law; and accordingly section 19AA should be construed so as to avoid this conflict by reading "any person" and "any vessels" as extending only to nationals and national vessels. The Judge did not have to deal with this point, as it was not established on the evidence that the plaintiff's vessel had been in territorial waters. However, in dealing with another related submission, he did point out without further comment that, on further consideration of *Croft* v. *Dunphy*[69] he thought that their Lordships considered it still to be arguable that legislation of a subordinate legislature may be challenged as *ultra vires* if it is contrary to principles of international law. Their Lordships had expressed themselves as follows:

> Legislation of the Imperial Parliament, even in contravention of generally acknowledged principles of international law, is binding upon and must be enforced by the Courts of this country, for in these Courts the legislation of the Imperial Parliament cannot be challenged as ultra vires: per Lord Justice-General Dunedin in *Mortensen* v. *Peters*. It may be that legislation of the Dominion Parliament may be challenged as ultra vires on the ground that it is contrary to the principles of international law, but that must be because it must be assumed that the British North America Act has not conferred power on the Dominion Parliament to legislate contrary to these principles.[70]

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[68] Pp. 29-30; Haultain, *op. cit.* 267-268. The last part of the paragraph refers to the fact that the only way of controlling the Japanese pearlers was by applying the provisions of s. 19AA, as most of the pearling grounds were beyond territorial waters. The Judge's conclusion as to the nature of the legislative power with respect to the Territory is consistent with the more recent decision of the High Court in *Lamshed* v. *Lake* (1958) 99 C.L.R. 132. See generally, Zines, " 'Laws for the Government of any Territory': Section 122 of the Constitution" (1966) 2 F.L. Rev. 72.

[69] [1933] A.C. 156.

[70] *Id.* 164.

This view, if sustained, would entail the consequence that former colonies such as Australia or Canada could not legislate contrary to principles of international law, even though the United Kingdom Parliament could do so. The later decision of *Polites* v. *The Commonwealth*[71] has clarified the situation so far as the Commonwealth is concerned, for the High Court in that case upheld the validity of certain regulations enacted by the Commonwealth which were recognised as being contrary to international law. Whether such a limitation exists in relation to State legislative powers is doubtful, but the existence of such a limitation on the Commonwealth's power with respect to the Northern Territory would also seem to be inconsistent with later High Court decisions such as *Lamshed* v. *Lake*[72] and *Spratt* v. *Hermes*.[73]

The Measurement of the Territorial Sea

Having considered the more important legal issues that surrounded the definition of the territorial sea, it became necessary for Wells J. to consider the factual question whether the plaintiff's vessel had, at any relevant time, been within three nautical miles of the shore measured from mean low water mark. This proved to be no easy matter, despite the fact that, as well as the arresting officer (Captain Haultain), two expert witnesses gave evidence at the hearing on the methods of measurement adopted.

Captain Haultain had tried to ascertain the position of the Japanese vessel at the time of the arrest by taking a series of vertical sextant angles on a clump of trees on the shore of Boucaut Bay opposite the spot where the vessel was arrested. He determined the mean of the angles to be 11 minutes, and he estimated the clump of trees to be 60 feet above sea level at that time. Using Bowditch's nautical tables, he estimated the plaintiff's vessel to be 2.93 sea miles from the shore.

No further measurements were made until several months later, when further bearings and horizontal sextant angles were taken in order to fix more accurately the plaintiff's position on charts; his failure to take further measurements at the time of the arrest was labelled by the judge as "remarkably casual and irresponsible".[74] The expert witnesses on each side disagreed on the value of a measurement based on a vertical angle of only 11 minutes, the plaintiff's witness taking the view that no reliance at all could be placed on such a calculation, while the defendants' witness suggested that he would not have been prepared to rely on such a calculation alone. His Honour took the view that "if such a calculation, based on an angle so small as this, is to be relied on at all, the angle must be taken with the utmost care and precision".[75] He was not convinced that this had been done, and he decided not to accept Captain Haultain's evidence on this point.[76]

His Honour then turned to consider whether the height of the tree

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[71] (1945) 70 C.L.R. 60; see also *Fishwick* v. *Cleland* (1960) 106 C.L.R. 186.
[72] (1958) 99 C.L.R. 132.
[73] (1965) 114 C.L.R. 226.
[74] P. 33; Haultain, *op. cit.* 269.
[75] P. 33; Haultain, *op. cit.* 270.
[76] P. 34; Haultain, *op. cit.* 270.

clump had been accurately ascertained, and indeed whether the same clump was used some months later when further measurements were made by the defendants in preparation for the case. This discussion dramatically revealed difficulties which can arise in attempting to measure offshore distances in places which lack distinctive landmarks, a problem complicated even more by the fact that tidal extremes along the northern coast of Australia are enormous. This latter factor alone can cast doubt on the validity of measurements taken at sea which rely on, for example, the height of land based objects, unless exceptional care is exercised.

It is unnecessary to analyse fully the Judge's discussion on this point. Briefly, Wells J. found a discrepancy between the evidence of the defendants' expert witness, Commander Hunt, and Captain Haultain, the arresting captain, as to the *locus* of the arrest. This led Wells J. to conclude that the arrest very probably took place elsewhere opposite another tree clump. The discrepancy arose because, when Commander Hunt went to the place of the arrest some months after the arrest to make further measurements, he was able to see Sand Island (which was said to be 14 feet above sea level at low water)[77] quite clearly, and took a bearing from it, whereas Captain Haultain revealed that he could not see it at the time of the arrest, and had to sail for some four minutes towards it before he could.

Several other factors were mentioned in this part of the judgment which did not directly influence the outcome, though which could have become important in other contexts. These were: weather conditions, and their possible effect on visibility and refraction; the state of the tides (evidence concerning which was partly oral and partly based on information taken from British Admiralty charts); whether Captain Haultain gave the Japanese skipper a notice of seizure before taking measurements, or vice versa. Some discussion also took place on the use of a compass—Captain Haultain failed to take bearings at the time of the arrest with the ship's compass, and stated that he did not do this because it would have involved dismantling the machine gun, an excuse rejected by the Judge at this would only have taken a few minutes to do. It was also agreed by the expert witnesses, and not dissented from by the Judge, that a shadow pin compass, which was on the seized vessel, would have produced bearings with a fairly wide margin of error.

It is no doubt true today that more sophisticated measuring equipment is available, especially radar fixing techniques, and from a prosecutor's point of view, if such equipment is used, there are greater chances of sustaining convictions where the presence of a vessel within a coastal

[77] The argument that this island generated its own territorial sea belt, which would clearly have brought the plaintiffs within territorial waters if the island formed part of the Arnhem Land Reserve, was not raised in the judgment. This was probably because there was no clear evidence available whether the island was permanently above *high* water. If it were merely what today would be termed a low tide elevation (Article 11, Territorial Sea Convention 1958) it may not have assisted the Commonwealth's case as there was considerable uncertainty in international law at that time as to the effect of such features on the delimitation of the territorial sea.

zone is an essential ingredient of the offence. Nonetheless, the present case brings to light factors which could once again make it difficult to sustain a prosecution.

In borderline situations, the tidal variations, and the absence of authoritative tidal maps for much of Australia's coastline[78] could make any final judicial decision difficult to predict. Writing about this incident several decades later, Captain Haultain was clearly amazed at the Court's verdict. Given the array of technical nautical information with which Wells J. had to grapple, he concluded that the Judge could have benefited by the presence of nautical assessors at the hearing.[79]

Fukutaroo Tange v. *The Commonwealth, Abbott and Haultain*[80]

On 19 September 1937, some three months after the seizures which led to the previous case, Captain Haultain was patrolling around Bremer Island, and discovered the *Tokio Maru No. 1* within half a mile of it. He chased the vessel, and seized it about 1800 yards from an islet.

The vessel, and its goods were brought to Darwin, though the crew and captain were transhipped at sea (except for the engineer who remained aboard until the vessel reached Darwin, where he was released). An action was brought by the owners to recover the vessel, and its goods. The defendants again pleaded that the seizure and subsequent detention were lawful under section 19AA of the Aboriginals Ordinance. As in the previous case, no prosecution for an offence under this section had been brought.

Because the Japanese vessel was seen within three miles of Bremer Island and was chased and arrested within 1800 yards of an islet (which formed part of a group of islets) but was at no relevant stage within three miles of the mainland, the defendants submitted that both Bremer Island, and the islet, were islands adjacent to, and formed part of, the Arnhem Land Aboriginal Reserve. It was also argued that, even if the vessel had been arrested outside territorial waters, the arrest could be justified under the doctrine of "hot pursuit".

Wells J. described Bremer Island as "a low-lying island about five miles long by about two miles wide, and . . . there are trees growing upon some portion of it. . . . It is separated from the mainland by [a strait] which at its narrowest point is about 2½ miles wide. . . . It is a considerable body of land, though whether inhabited or habitable does not appear".[81] His Honour concluded that it is "clearly an island 'adjacent to' the shores of Arnhem Land, and that it comes within the terms of the Proclamation defining the limits of the Arnhem Land reserve for aboriginals".[82] Thus, His Honour decided that Bremer Island

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[78] These are currently being prepared. A few have been issued so far: see nn. 29 and 30 *supra*.

[79] Haultain, *op. cit.* 236.

[80] Case No. 21 of 1937, Northern Territory Supreme Court. See n. 8 *supra*. (Subsequent references to this case in this Article are to the page number(s) of the transcript of Wells J.'s judgment.)

[81] P. 4.

[82] *Ibid.* The full definition of the boundaries of the reserve can be found in the *Commonwealth Gazette* 16 April 1931.

had its own territorial sea of three miles measured from low water mark at mean spring tide.

His Honour did not have to deal with the submission that the islet, and the others in the same group, each had its own territorial sea.[83] He did, however, make the following comment:

> That such is the case seems rather doubtful on principle. The only decision of a British Court to which I have been referred in support of the submission is the judgment of Lord Stowell in the case of the "Anna" (1805 5 C.Rob. 373); and it is doubtful whether the considerations which influenced Lord Stowell in coming to his decision in that case would have any application to the islets or rocks in question here.[84]

His Honour's view would seem to be incorrect. It has for a long time been accepted that any naturally formed area of land which is above water at high tide generates its own territorial sea and it is difficult to see why these islets should not also have done so.[85]

Although His Honour was considering the meaning of "islands adjacent" in the narrow context of the Proclamation defining an aboriginal reserve, his decision that Bremer Island, at least, came within the term is significant in a broader context. When the Australian colonies were founded, it was a common practice to define the colonial boundary by reference to lines of latitude and longitude within which the colonial territory was located and which in some instances covered quite vast areas of adjacent ocean, though "all and every the islands adjacent", or similar phrases were often included in the definition. It would seem to follow that these islands are subject to any laws applying on the adjacent mainland unless specifically excluded. It would seem to also follow that the territorial sea of these islands would be subject to the same jurisdictional regime as the territorial sea of the mainland, unless specifically excluded.

Two other issues were raised in the case which merit brief mention. First, His Honour's consideration of the "hot pursuit" doctrine. The defendants had submitted that, because the vessel had been in territorial waters they were entitled to follow and seize it, if necessary outside territorial waters. After referring to *The North*[86] and to the fact that the doctrine had received wide support from writers, and in U.S. Supreme Court decisions, he concluded that the doctrine permitted an arrest in the circumstances of the case.[87] His Honour did not deal with the intricacies of the doctrine, nor was this necessary in this case. The doctrine has been codified in the Convention on the High Seas 1958 (Article 23), and in the Revised Single Negotiating Text 1976 Part II Article 99 where it is extended to include violations in the exclusive

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[83] P. 6.

[84] Pp. 5-6.

[85] Article 10, Territorial Sea Convention 1958. In the Revised Single Negotiating Text 1976 Part II Article 128(3) a qualification is added that: "Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf".

[86] (1906) 37 Can. S.C.R. 385.

[87] P. 5.

economic zone, or on the continental shelf. The codified version sets out in some detail the manner in which a seizure may be effected, and care is needed to ensure that the correct procedures are observed when making such seizures.

The second issue concerned possible defences to the statutory offence created by section 19AA of the Aboriginals Ordinance. Despite the fact that His Honour found that the *Tokio Maru No. 1* had been in territorial waters and had been correctly pursued to and arrested on the high seas, the plaintiff was able to convince Wells J. that the vessel's presence within territorial waters was due to an accident, and unintentional. After referring to certain wellknown decisions[88] he stated:

> It is open to the plaintiff to show that despite that fact the offence created by ss. (1.) from the committal of which the liability to forfeiture of the vessel under ss. (2.) flows, is not complete, by reason of the fact that 'the violation of the law which had taken place had been committed accidentally or innocently so far as he was concerned'.[89]

After considering the evidence from both sides, Wells J. accepted the Japanese captain's explanation that his vessel had engine trouble, and he was unable to prevent the vessel from drifting into territorial waters, that he started the engines to stop the boat drifting onto some rocks, and only then did he notice the *Larrakia* coming towards him.[90]

His Honour accordingly found for the plaintiff.

* * *

The failure of the defendants (the Commonwealth) in the first of these cases, to prove to the Court's satisfaction that the *locus* of the offence was within three nautical miles of the coast despite the fact that the measurements had been checked both by the arresting officer, and later by their expert witness, dramatically demonstrates the uncertainties facing enforcement agencies in cases where it is an essential ingredient of an offence that a vessel was within a certain distance of the coast at a relevant time. While modern techniques of measurement may help to lessen this particular problem today, both these cases also show how an outwardly straightforward case involving an offshore element can easily become enmeshed with a variety of complex and unclear legal questions. Had the incidents leading to these cases occurred in waters adjacent to a State, the legal issues would have been even more complex. We are fortunate to have four recent decisions of the High Court[91] which have settled some of the more basic issues, but even the most important of these, *N.S.W.* v. *The Commonwealth*,[92] which in broad terms upheld the

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[88] *R.* v. *Banks* (1794) 1 Esp. 144, 170 E.R. 307; *R.* v. *Tolson* (1889) 23 Q.B.D. 168; *Maher* v. *Musson* (1934) 52 C.L.R. 100.

[89] P. 7; quoting in part the judgment of Dixon J. in *Maher* v. *Musson* (1934) 52 C.L.R. 100, 105.

[90] Haultain has strongly criticised Wells J. for his interpretation of the facts: *op. cit.* 236-237.

[91] *Bonser* v. *La Macchia* (1969) 122 C.L.R. 177; *R.* v. *Bull* (1974) 131 C.L.R. 203; *N.S.W.* v. *The Commonwealth* (1975) 8 A.L.R. 1; *Pearce* v. *Florenca* (1976) 9 A.L.R. 289.

[92] (1975) 8 A.L.R. 1.

claim of the Commonwealth in the Seas and Submerged Lands Act 1973 (Cth) to sovereignty over the territorial sea, and sovereign rights over the continental shelf, does not indicate the detailed application of that principle in relation to delimitation criteria.

In regard to fishing, the Fisheries Act 1952-1975 (Cth) has done much to facilitate the management of coastal fisheries, though at the present time foreign fishermen are excluded only from a 12 mile zone. The Act (section 16) does attempt to facilitate evidential aspects of judicial hearings by allowing a Minister to issue certificates specifying, for example, the nationality of a boat, whether certain waters were subject to a particular regime under the Act, whether a licence had been issued, *et cetera*. These certificates are, however, only *prima facie* evidence of the facts contained therein. Nonetheless, because the Act only has effect beyond the three mile limit, a prosecution for an offence committed approximately at this distance could raise the question whether State or Commonwealth laws applied.

When foreigners or foreign vessels are seized, whether for fisheries offences or anything else, there is the added risk that Australia could become involved in a dispute on the international level, especially if the circumstances of the arrest do not accord with principles of international maritime law. Of course, if the local law under which the seizure is made is clear in its terms, it will prevail over these principles if the case reaches an Australian court, but if there is a clear conflict between national and international law, this conflict will obviously be a highly relevant consideration in deciding whether or not a prosecution against a foreigner or a foreign ship should be proceeded with. It is thus important to ensure at least that the correct international procedures are used when foreign shipping is involved. In one of the cases before the Northern Territory Supreme Court, arising out of the arrest and seizure of the *Dai Nippon Maru*, the government vessel had sailed towards the Japanese pearler flying a flag signal which was intended to tell the pearler to stop. The arresting officer (Parnell) admitted in evidence that he would have been surprised if the pearler's captain had understood the meaning of the signal, hence he fired across its bows twice without further warning.[93]

If a 200 mile exclusive economic zone is accepted as part of the international law of the sea, and is applied to Australia's coastline, many Commonwealth laws, and perhaps also some State laws, may need some adaptation. This would be a timely occasion to review all laws which apply in the offshore zone with a view to streamlining them to provide an overall effective offshore management scheme. One does not need a crystal ball to foresee that a 200 mile coastal zone around the Australian coast will significantly increase the need for effective policing in offshore zones, and it would be a pity if the overall management of our offshore areas was not backed up by a clear understanding of the relevant legal regime on all sides.

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[93] *The Argus* 24 September 1938. The case was settled out of court in favour of the Japanese owners before judgment was handed down.