THE LIMITS OF THE GREAT BARRIER REEF MARINE PARK: DEFINING BAYS AND REDEFINING REGULATORY CONTROL

Donald R Rothwell **and** *Brad Jessup*[*]

INTRODUCTION

The Great Barrier Reef is a vast area of enormous biological, including human, importance. In recent years the significance of the Great Barrier Reef has been growing because of the increased interest in global climate change and the role of the reef as a potential predictor of the impact of climate change, especially upon the marine environment. The Great Barrier Reef has also legally been important because of its status as a marine park and World Heritage site. To that end, the Great Barrier Reef has specifically been regulated by the Great Barrier Reef Marine Park Authority ('GBRMPA') in accordance with the *Great Barrier Reef Marine Park Act 1975* (Cth). Those parts of the reef within the Great Barrier Reef Marine Park ('Marine Park') have particular protections under the Act and activities within those parts ordinarily require permission from GBRMPA. Activities authorised by GBRMPA are exempt from the environmental assessment provisions of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('EPBC Act'), the Commonwealth's principal environmental legislation.[1] The interweave of these statutes has not only created additional layers of environmental law for the management of the Great Barrier Reef, but also brought into relief some important foundational issues as to the status of the Great Barrier Reef and the constitutional extent of Commonwealth and Queensland law which applies to not only the reef itself but also to the islands and waters which fall within the Marine Park.

The two 2007 cases of *Connolly and Great Barrier Reef Marine Park Authority and Far North Queensland Airwork Pty Ltd* before the Administrative Appeals Tribunal ('AAT') have highlighted these issues in unexpected ways. These cases began under a

---

[*] Professor Donald R Rothwell, Professor of International Law, ANU College of Law, Australian National University; Brad Jessup, Teaching Fellow, ANU College of Law, Australian National University.

1 For an analysis of some of the environmental law and policy issues which have arisen with respect the Great Barrier Reef area see Paul Havemann et al, 'Traditional use of marine resources agreements and dugong hunting in the Great Barrier Reef World Heritage Area' (2005) 22 *Environmental and Planning Law Journal* 258; Peter Wulf, 'Diffuse land-based pollution and the Great Barrier Reef World Heritage Area: the Commonwealth's responsibilities and implications for the Queensland sugar industry' (2004) 21 *Environmental and Planning Law Journal* 424.

presumption that a seaplane known as the 'Red Baron' based at Horseshoe Bay, Magnetic Island, in far North Queensland and operating as a business directed towards the local tourist market in that part of the Great Barrier Reef, required permission to operate under the *Great Barrier Reef Marine Park Act 1975* (Cth). By the end, however, the AAT had excised Horseshoe Bay from the Marine Park. The AAT's decision in December 2007[2] raises significant issues about the geographical extent of the Marine Park and ultimately the regulatory capacity of GBRMPA and potentially the environmental protection of high-activity bays in the Great Barrier Reef. The relatively simple, but nevertheless complex legal issue that confronted the AAT, as to whether Horseshoe Bay is or is not for the purposes of law a part of the Marine Park, was dealt with in only seven paragraphs. However, it has considerable legal significance for the offshore areas of Queensland and raises important issues with respect to the status of bays within offshore islands under Australian law. Any analysis of this question requires an appreciation of not only existing Commonwealth law regulating the Marine Park, but also historical constitutional issues which pre-date Federation. Additionally, an inadvertent consequence of the AAT's ruling that Horseshoe Bay was not within the Marine Park and outside the regulatory control of GBRMPA was the revived operation of the EPBC Act, which was otherwise excluded.

This article focuses on the AAT's finding in its December 2007 decision that Horseshoe Bay is not part of the Marine Park, and therefore beyond the decision-making jurisdiction of GBRMPA. It highlights the many facets of the law that were overlooked by the AAT and that raise doubt about the AAT's finding. It revives the question of regulatory domain over bays in the Great Barrier Reef World Heritage Area. The article proceeds by way of an analysis and critique of the AAT's application of the relevant law and also identifies some of the consequences of the legal outcome of the Red Baron matter and, more generally, for the regulation and protection of the Great Barrier Reef World Heritage Area.

THE CONTROVERSY OF THE RED BARON

In April 2005, Far North Queensland Airwork Pty Ltd (Airwork) applied for a permit from GBRMPA to conduct the Red Baron seaplane business.[3] According to the permit application, the Red Baron would land and take off from Horseshoe Bay, Nelly Bay and Picnic Bay, which are all bays within Magnetic Island.[4] Under sections 32 and 36 of the *Great Barrier Reef Marine Park Act 1975* (Cth) and regulation 77 of the supporting Regulations,[5] together with the Great Barrier Reef Marine Park Zoning Plan 2003

2 *Connolly and Great Barrier Reef Marine Park Authority and Far North Queensland Airwork Pty Ltd (Party Joined)* [2007] AATA 2098 (Unreported, Downes P and Kelly M, 18 December 2007) ('*Connolly No 2*').

3 Airwork also applied to the Queensland Environmental Protection Agency for a permit to conduct its business in the State marine park that abuts the Marine Park. A permit is required under the *Marine Parks Act 2004* (Qld) and the *Marine Parks Regulation 2006* (Qld). A joint permit was issued simultaneously with the permit from GBRMPA.

4 *Connolly and Great Barrier Reef Marine Park Authority and Far North Queensland Airwork Pty Ltd (Party Joined)* [2007] AATA 1883 (Unreported, Downes P and Kelly M, 19 October 2007) [1] ('*Connolly No 1*'). An excellent map of Magnetic Island, depicting the various bays and associated features can be found via Google Maps Australia at <http://maps.google.com.au/maps?hl=en&tab=wl> at 24 February 2009.

5 *Great Barrier Reef Marine Park Regulations 1983* (Cth).

(Cth),[6] Airwork required a permit to conduct a tourist and aircraft operation in the waters surrounding Magnetic Island within the Marine Park. On 26 October 2006 GBRMPA granted Airwork a permit for six years to conduct its business from and in the Marine Park, subject to a number of conditions.[7]

The Red Baron began flying in November 2006.[8] It used Horseshoe Bay as its primary point to take-off and land. Some residents, led by the applicants to the AAT cases, sought a reversal of GBRMPA's decision,[9] and ultimately appealed to the AAT.[10] The bases for the AAT claim were manifold, but centred around concerns about noise and safety and adverse consequences on the natural and cultural values of Magnetic Island, and in particular Horseshoe Bay, where the applicants lived and where the Red Baron had the greatest presence in the environment and was most noticeable to people. In the AAT's October 2007 decision,[11] the matter proceeded on the basis that GBRMPA had clear authority to regulate those aspects of the Red Baron's operations that directly related to the Marine Park, especially with respect to take-off and landing within Horseshoe Bay. At that time, no issues were raised by either the respondents or GRBMPA as to the geographical and jurisdictional limits of the Marine Park. A preliminary determination was made on some of the environmental and safety issues raised by the applicants, with an expectation that further evidence would be adduced and submissions received on outstanding matters.[12]

In its December 2007 decision, the AAT was confronted for the first time with a submission by the joined respondent in the matter, Airwork, that no part of Horseshoe Bay was within the limits of the Marine Park, and that instead it was within the limits of the State marine park, in this instance the Magnetic Island National Park. This proposition was opposed by the applicants but conceded by co-respondents, GBRMPA. After making some observations regarding the obligations upon GBRMPA to be aware of any issues concerning its boundaries,[13] the AAT reviewed the matter and concluded that Horseshoe Bay was a bay for the purposes of the common law, international law, and the *Seas and Submerged Lands Act 1973* (Cth).[14] It therefore followed for the AAT that GBRMPA had incorrectly decided that Horseshoe Bay was a part of the Marine Park.[15] The AAT reiterated that GBRMPA's power is confined to

---

6 The Zoning Plan creates a number of zones. Each zone specifies activities for which GBRMPA's permission is or is not required.

7 *Connolly No 1* [2007] AATA 1883 (Unreported, Downes P and Kelly M, 19 October 2007) [33–4].

8 Ibid [1].

9 Under regulation 185 of the *Great Barrier Reef Marine Park Regulations 1983* (Cth) a person may request a reconsideration of a decision, including a decision to vary a permit.

10 *Connolly No 1* [2007] AATA 1883 (Unreported, Downes P and Kelly M, 19 October 2007) [34].

11 Ibid.

12 Ibid [123].

13 *Connolly No 2* [2007] AATA 2098 (Unreported, Downes P and Kelly M, 18 December 2007) [8].

14 Ibid [16].

15 Ibid. GBRMPA had asserted that Horseshoe Bay was within the Marine Park area up to the limit of the low water mark, and that the area between the high water and low water mark was within the confines of State marine park, in this instance the Magnetic Island National Park: *Connolly No 2* [2007] AATA 2098 (Unreported, Downes P and Kelly M, 18 December 2007) [6].

regulate activities within the limits of the Marine Park as set out in the legislation that created the Marine Park.[16] Horseshoe Bay was found to be outside the boundaries of the Marine Park, notwithstanding that GBRMPA had been managing or purporting to manage Horseshoe Bay and other similar water bodies.[17] Consequently, GBRMPA and the AAT, by virtue of the *Administrative Appeals Tribunal Act 1975* (Cth),[18] were unable to regulate the Red Baron whilst it was operating on and above Horseshoe Bay. Nevertheless, because the Red Baron would be flying over and operating in waters of the Marine Park beyond Horseshoe Bay, the Red Baron's operators still required a permit from GBRMPA for these non-Horseshoe Bay operations. The AAT granted such a permit in the December 2007 decision, albeit with reservations about noise and safety, substituting the earlier permit of GBRMPA with more stringent conditions. The permit allowed the Red Baron to operate on and above the Marine Park.

The discussion below will now turn to a review and analysis of some of the issues considered by the AAT in determining the status of the waters of Horseshoe Bay.

HORSESHOE BAY AND THE GREAT BARRIER REEF MARINE PARK

In reviewing whether Horseshoe Bay was a part of the Marine Park, the AAT gave particular consideration to the meaning of 'Great Barrier Reef Region' under the *Great Barrier Reef Marine Park Act 1975* (Cth). The Act confines the boundaries of the Marine Park to within the 'Great Barrier Reef Region' as follows:

> There shall be a marine park, to be known as the Great Barrier Reef Marine Park, consisting of such areas in the Great Barrier Reef Region as are, for the time being, declared under section 31 to be parts of that Marine Park.[19]

As the AAT noted,[20] the 'Great Barrier Reef Region' means, according to section 3 of the Act, an area that is principally described in Schedule 1 of that Act. That area, which is identified by geographical coordinates extending due east from the low-water mark of parts of the Queensland coast, comprises significant portions of Australia's maritime domain offshore Queensland running south from a point east of Cape York to just north of Fraser Island at distances of 100-300 km from the coast.[21]

---

16 *Connolly No 2* [2007] AATA 2098 (Unreported, Downes P and Kelly M, 18 December 2007) [9]. As noted above, under sections 32 and 36 of the *Great Barrier Reef Marine Park Act 1975* (Cth) and regulation 77 of the Regulations, Airwork required a permit to conduct a tourist and aircraft operation in the waters surrounding Magnetic Island *within the Marine Park*.

17 See for example the decision in *North Queensland Conservation Council and Great Barrier Reef Park Authority and Ors* [2000] AATA 925 (Unreported, Forgie DP and Christie M, 20 October 2000) where the Tribunal considered a matter relating to Nelly Bay, Magnetic Island, and the granting of certain permissions by GBRMPA.

18 Section 43(1) provides that the AAT, in making its decision, has all the powers of the original decision maker. It is equally constrained to the powers and jurisdictions of that decision maker. Hence, here, having found that GBRMPA did not have power to regulate activities in Horseshoe Bay, the AAT similarly was unable to make a decision with respect to the operation of the seaplane business in Horseshoe Bay.

19 *Great Barrier Reef Marine Park Act 1975* (Cth) s 30.

20 *Connolly No 2* [2007] AATA 2098 (Unreported, Downes P and Kelly M, 18 December 2007) [9].

21 For further details see Great Barrier Reef Marine Park Authority, *Great Barrier Reef Marine Park Zoning Plan* (2003) <www.gbrmpa.gov.au/__data/assets/pdf_file/0016/10591/Zoning_Plan.pdf > at 28 July 2008.

This area offshore the Queensland coast unquestionably included Magnetic Island,[22] and the AAT was right to therefore turn its consideration to those areas exempted from the operation of the *Great Barrier Reef Marine Park Act 1975* (Cth) under section 3 which included

> any part of such an area that is referred to in section 14 of the *Seas and Submerged Lands Act 1973* or is an island, or a part of an island, that forms part of Queensland and is not owned by the Commonwealth.

This provided the AAT with two options. It could either consider the status of Horseshoe Bay under the *Seas and Submerged Lands Act 1973* (Cth), or in addition it could have considered whether the Bay was part of Magnetic Island, forming part of Queensland and not owned by the Commonwealth. The Tribunal ultimately only addressed the first issue. The unasked question of whether Horseshoe Bay could be conceived as being part of an island, in this case Magnetic Island, is worthy of some review, and shall be addressed at a later stage. To begin, it is appropriate to consider the status of Horseshoe Bay for the purposes of the *Seas and Submerged Lands Act 1973* (Cth).

THE SEAS AND SUBMERGED LANDS ACT AND THE LIMITS OF A STATE

The *Seas and Submerged Lands Act 1973* (Cth) was enacted as a means of giving effect to various provisions of the 1958 *Convention on the Territorial Sea and Contiguous Zone*,[23] and the 1958 *Convention on the Continental Shelf*,[24] and to also confirm the extent of Commonwealth offshore sovereignty and jurisdiction, which up until that time was unresolved.[25] The High Court in the landmark decision of *NSW v Commonwealth* ('*Seas and Submerged Lands Case*')[26] held that this statute provided a valid basis for an extensive assertion by the Commonwealth of offshore sovereignty and jurisdiction.[27] While the Commonwealth ultimately made certain concessions as to the extent of its offshore control by way of the 'Offshore Constitutional Settlement',[28] the *Seas and Submerged Lands Act 1973* (Cth) has remained in place and more recently has been the basis for even more extensive Commonwealth assertion of offshore title and

---

22 *Connolly No 2* [2007] AATA 2098 (Unreported, Downes P and Kelly M, 18 December 2007) [10].

23 *Convention on the Territorial Sea and Contiguous Zone*, opened for signature 29 April 1958, 516 UNTS 205 (entered into force 10 September 1964).

24 *Convention on the Continental Shelf*, opened for signature 29 April 1958, 499 UNTS 311 (entered into force 10 June 1964).

25 See the extensive discussion of the position prior to 1973 in D P O'Connell, 'Australian Coastal Jurisdiction' in D P O'Connell (ed), *International Law in Australia* (1965) 246–91.

26 (1975) 135 CLR 337 ('*Seas and Submerged Lands Case*').

27 See the post-*Seas and Submerged Lands Act 1973* (Cth) position as outlined in Michael Landale and Henry Burmester, 'Australia and the Law of the Sea – Offshore Jurisdiction' in K W Ryan (ed), *International Law in Australia* (2nd ed, 1984) 390–416.

28 See, eg, Marcus Haward, 'The Australian Offshore Constitutional Settlement' (1989) 13 *Marine Policy* 334.

jurisdiction by way of extended maritime zones proclaimed consistently with the provisions of the *United Nations Convention on the Law of the Sea ('LOSC')*.[29]

Notwithstanding the extensive assertion of offshore title and control by the Commonwealth, the Act included some savings provisions.[30] In particular, section 14 provided:

> Nothing in this part affects sovereignty or sovereign rights in respect of any waters of the sea that are waters of or within any bay, gulf, estuary, river, creek, inlet, port or harbour and:
>
> (a) were, on 1st January 1901, within the limits of a State; and
>
> (b) remain within the limits of the State;
>
> or in respect of the airspace over, or in respect of the sea-bed or subsoil beneath, any such waters.

During their deliberations in the *Seas and Submerged Lands Case*, some members of the High Court had occasion to reflect upon the role of section 14. In noting that the territory of an Australian State extends to the low-water mark, Gibbs J considered the consequences arising from a proclamation by the Governor-General of straight baselines which would have the effect of enclosing certain waters.[31] In these instances, Gibbs J noted that:

> Section 14 would preserve the sovereignty of the States in respect of areas "within any bay, gulf, estuary, river, creek, inlet, port or harbour" but would not preserve State rights in respect of the shore between low- and high-water mark.[32]

Mason J was more direct in his views as to the import of the provision, noting:

> The saving provisions of s. 14 are designed to preserve State rights over internal waters within the territory of a State, as for example, waters of the sea within a bay which is on the landward side of the baselines of the territorial sea.[33]

The importance of this observation, however, needs to be seen against section 10 of the *Seas and Submerged Lands Act 1973* (Cth) which directly referred to the sovereignty of the Commonwealth over the internal waters of Australia, being those waters on the landward side of the straight baselines from which the territorial sea had been proclaimed. The savings provision of section 14 was of particular importance in relation to section 10, which as Mason J noted, was therefore a provision which 'did not operate so as to attempt to vest in the Commonwealth sovereignty over waters within the territory of a State.'[34]

The intent of section 14 of the *Seas and Submerged Lands Act 1973* (Cth), and the subsequent High Court commentary highlight two matters. The first matter is the importance of attempting to define what are the limits of a State and whether certain waters are considered to fall within the limits of a State. This involves an analysis of

---

29 See, eg, Martin Ferguson, *UN Confirms Australia's Rights over Extra 2.5 Million Square Kilometres of Seabed* (2008) Minister for Resources and Energy <http://minister.ret.gov.au/TheHonMartinFergusonMP/Pages/UNCONFIRMSAUSTRALIA'SRIGHTSOVEREXTRA.aspx> at 25 March 2009.

30 *Seas and Submerged Lands Act 1973* (Cth) ss 14-16.

31 *Seas and Submerged Lands Case* (1975) 135 CLR 337, 414–15 (Gibbs J).

32 Ibid 415 (Gibbs J) who noted that any claim by the Commonwealth to sovereignty over the area between the low-water and high-water mark would be invalid.

33 Ibid 476 (Mason J).

34 Ibid.

colonial boundaries, the considered limits of the States at the time of Federation, and the common law. The second matter is the importance of distinguishing between waters of a State recognised as such at the time of Federation, and the internal waters adjacent to a State arising as a consequence of the declaration of straight baselines around parts of the coastline consistent with Australia's entitlements under international law.[35] Care, however, must be exercised in undertaking this analysis as 'internal waters' is a law of the sea concept which only gained support throughout the 20th Century as a result of developments in the relevant conventional law, especially following recognition of the capacity of coastal States to proclaim straight baselines. Whilst there are numerous examples of internal waters now to be found around the Australian coastline following the proclamation of straight baselines consistent with international law, no such baselines were in place at the time of Federation in 1901.[36] Accordingly, whilst the waters which comprise Horseshoe Bay do now in fact fall on the landward side of baselines proclaimed in the vicinity of the Great Barrier Reef, that was not the position at Federation and the sovereignty over those waters for the purposes of the *Seas and Submerged Lands Act 1973* (Cth) can only be determined by a consideration of section 14 of that Act.

In light of these factors, the question that confronted the AAT of whether Horseshoe Bay is an 'area that is referred to' in section 14 of the *Seas and Submerged Lands Act 1973* (Cth) is not straightforward. The legislation creates a three-step test. First, the area must be a bay, gulf, estuary, river, creek, inlet, port or harbour (or airspace above or subsoil beneath such geographic formations). Secondly, the area must have been within the limits of a State at the time of Federation. Thirdly, the area must still remain within the limits of the State. What follows is a review and critique of the manner in which the AAT approached these issues.

Is Horseshoe Bay a 'bay'?

Whether Horseshoe Bay is a 'bay' for the purpose of the *Great Barrier Reef Marine Park Act 1975* (Cth) and the *Seas and Submerged Lands Act 1973* (Cth) is a question of fact. The AAT acknowledged this and in addition to citing a range of relevant legal precedent, particularly noted the High Court decision in *Raptis v South Australia.*[37] However, the principal concern in *Raptis* was the status of certain South Australian bays, particularly Spencer Gulf and the Gulf of St Vincent, and not the definition of what constitutes a bay in law.[38] The Tribunal did not, however, identify emphatic geographical facts to

35 The international law with respect to straight baselines has developed considerably during the past 50 years, and Australia has sought to take advantage of this especially since the conclusion of the LOSC and baselines have been proclaimed under the *Seas and Submerged Lands Act 1973* (Cth): Attorney-General's Department, *Australia's Territorial Sea Baseline* (1988).

36 This is not to suggest that at the time of Federation there were no examples of waters which fell under the exclusive control of a colony as a result of such waters being 'historic bays': see the extensive discussion in W R Edeson, 'Australian Bays' [1968–1969] *Australian Year Book of International Law* 5.

37 (1977) 138 CLR 346 ('*Raptis*').

38 Ibid 360–361 where Gibbs J did refer to the dictionary definition in order to distinguish between a bay and gulf, noting that: 'Both are indentations of the sea into the land. "The distinction between *gulf* and *bay* is not always clearly marked, but in general a bay is wider in proportion to its amount of recession than a gulf…"'. See also 384 (Mason J).

support the proposition that Horseshoe Bay is a 'bay'. The AAT stated, for instance, that:

> Horseshoe Bay is a relatively small depression in its [Magnetic Island's] north coast. There are two distinct headlands, although, because they do not have single points, it is not easy to identify the appropriate places to draw a line between to mark the boundary between the bay and the waters outside the bay. The headlands are not narrower than the width of the bay, but they are not particularly far apart.[39]

Ultimately, the AAT based its conclusion that Horseshoe Bay is a bay on a range of factors including geography, usage and even nomenclature in purported reliance upon both the common law and international law. The Tribunal noted: 'the bay provides a protected anchorage and is the site of considerable leisure activities',[40] and it emphasised its findings about the recreational uses and protective nature of Horseshoe Bay in its October 2007 decision. The use of Horseshoe Bay as a safe anchorage is of high relevance in the inquiry, as such uses are not as common along the open coast as in bays. However, references to and implicit reliance on Horseshoe Bay's recreational uses, notably the 'high level of commercial use'[41] particularly for tourism-related water activities; and the presence of 'adjacent recreational facilities includ[ing] public toilets, picnic tables, boat ramp, stinger enclosure, restaurants and shops'[42] should carry less weight as these uses occur along much of Australia's populated coastal regions irrespective of the indentation of the water body along the coast.

The AAT also used common understandings to support its conclusion that Horseshoe Bay is a 'bay' finding support for its conclusion as 'a matter of ordinary English'.[43] The following Macquarie Dictionary definition of the word 'bay' is important in this regard: 'a recess or inlet in the shore of a sea or lake between two capes or headlands, not as large as a gulf but larger than a cove.' On this dictionary definition Horseshoe Bay is more likely a bay than it is not. Horseshoe Bay does recede from the open sea to form a body of water between two headlands. The AAT did not, however, have regard to a dictionary definition to support its finding.

Using the description and technical formula in the *LOSC*,[44] a description and formula the significance of which under Australian law the Tribunal conceded had not been concluded,[45] the AAT also found Horseshoe Bay to be a 'bay'. In this regard article 10(2) of the *LOSC*[46] provides that:

> a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain land-locked waters and constitute more than a mere curvature

---

39 *Connolly No 2* [2007] AATA 2098 (Unreported, Downes P and Kelly M, 18 December 2007) [14–15].

40 Ibid [15].

41 *Connolly No 1* [2007] AATA 1883 (Unreported, Downes P and Kelly M, 19 October 2007) [14].

42 Ibid.

43 *Connolly No 2* [2007] AATA 2098 (Unreported, Downes P and Kelly M, 18 December 2007) [16].

44 *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) ('*LOSC*').

45 *Connolly No 2* [2007] AATA 2098 (Unreported, Downes P and Kelly M, 18 December 2007) [13].

46 *LOSC*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994).

> of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.

Unfortunately the Tribunal did not engage with the definition of the Convention nor plot the requisite semi-circle in its decision. It did not even venture to determine the places where a baseline should be drawn between the headlands of Horseshoe Bay.[47] Rather, it commented in passing that 'we note that it also satisfies the international law test'.[48] The AAT also relied on the geographic name of Horseshoe Bay, dismissing the general principle in law to look beyond form for substance, and beyond names for actual meanings.[49]

It is also very likely that the Tribunal was encouraged to reach its finding by GBRMPA's concession that Horseshoe Bay is a 'bay' and the absence of any legal counsel to contest the proposition.[50] Whilst the AAT found some comfort in its determination as to the status of Horseshoe Bay as a result of an apparent concession by both the GBRMPA and also 'representatives of the Commonwealth in Canberra'[51] this does not absolve the Tribunal of making its own independent determination of the matter, especially given the ramifications which follow from such a concession and the Tribunal's endorsement of that position. Whilst, therefore, the AAT's conclusion that Horseshoe Bay is a 'bay' can be defended, it is also arguable that the opposite conclusion could have been reached on the facts, and that the AAT had insufficient regard to other factors, especially the history of Horseshoe Bay (other bays on Magnetic Island were historically used as forts and as safe anchorages and not Horseshoe Bay), and gave greater prominence to particular features and uses of the coastline than it should have.

Was Horseshoe Bay a part of Queensland at Federation?

In reviewing whether Horseshoe Bay was a part of Queensland at Federation, the AAT gave very brief consideration to the status of Magnetic Island, concluding 'there is no doubt that Magnetic Island was part of Queensland at the time of Federation, and we need not refer to the instruments showing this.'[52] This conclusion, notwithstanding its potential constitutional significance as to the ultimate outer limits of Queensland, is undoubtedly correct. The Letters Patent for Queensland, the territory of which was previously a part of the colony of New South Wales, specify that Queensland includes

---

47 This exercise was left to the *Magnetic Times*; see Hirst, G (2007) 'Red Baron case reveals "dangerous precedent"' *Magnetic Times* (Magnetic Island, Queensland), 19 December 2007 <http://www.magnetictimes.com/index.php?ID=2541> at 6 March 2008.

48 *Connolly No 2* [2007] AATA 2098 (Unreported, Downes P and Kelly M, 18 December 2007) [15].

49 See, eg, *Radaich v Smith* (1959) 101 CLR 209 where the High Court characterised a deed a lease despite it being referred to as a 'licence'. See also the discussion of this issue in *Raptis* (1977) 138 CLR 346, 377–8 (Stephen J) who upon a review of the jurisprudence as to whether a bay was part of inland or internal waters, noted that the common law approach would also apply in determining whether 'indentations are within the description of bays'.

50 The applicants, who did contest the proposition that Horseshoe Bay was not a part of the Marine Park, were self-represented. GBRMPA was a co-respondent with Airwork, the party that led the argument.

51 *Connolly No 2* [2007] AATA 2098 (Unreported, Downes P and Kelly M, 18 December 2007) [7].

52 Ibid [11].

'all and every … adjacent Islands … in the Pacific Ocean.'[53] In one of the first extensive studies on the boundaries of Queensland, Cumbrae-Stewart noted in 1930 that while the land boundaries of the colony of Queensland had 'given little trouble' this was not the case with the maritime boundary.[54] Whilst there was little doubt that the maritime boundary commenced at the land terminus of the New South Wales/Queensland border at Point Danger and extended north to Cape York and into the Gulf of Carpentaria, the main area of contention was the outer eastern limits of the boundary especially with respect to offshore islands. Following some disputes with New South Wales as to which islands did pass to Queensland, further Letters Patent were issued seeking to clarify the matter followed by the *Queensland Coast Islands Act 1879* (Qld).[55] Cumbrae-Stewart concluded that as a result 'the maritime boundary of Queensland is the coastline from Point Danger to the 138th median in the Gulf of Carpentaria, together with the islands within the outer edge of the Barrier Reef and within a line drawn from the north-western point of the reef to the spot mentioned in the Gulf of Carpentaria.'[56] However, caution needs to be exercised in giving too much weight to the use of the term 'maritime boundary', which in a contemporary setting suggests the limits of maritime zones proclaimed under the *LOSC*[57] and Australian law. Cumbrae-Stewart qualified the term to extend to 'the ownership of the islands adjacent to the coast'.[58] This is consistent with the approach taken by the High Court in its subsequent consideration of the distinction between the territories of the colonies prior to Federation and their surrounding waters and seabed.[59]

On any interpretation, the territorial extent of Queensland offshore the outer limits of the mainland would include Magnetic Island, which is an island separated from the coast by a relatively narrow strait of water less than five kilometres wide.[60] It is also inconceivable that the drafters of the Letters Patent would not have intended to include an island clearly visible from the Queensland mainland within the limits of the colony especially through the use of the term 'adjacent island'. This view also finds

---

53 *Letters Patent Erecting Colony of Queensland 1859* (Imp).

54 F W S Cumbrae-Stewart, *The Boundaries of Queensland with Special Reference to The Maritime Boundary and "Territorial Waters Jurisdiction Act, 1878"* (1930) 8.

55 R D Lumb, 'The Maritime Boundaries of Queensland and New South Wales' (1964) 1, No. 4 *University of Queensland Papers, Faculty of Law* 3, 7 concluded that by 1872 as a result of the issuing of additional Letters Patent, that the 'boundaries of Queensland extended to all islands within 60 nautical miles of the coast'.

56 Cumbrae-Stewart, above n 55, 14. See also comments by the High Court on the processes leading to the settling of the boundaries of Queensland in *Seas and Submerged Lands Case* (1975) 135 CLR 337, 461 (Mason J); 484 (Jacobs J).

57 *LOSC*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994).

58 Cumbrae-Stewart, above n 55, 14. See also the discussion in Lumb, above n 56, 3–15; and O'Connell, above n 25, 268–72 who also took a wide view of the potential ambit of Queensland's control over the Great Barrier Reef; cf. the subsequent discussion in R D Lumb, 'Australian Coastal Jurisdiction' in K W Ryan (ed), *International Law in Australia* (2nd ed, 1984) 370, 388 who qualified the position with respect to 'Queensland internal waters' by noting that '[t]hese waters may well be extensive and would include waters which are traditionally regarded as being within State jurisdiction under internal waters principles'.

59 See, eg, *Bonser v La Macchia* (1969) 122 CLR 177, 185 (Barwick CJ).

60 From Cape Pallarenda to the south west coast of the island.

support in 21st centuryunderstandings of the meaning of the word 'adjacent', which the Macquarie Dictionary defines as 'lying near, close, or contiguous; adjoining; neighbouring'.[61]

The more significant question to be asked here was rather whether Horseshoe Bay was a part of Queensland at the time of Federation. The AAT did recognise this as an issue, and principally saw it as a question for the common law.[62] In a one paragraph assessment of the question, the AAT refers to authority noting the *fauces terrae* and 'jaws of the land' principle, before turning to place some weight on Stephen J's discussion of the issue in *Raptis*.[63] A more considered approach of relevant authority may have been helpful, especially in light of the extensive discussion of some of these issues by the High Court.

In *Bonser v La Macchia*, the *Seas and Submerged Lands Case*, and *Raptis*, a series of cases determined over an eight-year period, the High Court had the opportunity to thoroughly consider the limits of the States and whether State territory extended to the seabed and surrounding waters. What is clear from these decisions is the view that prior to Federation the limits of the colonies ended at the low-water mark, which by implication extends to any islands that formed a part of the colony at that time.[64] Accordingly, and this was a crucial aspect of the finding in the *Seas and Submerged Lands Case*, neither the colonies or the Australian States had control over any adjacent territorial sea that may have existed offshore land, however that may have been defined under international law from time to time.[65] The only exception that could arise would be where the boundaries of the colony expressly included waters adjacent to the land, or in those instances where the common law would have granted rights over adjoining waters.

With respect to the boundaries of a colony, in *Raptis* the High Court gave particular emphasis to the 1836 Letters Patent for South Australia. These expressly refer to the 'Bays and Gulfs together with the Island called Kangaroo Island', which in the ultimate view of the Court made clear that waters of those bays and gulfs formed a part of the territory of South Australia.[66] However, as noted by Mason J the position of South

---

61 For example, the Macquarie Dictionary defines 'adjacent' to mean 'lying near; close, or contiguous; adjoining; neighbouring'. Magnetic Island is each 'lying near', 'close, or contiguous' and 'neighbouring' the Queensland coast.

62 *Connolly No 2* [2007] AATA 2098 (Unreported, Downes P and Kelly M, 18 December 2007) [11].

63 *Raptis* (1977) 138 CLR 346, 376–7 (Stephen J) who in turn had considered the decision of the international tribunal in the *North Atlantic Coast Fisheries Case (Great Britain v United States of America)* (1910) 11 RIAA 167.

64 *Bonser v La Macchia* (1969) 122 CLR 177, 185 (Barwick CJ); 221–2 (Windeyer J); *Seas and Submerged Lands Case* (1975) 135 CLR 337, 371–2 (Barwick CJ); 459, 468 (Mason J); cf *Bonser v La Macchia* (1969) 122 CLR 177, 209 (Menzies J) who stated that 'In 1900 waters within the three-mile limit of the coast of a colony would be understood as the territorial waters of a colony', though this observation needs to be read against the consideration by the Court in that case of the interpretation of s 51(x) of the Constitution and the words 'territorial limits'.

65 *Bonser v La Macchia* (1969) 122 CLR 177, 221–2 (Windeyer J); *Seas and Submerged Lands Case* (1975) 135 CLR 337, 369 (Barwick CJ).

66 *Raptis* (1977) 138 CLR 346, 359–60 (Gibbs J) noting that 'the effect of the letters patent of 1836 was that the bays and gulfs on the south coast of South Australia became part of the territory of South Australia whether or not they would have been regarded by the rules of

Australia is 'singular; it stands in marked contrast to the definition of the boundaries of other Australian colonies where there is no reference to bays and gulfs.'[67] As the Queensland Letters Patent make no express reference to bays, there is little support from the decision in *Raptis* that Horseshoe Bay may have been a part of Queensland at Federation.[68]

What then of the position at common law? There is significant authority that at common law certain bodies of water fell within the reach of the land so as to be equated with land for the purposes of sovereignty, jurisdiction and title. Often, the reach of the common law in this manner would include the waters found within bays.[69] Two approaches could have been taken by the AAT. The first would have been to review the position at common law as to the relationship between the land and adjacent waters such as that within a bay.[70] An argument can be made that under the common law bays formed part of the adjacent territory.[71] This approach had various bases including that a branch or 'arm of the sea' is within *fauces terrae*, or the 'jaws of the land'. The effect of such a characterisaton would be to treat the waters of the bay similarly to land over which certain rights and controls could be exercised. There is in principle nothing that would bar such an argument being mounted in the case of the waters of a bay adjoining an island,[72] especially if the island was of some significance due to its size and historical usage and was relatively adjacent to the mainland. However, some caution must be exercised when reviewing the relevant cases on point. For example in 1875 the Queensland Supreme Court in *R v Jimmy*[73] held that the waters of Challenger Bay off Palm Island were not a place where the crime of piracy could be committed because the 'scene of the alleged piracy forms part of this colony' and was 'within a line drawn from headland to headland [and] was within the jaws of

---

the common law or the rules of international law as forming part of that territory.'; see also 367 (Stephen J); 381 (Mason J); 390–91 (Jacobs J).

67 *Raptis* (1977) 138 CLR 346, 381 (Mason J). See also *Seas and Submerged Lands Case* (1975) 135 CLR 337, 460 (Mason J).

68 Edeson, writing in 1969 prior to decision in *Raptis* had taken a similar view to that subsequently endorsed by the High Court, see Edeson, above n 36, 17.

69 Ibid 18. See also O'Connell, above n 25, 262–3 who outlines three tests in English jurisprudence as to what are the waters that fall within a bay.

70 The rights which may exist under international law to claim maritime zones from the low-water mark around an island are distinguishable from the common law rights primarily because the starting point under international law is the outer point of recognisable territorial limits, or in exceptional cases where straight baselines have been drawn, artificial limits which are founded upon criteria provided for in the *LOSC*; see *Raptis* (1977) 138 CLR 346, 384 (Mason J). For a discussion of the position Australia has taken under the law of the sea with respect to the drawing of straight baselines see R D Lumb, *The Law of the Sea and Australian Off-Shore Areas* (2nd ed, 1978) 10–16; Landale and Burmester, above n 27, 395–6.

71 In 1965 O'Connell had argued that 'It is accepted in Australian practice that "bays" are State and not Federal territory': O'Connell, above n 25, 262. However, this statement needs to be qualified as there does not seem to have been any conclusive position on this issue at the time of Federation, and whilst there may well have been practice to that effect between 1901 and 1965, this was not reflected by the decision of the High Court in *Seas and Submerged Lands Case* (1975) 135 CLR 337; see also Edeson, above n 36, 18.

72 See the discussion of some of these approaches in Edeson, above n 36, 19–23.

73 *R v Jimmy* [1875] IV QSCR 130.

the land.'[74] Yet, in cases concerning piracy the principal issue was whether the act took place on the high seas, and on the interpretation of the facts in this case, where the alleged act took place no more than half a mile from shore, it is clear that these waters were not part of the high seas.[75]

In his exhaustive study of this issue Edeson notes that in the early English authority and writings on point that the phrase 'arm of the sea' is mentioned, 'which clearly suggests that there must be a marked indentation of the coastline'.[76] This accords with the approach taken in *Union Steamship v Ferguson*,[77] one of the few Australian cases to give the matter consideration.[78] There Windeyer J considered the status of Emu Bay, Tasmania, and was of the view that *fauces terrae* referred to 'defined promontories or headlands enclosing a narrow entrance to an arm or inlet of the sea'.[79] Emu Bay was not considered to meet that description. Edeson concluded that in addition to the possibility that bays may have formed part of the adjacent territory as a result of Imperial enactment, or local practice, or effective occupation, the nineteenth century decisions had a 'tendency towards "configuration" as a decisive test for bays, especially where the area sought to be enclosed is large'.[80] This is consistent with the approach of Stephen J in *Raptis*, who emphasised that in determining the status of a bay: 'The geographical aspects of the particular feature would require to be adequately understood and all relevant aspects of history and usage would have to be examined'.[81]

Whilst in the absence of conclusive High Court authority on point care must be taken in determining the test at common law, it is clear that a range of factors can be taken into account in determining whether the waters of a bay fall within the reach of the common law so as to be equated with the land. These would have included the indentation of the coastline, whether there existed a narrow inlet or arm of the sea,

---

74 Ibid 131 (Cockle CJ).

75 Likewise in another Queensland case *D v Commissioner of Taxes* [1941] QSR 218, the Full Court of the Supreme Court of Queensland interpreted the word 'Queensland' in the *Income Tax Assessment Act 1936* (Qld) to include the territorial waters, however, this case turned on the extraterritorial capacity of the Queensland legislature to legislate over these waters; see *D v Commissioner of Taxes* [1941] QSR 218, 226 (Philp J).

76 Edeson, above n 36, 20. See also the discussion in Cumbrae-Stewart, above n 52, 16–17 discussing the notion of the 'King's Chambers' in the case of 'enclosed areas of sea more than 6 miles across, whether bays or estuaries'.

77 (1968) 119 CLR 191.

78 See also the decision in *Risk v Northern Territory* (2002) 210 CLR 392 and the exchange which took place between counsel and the bench on the status of waters *fauces terrae*: Transcript of Proceedings, *Risk v The Northern Territory of Australia & Anor D12/2001* (High Court of Australia, 6 March 2002).

79 *Union Steamship v Ferguson* (1968) 119 CLR 191, 201 (Windeyer J).

80 Edeson, above n 36, 23.

81 *Raptis* (1977) 138 CLR 346, 378 (Stephen J). In *Commonwealth of Australia v Yarmirr* (1999) 101 FCR 171, the Full Court of the Federal Court did have occasion to review parts of the common law test outlined by the High Court in *Raptis* as to the status of bays and applied those tests to certain waters in the Northern Territory; see [90–200]. However, when the matter went on appeal to the High Court, this issue was not explored in any detail: *Commonwealth v Yarmirr* (2001) 208 CLR 1. For some foreign commentary on the Australian position with respect to bays see Leo J Bouchez *The Regime of Bays in International Law* (1964) 228–9; Gayl S Westerman, *The Juridical Bay* (1987) 197–201.

historic usage of the waters, and any relevant statutes which directly applied to the waters in question. Accordingly, further investigation should have been undertaken by the AAT when it considered the common law tests in the case of Horseshoe Bay. With respect to the geography of Horseshoe Bay, more attention could have been given to its size, the distance between the entrance points, and the semi-circle test developed under the law of the sea and found in *LOSC*. In addition, the AAT could have looked at how the waters of Horseshoe Bay were used prior to Federation, including usage by the indigenous traditional owners who were present in their communities until the 1930s, and European colonisers, who arrived on the island in the 1800s, mined coral, stone, and gold and harvested timber in the mid to late 1800s, built a quarantine station on the west coast, and established the first island resort at Picnic Bay in the 1890s.[82] On the basis of these factors, and considering the relevant case law with respect to bays at common law, it is difficult to conclude that Horseshoe Bay would have been considered a bay at common law over which the colony of Queensland had ownership and control prior to Federation. Compared to bays over which such rights at common law have been held to exist, Horseshoe Bay is comparatively small. This is not a bay which represents a significant indentation into the coastline. It is also not a bay where there is evidence of long standing historical usage, especially when it is considered that the bay sits within a relatively small offshore island and when it is compared to bays along other parts of the Queensland coastline where significant commercial and other activities were occurring.[83] O'Connell's exhaustive analysis on the status of historic bays in Australia likewise supports this view.[84] While the AAT did take into account some of these factors in its decision, it did not undertake any historical analysis of the issue to determine the status of the bay at Federation and rather principally focused on the contemporary usage of the bay. There must be considerable doubt therefore as to whether Horseshoe Bay was within the limits of Queensland at Federation.

Was Horseshoe Bay a part of Queensland in 2007?

The final part of the test under the *Seas and Submerged Lands Act 1973* (Cth) is to ask whether Horseshoe Bay remains within the limits of the State. Presumably this was inserted into the Act to cover circumstances where territory may be ceded by one State to another, or more probably where territory formerly part of a State had become part of a Territory.[85] Inevitably for the AAT, the Tribunal probably implicitly assumed that

---

82 Queensland Environmental Protection Agency, *Magnetic Island: nature, culture and history* (2006) <http://www.epa.qld.gov.au/parks_and_forests/find_a_park_or_forest/magnetic_island_national_park/magnetic_island__nature_culture_and_history/> at 7 March 2008.

83 Moreton Bay, adjoining the port of Brisbane, and a principal bay in Southeast Queensland prior to Federation, would be a possible example of such a bay in Queensland; see O'Connell, above n 25, 267. In *Commonwealth of Australia v Yarmirr* (1999) 101 FCR 171, 217-220, the Federal Court placed emphasis upon undertaking an historical analysis when reviewing the status of certain bays in the Northern Territory.

84 O'Connell, above n 25, 267, where O'Connell omits Horseshoe Bay from a list of possible historic bays in Australia.

85 In this respect it needs to be recalled that all of Australia's external territories other than the Australian Antarctic Territory are principally comprised of small offshore islands and associated maritime territory; an example of which is the Coral Sea Islands Territory established under the *Coral Sea Islands Act 1969* (Cth).

the answer to the question was 'yes' based on its twin findings that Horseshoe Bay is currently a part of Queensland and that Magnetic Island was a part of Queensland at Federation. Ultimately the Tribunal merged the consideration of the historic and contemporary status of the Bay and in doing so gave undue weight to the current status of the Bay. In this respect it is also interesting to note that no reference was made to a 2000 AAT decision which also related to Magnetic Island, in this instance a development activity at Nelly Bay, wherein the capacity of GBRMPA to regulate the activity as being within the Marine Park went unquestioned.[86]

The AAT and the unasked questions

In light of the above critique as to the approach adopted by the AAT in assessing whether for the purposes of the common law Horseshoe Bay was a part of Queensland at the time of Federation, the failure of the Tribunal to address the second limb of the exemption from the 'Great Barrier Reef Region' under the *Great Barrier Reef Marine Park Act 1975* (Cth) has greater significance. Could Horseshoe Bay be considered as per section 3 of the Act 'an island, or a part of an island, that forms part of Queensland and is not owned by the Commonwealth'? The intent here was to exclude Queensland islands which may fall within the Region from the operation of the Act.[87] At international law Magnetic Island would be an 'island' because it is 'a naturally-formed area of land, surrounded by water, which is above water at high-tide'[88] and is sufficiently large to clearly distinguish it from rocks.[89] A similar approach is also reflected in the Australian common law. For example, in *Chen Yin Ten v Little*,[90] Burt J of the Western Australian Supreme Court simply stated that an island is 'a piece of land surrounded by water which is above water at high tide'.[91] Whilst there appears to have been no previous occasion when an Australian court has considered the status of Magnetic Island, the facts in this instance would almost certainly point to it being an island for the purposes of the law.

The more challenging question would ultimately have been to consider whether Horseshoe Bay is 'a part of' Magnetic Island. Two approaches could have been taken. The first would have been to consider the position at common law which inevitably returns to an analysis of the issues which have already been noted above. As already concluded, it is doubtful whether at the time of Federation or subsequently the common law would have considered Horseshoe Bay to be a part of Magnetic Island. A

86 *North Queensland Conservation Council and Great Barrier Reef Park Authority and Ors* [2000] AATA 925 (Unreported, Forgie DP and Christie M, 20 October 2000).

87 This interpretation was adopted in Ibid [141] where the AAT simply noted: 'As an island, Magnetic Island is excluded from the Great Barrier Reef Region and so from the area that may be part of the Marine Park.'

88 *Convention on the Territorial Sea and Contiguous Zone*, opened for signature 29 April 1958, 516 UNTS 205, art 10(1) (entered into force 10 September 1964); confirmed in *LOSC*, opened for signature 10 December 1982, 1833 UNTS 3, art 121(1) (entered into force 16 November 1994). See the general discussion on this point in Hiran W Jayewardene, *The Regime of Islands in International Law* (1990) 3–6.

89 See *LOSC*, opened for signature 10 December 1982, 1833 UNTS 3, art 121 (entered into force 16 November 1994).

90 (1976) 28 FLR 480.

91 Ibid 490. From time to time the status of certain islands has been considered by Australian courts, most particularly Kangaroo Island in *Raptis* (1977) 138 CLR 346, 363–4 (Gibbs J).

second approach would be one of simple statutory interpretation, and this would also support a conclusion that Horseshoe Bay is not a part of the island. The statutory provision for an exemption in the case of 'part of an island' suggests that the exemption from the Great Barrier Reef Marine Region applies to islands that only partially fall within the boundary limits, such as where the boundary cuts across or through an island so that part of the island falls within the region and another part is outside of the region. The current boundaries of the Great Barrier Reef Marine Park suggest that this indeed may be the case for certain islands at the far northern extremity of the Park adjacent to Cape York and the Torres Strait. Such a construction of the Act would also be consistent with *Acts Interpretation Act 1901* (Cth),[92] being one which promotes the object and purpose of the *Great Barrier Reef Marine Park Act 1975* (Cth) which is to provide for the protection and conservation of the marine region,[93] as opposed to the terrestrial or land areas that fall within the region. Accordingly an interpretation of the Act which favours the inclusion of the waters of a bay as being within the Great Barrier Reef Marine Park region is consistent with the tenor of the Act.[94] Finally, it should be noted that whilst the waters of Horseshoe Bay are proclaimed Australian internal waters for the purposes of international law,[95] neither Commonwealth or Queensland law identify those waters as being 'part of' Magnetic Island.

The inadvertent revival of the EPBC Act assessment process

The exclusion of Horseshoe Bay from the Marine Park was central to the AAT deciding to grant a permit for the operation of the seaplane business. This is because the AAT concluded that it could not consider the activities in Horseshoe Bay when assessing whether to grant a permit despite the noise, visual, safety and any potential effects on the marine ecosystem from the seaplane operation being consolidated in Horseshoe Bay. Under regulation 74(5)(f) of the *Great Barrier Reef Marine Park Regulations 1983* (Cth), the AAT was required to consider 'the likely effects of the proposed use on adjoining and adjacent areas and any possible effects of the proposed use on the environment and the adequacy of safeguards for the environment'. However, the AAT interpreted this regulation to mean that it could only consider the effects of the proposed activities beyond Horseshoe Bay such as the flying of the seaplane.[96] Further, it could not consider the effects on, adjoining or adjacent to, Horseshoe Bay of

92 *Acts Interpretation Act 1901* (Cth) s 15AA.

93 *Great Barrier Reef Marine Park Act 1975* (Cth) s 2A.

94 In support of this view, see also *North Queensland Conservation Council and Great Barrier Reef Park Authority and Ors* [2000] AATA 925 (Unreported, Forgie DP and Christie M, 20 October 2000) [142–3] where the AAT was of the opinion that a breakwater constructed over Nelly Bay on Magnetic Island was not a part of Queensland and instead fell within the ambit of the Great Barrier Reef Region and within the Marine Park.

95 *Commonwealth of Australia Gazette*, No S 29 (9 February 1983); see also Attorney-General's Department, *Australia's Territorial Sea Baseline* (1988). The precise coordinates from which the baselines are drawn are to be found in *Commonwealth of Australia Gazette*, No S 29 (9 February 1983), sch, table 1.

96 The AAT did decide that it could consider the effects of activities outside Horseshoe Bay not only on Horseshoe Bay itself, but also on the areas on land, including residential areas: *Connolly No 2* [2007] AATA 2098 (Unreported, Downes P and Kelly M, 18 December 2007) [28]. In the October 2007 decision, the AAT held that these peripheral areas were 'adjacent to' the Marine Park: *Connolly No 1* [2007] AATA 1883 (Unreported, Downes P and Kelly M, 19 October 2007) [49].

activities within Horseshoe Bay including the take-off, landing, or refuelling of the seaplane, because it did not have the power to regulate such activities. The AAT summarised with respect to regulation 74(5) that:

> So understood, these provisions do not assist the argument that the Authority can have regard to activities in Horseshoe Bay, because Horseshoe Bay, not being within the marine park, the question of what effect those activities have on adjacent, adjoining or nearby areas, does not arise.[97]

Ultimately, in the December 2007 decision the AAT granted a permit without having regard to the activities and effects of the seaplane operation perceived by its opponents to be the most offensive and objectionable.[98]

The regulation and management of activities within Horseshoe Bay were left to the Queensland Environmental Protection Agency. The agency elected not to amend its own permit, which was identical to the permit disregarded by the AAT, to accord with the permit issued by the AAT. The Red Baron's operations in Horseshoe Bay were therefore not subject to the more stringent conditions laid down by the AAT: conditions directed at overcoming amenity and safety concerns of Horseshoe Bay residents. Hence, the primary concerns of the applicants before the AAT and of the AAT itself have been left unheeded.

Depending on the magnitude, frequency and consequence of the effects of the Red Baron's operations, the Commonwealth, in another guise, that of the Minister of the Environment, Water, Heritage and the Arts, may yet be called on to manage and regulate the Red Baron's activities in Horseshoe Bay. An inadvertent consequence of the AAT's finding that Horseshoe Bay is not a part of the Marine Park is that the assessment process under the EPBC Act is revived for Horseshoe Bay and perhaps other bays within the Marine Park. Under the EPBC Act it is an offence to take an action (which would include flying a seaplane or operating a tourism business)[99] without an approval from the Commonwealth Minister for the Environment that is likely to have a significant impact on:

- the values of a World Heritage area,[100]
- the values of a National Heritage area,[101]

---

97 *Connolly No 2* [2007] AATA 2098 (Unreported, Downes P and Kelly M, 18 December 2007) [28].

98 The AAT did, however, in the December 2007 decision, have regard to the effects of noise and safety issues as they applied to Nelly Bay: *Connolly No 2* [2007] AATA 2098 (Unreported, Downes P and Kelly M, 18 December 2007) [29], which is a much more commercial bay, with a harbour and ferry terminal: *Connolly No 1* [2007] AATA 1883 (Unreported, Downes P and Kelly M, 19 October 2007) [12, 100]; and Picnic Bay, which is less popular for recreation than Horseshoe Bay: *Connolly No 1* [2007] AATA 1883 (Unreported, Downes P and Kelly M, 19 October 2007) [71]; *Connolly No 2* [2007] AATA 2098 (Unreported, Downes P and Kelly M, 18 December 2007) [43]. The operator of the seaplane sought a permit to use these bays as locations for take-off and landing but had not done so by the time of the October 2007 decision: *Connolly No 1* [2007] AATA 1883 (Unreported, Downes P and Kelly M, 19 October 2007) [79]. Consequently no effects of take-off and landing had been observed at these locations, unlike at Horseshoe Bay.

99 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 523 defines an 'action' as including a project; a development; an undertaking; an activity or series of activities; and an alteration of any of those things.

100 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 12 and 15A.

- threatened or listed species,[102] or
- migratory species.[103]

Section 43 of the EPBC Act creates an exemption for actions authorised under the *Great Barrier Reef Marine Park Act 1975* (Cth). The EPBC Act provisions, and the need to obtain an approval from the Commonwealth Minister for the Environment under the EPBC Act, do not apply to situations where:[104]

(a) the action is taken in the Great Barrier Reef Marine Park established by the *Great Barrier Reef Marine Park Act 1975* (Cth); and

(b) the person is authorised[105] to take the action in the place where he or she takes it.

The consequence of Horseshoe Bay being found to be beyond the boundaries of the Marine Park is not merely that GBRMPA has no power to regulate the Red Baron business, but also that the exemption from the EPBC Act no longer applies. The ill of regulatory duplication that the exemption in the EPBC Act aimed to overcome has been confirmed by the AAT. This is because the Red Baron, when active in Horseshoe Bay, is no longer being operated in the Marine Park, and because the operators of the Red Baron seaplane do not have an authority as stipulated under section 43(b) of the EPBC Act. Nevertheless, Horseshoe Bay and Magnetic Island are a part of the Great Barrier Reef World Heritage Area site irrespective of whether they are a part of the Marine Park. Whilst the World Heritage Area site[106] is aligned with the GBRMPA area as described in Schedule 1 of the *Great Barrier Reef Marine Park Act 1975* (Cth), islands such as Magnetic Island which are otherwise excluded from the Park area are not excluded from the World Heritage Area. Indeed the World Heritage Committee of the United Nations Educational, Scientific and Cultural Organisation noted, and expressed concern, at the time the Great Barrier Reef was included on the World Heritage List, that the boundaries of the Marine Park (and subsequent protection) did not align with the boundaries of the World Heritage Area.[107]

---

101 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 15B and 15C.

102 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 18 and 18A.

103 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 20 and 20A. Other 'matters' are also included within the EPBC Act, but these other matters are not relevant to this case.

104 See *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 43.

105 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 43(b) continues by stipulating that an authorisation may be made or issued under the *Great Barrier Reef Marine Park Act 1975* (Cth) or regulations in the form of a zoning plan, a plan of management, a permission, an authority, an approval or a permit.

106 Department of the Environment, Water, Heritage and the Arts, *Australian Heritage Database Great Barrier Reef, Townsville, QLD, Australia* <http://www.environment.gov.au/cgi-bin/ahdb/search.pl?mode=place_detail;place_id=105060> at 7 March 2008.

107 World Heritage Committee, *Fifth Session Sydney, 26–30 October 1981 Report of the Rapporteur*, CC-81/CONF/003/6 (1982). The decision contains the following addendum 'The Committee noted that only a small proportion of the area nominated for the World Heritage List had been proclaimed within the Great Barrier Reef Region as defined in the *Great Barrier Reef Marine Park Act 1975* (Cth), and the Committee requested the Australian Government to take steps to ensure that the whole area is proclaimed under relevant legislation as soon as possible and that the necessary environmental protection measures are taken.'

Horseshoe Bay is also a part of the Great Barrier Reef National Heritage area, which has the same boundaries as the World Heritage area,[108] though with different protected values,[109] and the area is frequented by protected dugong, turtle species and migratory birds.[110] Of course, the mere presence of threatened species and the existence of the National Heritage and World Heritage Areas is not enough for the Commonwealth Minister for the Environment to intervene or for the operators of Red Baron to fall foul of the severe penalties in the EPBC Act for undertaking an action without approval. Under the EPBC Act there must be a likelihood that the Red Baron will have a significant impact on the protected values or species.[111]

---

108 'Determination regarding including World Heritage Places in the National Heritage List of the Minister of the Environment and Water Resources', 15 May 2007, *Government Gazette* S99, 21 May 2007.

109 The Determination of the Minister of 15 May 2007, ibid, listed the protected values as:

World Heritage Criteria

(vii) to contain superlative natural phenomena or areas of exceptional natural beauty and aesthetic importance;

(viii) to be outstanding examples representing major stages of earth's history, including the record of life, significant on-going geological processes in the development of landforms, or significant geomorphic or physiographic features;

(ix) to be outstanding examples representing significant on-going ecological and biological processes in the evolution and development of terrestrial, fresh water, coastal and marine ecosystems and communities of plants and animals;

(x) to contain the most important and significant natural habitats for in-situ conservation of biological diversity, including those containing threatened species of outstanding universal value from the point of view of science or conservation.

National Heritage Criteria

(a) the place has outstanding heritage value to the nation because of the place's importance in the course, or pattern, of Australia's natural or cultural history;

(b) the place has outstanding heritage value to the nation because of the place's possession of uncommon, rare or endangered aspects of Australia's natural or cultural history;

(c) the place has outstanding heritage value to the nation because of the place's potential to yield information that will contribute to an understanding of Australia's natural or cultural history;

(d) the place has outstanding heritage value to the nation because of the place's importance in demonstrating the principal characteristics of:

(i) a class of Australia's natural or cultural places; or

(ii) a class of Australia's natural or cultural environments;

(e) the place has outstanding heritage value to the nation because of the place's importance in exhibiting particular aesthetic characteristics valued by a community or cultural group.

110 *Connolly No 1* [2007] AATA 1883 (Unreported, Downes P and Kelly M, 19 October 2007) [41, 91, 95].

111 'Significant impact' is a concept that is still uncertain. It is not defined in the *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) and courts have determined that significant impact must be determined on the particular facts of a case; see *Booth v Bosworth* (2001) 114 FCR 39; *Brown v Forestry Tasmania* (2007) 159 FCR 467.

The case of *Booth v Bosworth*[112] was the first and remains the most helpful decision made under the EPBC Act. In that case the Federal Court adopted the submissions of the parties that a significant impact is an 'impact that is important, notable or of consequence having regard to its context or intensity'.[113] In applying the test to the facts the Court determined that the killing of a large portion of a community of flying foxes such to render the species endangered by a farmer neighbouring the Wet Tropics World Heritage area would significantly impact the values of the World Heritage area. A similar argument was available to be constructed, and could still be made, about the Red Baron.

The Great Barrier Reef World Heritage values protected by the EPBC Act include its aesthetic importance and the persistence of natural habitats for in-situ conservation of biological diversity. The National Heritage values include 'aesthetic characteristics valued by a community'. Should the operation of the Red Baron have an important, notable, or of consequence impact on these aesthetic or conservation values, then the operators of the Red Baron will infringe the provisions of the EPBC Act. This would particularly be the case if the operations are of high regularity, occur in the most important parts of Horseshoe Bay, including a dedicated dugong protection area, and noise and visual intrusions are offensive as the applicants in the AAT claimed. These claims were not settled by the AAT because of the consequence of excising Horseshoe Bay from the Marine Park.

Despite the threat of the Red Baron's operators breaching the EPBC Act, the Minister, through his delegate, has chosen not to intervene.[114] Curiously, one reason given to the Connollys for not intervening was that GBRMPA and the Department have similar assessment processes for determining effects of proposals on the World Heritage Area and protected species. In this respect the Tribunal (standing in the shoes of GBRMPA) in the October 2007 decision concluded that: [115]

> We do not consider that the operation of the aircraft has a significant impact on animal life, other aspects of the environment, or the cultural and heritage values of the traditional owners.

However, the AAT also conceded that it was confronted with a different legislative regime and protected matters. At the time it was under the assumption that Horseshoe Bay was in the Marine Park and the relevant legislation to consider was the *Great Barrier Reef Marine Park Act 1975* (Cth). It did not, as the Department for Environment and Heritage suggest, adopt a similar assessment process with respect to effects on protected matters under the EPBC Act. It was not required to consider impacts on the World Heritage Area outside the boundaries of the Marine Park. It specifically dismissed evidence about such impacts, which would be solely relevant to any determination under the EPBC Act:[116]

---

112 (2001) 114 FCR 39.
113 Ibid 65 (Branson J).
114 Letter from David Jackson, EPBC Act Compliance Section (QLD) to Tanina Connolly, June 2008.
115 *Connolly No 1* [2007] AATA 1883 (Unreported, Downes P and Kelly M, 19 October 2007) [117].
116 Ibid [113].

> Other evidence was directed to the Aboriginal and World Heritage values of Magnetic Island. However, the Regulation directs attention to the cultural and heritage values held in relation to the Marine Park.

The consequence of the structure, operation and implementation of the EPBC Act[117] and the state of affairs following the AAT's December 2007 decision is that the Department of the Environment, Heritage and Arts has concluded that the operators of the Red Baron do not require Commonwealth approval in all parts of the World Heritage Area: an area that is afforded the highest level of environmental protection in the country. The next step could be for the Connollys to seek third party enforcement of the EPBC Act at the Federal Court,[118] where the question of the boundaries of the Marine Park would undoubtedly be raised again.

CONCLUDING REMARKS

The limits of the Australian States, even a century after Federation, remain uncertain in the absence of conclusive judicial determination. Whilst complex processes under the Offshore Constitutional Settlement have sought to resolve wider Commonwealth/State management of the Australian offshore, there remain significant issues regarding the management of particular bodies of water as a result of the *Seas and Submerged Lands Act 1973* (Cth). The Red Baron case highlights that these are matters which can only be resolved on a case-by-case basis. The decision of the AAT about the limits of the Great Barrier Reef Marine Park and the status of Horseshoe Bay cannot be considered conclusive. Unfortunately, the AAT has made a decision that may be relied on by GBRMPA and business operators without due regard for the complexity and breadth of the relevant constitutional, common and international law that apply when assessing the limits of State waters. Important questions were not asked by the AAT and avenues of inquiry not pursued. Any conclusion about whether Horseshoe Bay is 'a part of the Marine Park' must depend on an investigation of the pre-Federation uses and treatment of the bay, and a rigorous analysis of constitutional and common law. While the AAT's decision in the Red Baron case is defendable, it has led to an unsatisfactory and inconclusive state of the law. In the longer term decisions remain about whether the anomaly and potential administrative and legal uncertainty created by the AAT should be allowed to persist or whether the Federal Parliament, as it was encouraged to do in 1981 by the World Heritage Commission, will finally align the boundaries of the Great Barrier Reef Marine Park and the Great Barrier Reef World Heritage Area.

---

117 Andrew Macintosh, 'Why the Environment Protection and Biodiversity Conservation Act's referral, assessment and approval process is failing to achieve its environmental objectives' (2004) 21 *Environmental and Planning Law Journal* 288; Andrew Macintosh and Debra Wilkinson, 'EPBC Act – The Case for Reform' (2005) 10(1) *Australasian Journal of Natural Resource Law and Policy* 139.

118 As an 'interested person' within the meaning of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) the Connollys could apply to the Federal Court for an injunction under s 475 of the Act to restrain breaches of the Act; that is to restrain the Red Baron being likely to have a significant impact on the values of the World Heritage area or any protected or migratory species.