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INTRODUCTION

It is a recognized rule of international law that a state has sovereignty over its land mass and the territorial waters adjacent thereto including the sea-bed lying beneath those waters.[1] The baseline from which the territorial waters are drawn is the low-water line along the coast.[2] Although many states have claimed a wider belt of territorial waters, the limit prescribed by customary international law is 3 miles from the low-water line.[3] Where a state has sovereignty over adjacent islands, it is also entitled to sovereignty over the territorial waters surrounding such islands. In the Australian context[4] this means that the jurisdiction of the Australian States

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[1]Geneva Convention on the Territorial Sea (1958), Articles 1, 2. For text see *The Law of the Sea* (London: Society of Comparative Legislation and International Law, 1958), pp.4 *et seq.* This Convention has been described as "representing the nearest thing that there is to an agreed statement of the modern law governing internal and territorial waters . . .": J. L. Brierly, *The Law of Nations*, ed. Sir Humphrey Waldock (6th ed.; London: Oxford University Press, 1963), p. 194. There is a right of innocent passage through territorial waters for ships of all states: Geneva Convention on the Territorial Sea, Article 14.

[2]Geneva Convention on the Territorial Sea, Article 3. In certain exceptional circumstances other methods of delimiting the territorial sea are recognized. See *postea*, Part V. In the case of bays, Article 7 of the Convention provides that a straight baseline not exceeding 24 miles may be drawn: the extent of territorial waters is measured from this line and the waters inside the line are treated as internal waters. For the definition of a bay, see Article 7 (2).

[3]No agreement was reached on the width of the territorial waters at the Geneva Conference in 1958 or at a later one which took place in 1960. At this last conference, a proposal was put forward to extend the limit of territorial seas to 6 miles but this did not receive the necessary majority of votes for adoption. At the present time, the United Kingdom and the United States adhere to the 3-mile limit, but a number of other states have claimed 6 to 12 miles. See Brierly, *op. cit.*, pp. 210-11. The Commonwealth of Australia also adheres to the 3-mile limit. See statement of Senator Gorton, Commonwealth Parl. Deb. (Senate), September 1963, p. 426. See also Sir Kenneth Bailey, "Australia and the Law of the Sea", 1 *Adelaide Law Review* (1960), p. 1.

[4]The Convention on the Territorial Sea and the other Geneva Maritime Conventions entered into by Australia in 1958 were ratified by the Commonwealth Government in May 1963. See *Current Notes on International Affairs* (July, 1963), p. 73. As was pointed out in n. 1, it may be regarded as stating the customary rules of international law which operate today.

covers the continental land mass within State mainland boundaries, adjacent islands which form part of a State's territory, and surrounding territorial waters.[5]

Off the eastern coast of Australia there are a great number of islands each possessing its own belt of territorial waters. It is proposed in the succeeding pages to examine the various executive and legislative instruments which defined the boundaries of New South Wales from its foundation in 1788, and those of Queensland which was separated from New South Wales in 1859, in order to ascertain the present maritime boundaries of these two States.[6] The issue is of such a nature that recourse to the earliest instruments is necessary.

I

Pursuant to an Act of the Imperial Parliament which empowered the Crown to establish penal settlements, two Orders in Council were issued in 1786 which provided that offenders might be transported to "the eastern coast of New South Wales, or some one or other of the adjacent islands".[7] Commissions were issued in 1786 and 1787 to Phillip, the first Governor of the Territory, and the limits of his jurisdiction were defined as "extending from the northern cape or extremity of the coast called Cape York, in the latitude of 10° 37′ South to the southern extremity of the said Territory of New South Wales or South Cape, in the latitude of 43° 39′ South, and of all the country inland to the westward as far as the one hundred and thirty-fifth degree of Longitude, reckoning from the Meridian of Greenwich, including all the islands adjacent in the Pacific Ocean, within the latitude aforesaid of 10° 37′ north and 43° 39′ south".[8]

The parallel of 43° 39′ south latitude crosses the southern coast line of Tasmania (Van Diemen's Land). At this time it was thought that Tasmania was part of the continental land mass. It was not found to be an island until Bass and Flinders had circumnavigated it some years later. Consequently, the source of jurisdiction over Tasmania (which was settled in 1803) was to be found in that part of the Commission which referred to "islands adjacent in the Pacific Ocean", despite the fact that Tasmania lay a considerable distance from the continental coastline.[9]

Instructions were issued to Phillip in 1787 to colonize Norfolk Island, which was accomplished, and in 1794 an Imperial Act which established a Criminal Court at Norfolk Island recognized that island as being an island adjacent to the eastern coast of New South Wales.[10] This island is situated at about 167° east longitude and 29° south latitude.

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[5]For a discussion of the territorial limits of the Australian States see D. P. O'Connell, "Problems of Australian Coastal Jurisdiction", 34 *British Year Book of International Law* (1958), p. 199; E. Campbell, "Regulation of Australian Coastal Fisheries", 1 *Tasmanian University Law Review* (1960), p. 404. Although there is some doubt as to whether, in view of the decision in *R.* v. *Keyn* (2 *Ex. Div.* 63), the territorial limits of the Australian Colonies ended at low-water mark or extended three miles from that mark, the better opinion would seem to be that the three-mile belt of territorial waters and the sea-bed lying beneath were subject to the legislative jurisdiction of the Colonial Legislatures, and therefore as at 1901 the boundaries of the States of the Commonwealth included that area. See, for example, the judgment of Mansfield J. in *D.* v. *Commissioner of Taxes* [1941] St.R.Qd. 1.

[6]Considerable assistance has been derived from F. W. S. Cumbrae-Stewart, *The Boundaries of Queensland* (Brisbane: University of Queensland, 1930) and *Australian Boundaries* (Brisbane: University of Queensland, 1934). A historical map of the boundaries of Queensland is to be found at the end of *The Boundaries of Queensland.*

[7]*Historical Records of New South Wales*, Vol. i, pt. 2, p. 30. See A. C. V. Melbourne, *Early Constitutional Development in Australia*, ed. R. B. Joyce (2nd ed.; St. Lucia: University of Queensland Press, 1963), pp. 1-6. Cumbrae-Stewart, *The Boundaries of Queensland*, pp. 5-6.

[8]See *Historical Records of Australia*, Series 1, Vol. I, p. 13.

[9]See E. Sweetman, *Australian Constitutional Development* (Melbourne: Macmillan, 1925), pp. 320-1.

[10]See Cumbrae-Stewart, *The Boundaries of Queensland*, p. 6.

Subsequent Commissions issued to the various Governors of New South Wales continued to refer to their jurisdiction as extending to the adjacent islands in the Pacific, but no attempt was made to define the limits of the area of adjacency.[11]

There is historical evidence that the Governors treated their authority as extending beyond Norfolk Island. In 1801, Governor King appointed an English missionary in Tahiti as a Justice of the Peace for that Island, while Governor Macquarie at a later date appointed a Justice of the Peace in the South Island of New Zealand.[12] A certain control over these islands was necessary because of the growth of trade between them and New South Wales with the possibility of conflict with the native islanders. In 1817 an Imperial Act was passed which provided for the conferment of jurisdiction by Royal Commission in respect of felonies committed in New Zealand, Tahiti, or other islands in the Pacific "not within His Majesty's dominions nor subject to any European State or power. . .", such offences to be treated as though they were offences committed on the high seas.[13] A learned historian has stated that the "Act of 1817[14] marked a diminution of British commitments in the South Pacific. By declaring that the islands to which it applied were not British possessions, it put an end to the vague claims that the Governors enjoyed jurisdiction there."[15]

Nevertheless, after 1817, the Commissions to the Governors continued to refer to adjacent islands, and it is clear that some effect must be given to this specific language. At least it must have been considered that islands close to the New South Wales coastline (for example, within 3 miles) were intended to form part of the area, i.e. the eastern coast, administered by the Governors, while Norfolk Island, lying at a great distance from the coast, was specifically included as having been colonized from New South Wales.[16] The only other island of importance near the coast was Lord Howe Island, which was settled in the eighteen thirties. It was not however until 1855 that this island was included by name within the boundaries of the Colony.[17]

New Zealand, as we have seen, although treated earlier as one of the adjacent islands, was defined by the 1817 Act as lying outside the King's dominions. However, in 1839, Letters Patent were issued which extended the limits of the Colony of New South Wales to include any New Zealand territory, sovereignty over which might be acquired by the Crown. In 1840, sovereignty over the two Islands of New Zealand was proclaimed, and in the same year an Imperial Act was passed which empowered the Crown to erect into a separate colony any islands which might be comprised within, and dependencies of, New South Wales.[18] Pursuant to this power, Letters Patent were issued in 1841 making New Zealand a separate colony.[19]

In 1842 a milestone in Australian colonial history was reached with the enactment of the Australian Constitutions Act,[20] which conferred representative government on New South Wales. That Act also empowered the Crown to erect into a separate

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[11]See J. M. Ward, *British Policy in the South Pacific* (Sydney: Australasian Publishing Association, 1948), p. 34.

[12]*Ibid.*, pp. 35-7.

[13]*Ibid.*, pp. 39-40.

[14]The Act was 57 Geo. III, c. 53.

[15]See Ward, *op. cit.*, p. 40.

[16]Norfolk Island was severed from New South Wales in 1844 and attached to Tasmania. In 1856 it was withdrawn from the colony and became subject to Imperial control under the administration of the Governor of New South Wales. In 1913 it became a Commonwealth territory. The island of New Caledonia, which is situated about 163° east longitude, was annexed by France in 1853.

[17]See Melbourne, *op. cit.*, pp. 429-30.

[18]3 & 4 Vic., c. 62, sec. 2.

[19]See J. L. Robson, *New Zealand* in *The British Commonwealth: The Development of its Laws and Constitution* (London: Stevens & Sons, 1954), IV, 1-5, for a discussion of the steps leading to the creation of the Colony of New Zealand.

[20]5 & 6 Vic., c. 76.

colony any territories which "now are or are reputed to be or hereafter may be comprised within the Colony of New South Wales". The qualification was however that no part of the territories lying southward of the twenty-sixth degree of south latitude should be separated[21] (i.e. territory lying below a line which crosses Queensland, near Gympie). The power of separation of territory north of this line was continued in the Australian Constitutions Act of 1850, but the territory which might be separated was extended to the parallel of 30° south latitude[22] (i.e. territory lying northward of a line which crosses New South Wales, near Grafton).

In 1855 responsible government was conferred on New South Wales by the New South Wales Constitution Statute.[23] The New South Wales Constitution Act (an act of the New South Wales Legislature) formed a schedule to that Statute. The power of separating the northern part of New South Wales was continued in these enactments and, for the first time, the boundaries of New South Wales were defined in an Act of Parliament. The boundaries of the Colony were defined as "comprising all that portion of Her Majesty's territory of Australia lying between 129 degrees of east longitude and 154 degrees of east longitude (the nearest meridian to the eastern coastline) and northward of the fortieth degree of south latitude, including all the islands adjacent in the Pacific Ocean within the latitude aforesaid, and also including Lord Howe Island, being in or about the latitude of 31° 30′ south and 159° east longitude, save and except the territories comprised within the boundaries of the province of South Australia and the colony of Victoria, as at present established . . .".[24]

It can be seen that the Act did not define the limits of New South Wales so far as the adjacent islands were concerned, apart from expressly including Lord Howe Island, which, as we have seen, had been settled in the eighteen thirties. Consequently, the doubts as to sovereignty over these islands still continued.

II

Pursuant to the power conferred by the New South Wales Constitution Statute to separate the northern part of New South Wales, Letters Patent were issued by the Crown erecting into a separate colony under the name of Queensland that part lying above a line, commencing at the coast at 28° 8′ south latitude (i.e. near Point Danger) and terminating at 141 degrees of east longitude, "together with all and every the adjacent islands, their members and appurtenances in the Pacific Ocean".[25] No definition was given as to the limits of the adjacent islands. However, it soon became clear that the Imperial authorities regarded the limits of adjacent islands mentioned in the Letters Patent as very narrow. This is apparent from subsequent Letters Patent of 1862, 1872, and 1878, which increased the boundaries of Queensland.

In 1861 the Imperial Parliament passed the Australian Colonies Act.[26] One effect of this Act was to empower the Crown to annex to any colony on the continent of Australia any territories which might have been erected into a separate colony by the alteration of the northern boundary of New South Wales.[27] In 1862 Letters Patent were issued annexing to Queensland all territory lying between 141 and 138 degrees of east longitude (and above 26 degrees of south latitude) together with "all and every the adjacent islands, their members and appurtenances in the Gulf of Carpentaria".[28] It is significant to note that the major part of the group of islands in

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[21]Sec. 51.
[22]13 & 14 Vic., c. 59, sec. 34.
[23]18 & 19 Vic., c. 54, sec. 7.
[24]New South Wales Constitution Act, s. 46. See now Constitution Act (1902), sec. 4.
[25]The Letters Patent are to be found in *Queensland Statutes* (1936 Reprint), Vol. II, p. 569.
[26]24 & 25 Vic., c. 44.
[27]Sec. 2.
[28]See *Queensland Government Gazette*, 1862, III, 295-6.

the Gulf of Carpentaria, the Wellesley Islands, lies between 15 and 60 miles from the coastline. The original boundaries of New South Wales would therefore seem to have comprised some islands outside the 3-mile limit.

It seems that the Imperial authorities did not regard islands outside the 3-mile limit and adjacent to the eastern coastline of Queensland as having passed to that Colony under the Letters Patent of 1859, for in 1863 and 1868 Commissions were issued to the Governors of New South Wales which authorized the leasing of islands belonging to the Crown in the oceans surrounding the Australian continent, including the Pacific Ocean "not being within the jurisdiction of any Colonial Government". The area of the Pacific Ocean within which islands might be leased was defined as being bounded on the north by the parallel of 10 degrees of south latitude (a line which would cut across the southern islands of the Torres Strait) and in the east by the meridian of 170 degrees of east longitude (a line which passes Norfolk Island a little to the east)[29]. Pursuant to this authority the Governor of New South Wales leased Raine Island on the outer edge of the Barrier Reef (about 60 miles from the coastline of Queensland) to a private individual for the purpose of extracting guano deposits on the islands.[30]

This anomalous situation of another Colony dealing with islands near the Queensland coastline became the subject of negotiations between the Imperial authorities and the Queensland Governor which resulted in a decision of the Imperial authorities to annex to Queensland all islands within 60 miles of the Queensland coast. Letters Patent were issued with this end in view.[31] They provided for the transfer to be accomplished in two stages. The islands were transferred to the control of the Governor of Queensland who was given power to annex them to the Colony on a request being received from the Queensland Legislative Council and Assembly. The local Houses passed resolutions to this effect, whereupon the Governor transferred the islands in question to the Colony.[32] From 1872, therefore, the boundaries of Queensland extended to all islands within 60 miles of the coast.

In the discussion which took place on the matter in the Legislative Assembly, the Colonial Secretary referred to the islands in question as being "principally small islands which this colony had been in the habit of claiming a right over, *although they really, up to the present time, belonged to New South Wales*",[33] while in the Legislative Council the Minister presenting the motion requesting annexation referred to the fact that cases of difficulty had arisen "from the doubt as to whether the islands were under New South Wales or under this colony".[34]

III

Besides the islands of the Gulf of Carpentaria and the Barrier Reef, there are a number of islands off the Queensland coastline which stretch from Cape York to the coastline of Papua. It would seem that these islands had never been part of New South Wales in as much as the original Commission to Governor Phillip and those to his successors did not extend beyond 10° 39′ south latitude in the north (Cape York), although, after the separation of Queensland from New South Wales, the jurisdiction to lease some of these islands was evidently intended, by reason of the fact that the 1863 and 1868 Commissions to the Governors of New South Wales, relating to the islands in the area referred to previously, extended to the tenth degree of south

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[29]See *New South Wales Government Gazette*, 1863, II, 2669; 1868, II, 3184. The western boundary was 75° east longitude and the southern boundary was the Antarctic Circle.

[30]See Cumbrae-Stewart, *The Boundaries of Queensland*, pp. 9-10.

[31]The Letters Patent are to be found in *Legislative Council Journals* (*Queensland*), XX, Sess. 2 of 1872, 883-5. In an accompanying despatch it was indicated that the authority of the Governor of New South Wales over the islands would cease on the annexation being effected.

[32]See *Queensland Government Gazette*, 1872, pp. 1325-26.

[33]See *Parl. Deb.*, Queensland, 5th series, 1872, XIV, 861. My italics.

[34]*Ibid.*, p. 904.

latitude. Thursday Island would have been included in this area. However, in 1872 all the islands in the Torres Strait within 60 miles of Cape York became part of the colony of Queensland by virtue of the Letters Patent referred to. In view of the communication and trade between these islands and the islands outside the 60-mile limit which lay adjacent to the Papuan coastline, it was considered desirable that all islands in the Torres Strait should be annexed to Queensland.[35] With this end in view, further Letters Patent were issued in 1878 conferring on the Governor of Queensland jurisdiction over these islands and empowering him to annex them to the Colony when the Queensland Parliament had passed an act providing for such annexation.[36] In 1879 the Queensland Parliament passed the Coast Islands Act, which provided that the islands were to become part of the Colony when a Proclamation to that effect had been made by the Governor.[37] The required Proclamation was made and the islands in question became part of the Colony of Queensland on 1 August 1879.

It is interesting to note however that the Act purported to deal not only with all islands in the Torres Strait but also with all islands between the Barrier Reef and the mainland coastline.[38] As we have seen, all islands of the Barrier Reef and islands in the Torres Strait lying within 60 miles of the coastline had already been annexed by the 1872 Letters Patent. There are some very small islands (geologically designated as cays) which lie outside the 60-mile limit but between the mainland and Barrier Reef. In the Torres Strait there are a number of islands, particularly the Talbot group off the Papua coastline, which lie outside the 60-mile limit. The Coast Islands Act therefore had the effect of annexing all these islands to Queensland. But it also purported to deal with all islands between the Barrier Reef and the Queensland coastline right up to the Papuan coastline, i.e. islands *within* and *outside* the 60-mile limit. It therefore has the effect of replacing the Letters Patent of 1872 and constitutes the instrument by reference to which after 1879 the maritime boundaries of Queensland are to be ascertained.

We can now summarize the steps by which Queensland's maritime boundaries were extended between 1859 and 1879. The Letters Patent of 1859 under which the Colony of Queensland was established may be taken to have separated the mainland-area north of the latitude described therein and the immediately adjacent islands (i.e. islands within the 3-mile limit). The Australian Colonies Act of 1861 empowered the Crown by Letters Patent to annex to any colony territory which might have been separated from New South Wales under the New South Wales Constitution Act. In 1862, the islands of the Gulf of Carpentaria were added to Queensland. In 1872, islands between the mainland coastline and the Barrier Reef on the eastern coast and to the north in Torres Strait lying within 60 miles of the coastline were annexed. Finally under the Letters Patent of 1878, which took effect on the passage of the Queensland Coast Islands Act, all islands lying within the Barrier Reef and to the designated line off the Papuan Coastline were annexed to the Colony. These Letters

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[35]Under the Pacific Islanders Protection Act 1875 (38 & 39 Vic., c. 51) the Governor of Fiji, in his capacity as High Commissioner of the Pacific Islands, exercised nominal jurisdiction over the islands of the Torres Strait outside the territorial limits of Queensland. His specific authority with respect to these islands was derived from an Order in Council made under that Act which referred to islands in the Pacific Ocean not being within the limits of Fiji, Queensland, or New South Wales, or within the jurisdiction of any civilized Power. See Ward, *op. cit.*, pp. 265-8.

A Queensland magistrate stationed at Thursday Island also exercised judicial authority derived from the High Commissioner over some of the islands. See *Parl. Deb.*, Queensland, 1879, XXVIII, 53; XXIX, 117-18, 193-94.

[36]The Letters Patent are to be found in *Legislative Council Journals* (*Queensland*), XXVII, Sess. 1 of 1879, 40.

[37]43 Vic., No. 1. *Queensland Statutes* (1936 Reprint), Vol. II, p. 538.

[38]The limits within which islands were annexed were set out in a Schedule to the Act. They comprise all islands within a line drawn from Sandy Cape and following the outer edges of the Barrier Reefs to Bramble Cay near the Papuan coastline off Daru, then cutting across the southern coastline so as to take in the islands of the Talbot Group and Deliverance Island and following a line to 138° east longitude.

Patent, in so far as they dealt with islands which were part of New South Wales, were authorized by the Australian Colonies Act; in so far as they dealt with islands not part of New South Wales (i.e. the Torres Strait Islands), they were prerogative acts to which the Queensland Parliament assented by enacting the Coast Islands Act.[39]

IV

Outside the Great Barrier Reef in the West Coral Sea there are to be found a number of small islands or cays widely dispersed. The best-known of these islands is Willis Island. This is the only inhabited island, so far as is known. In 1921, a Commonwealth meteorological station was set up on the island and Commonwealth officials were stationed on the island.[40] Despite the fact that these islands are, apart from Willis Island, uninhabited, they would seem to be within the sovereign jurisdiction of some government. It is proposed to examine the basis of possible claims, such as they are, to sovereignty over these islands.[41]

As was pointed out earlier, great uncertainty attached to the meaning of the phrase "adjacent islands" in the Pacific. Apart from the Barrier Reef Islands, the status of which was settled in 1879, two other islands in the Pacific had been regarded as falling within the territorial jurisdiction of New South Wales: Norfolk Island (which was detached from New South Wales in 1844) and Lord Howe Island, which was specifically mentioned in the section of the New South Wales Constitution Act of 1855 which defined the boundaries of that Colony.[42] Apart from the fact that these islands were specifically mentioned in the instruments already referred to, there is the additional factor that they were colonized from New South Wales. The islands in the West Coral Sea were not colonized from New South Wales. On the other hand, they are much closer to the eastern coastline than either Lord Howe Island or Norfolk Island and therefore there is a strong argument for including them within the category of adjacent islands mentioned in the Commissions to the New South Wales Governors before 1855 and in the Constitution Act of that year. However, certain developments subsequent to 1855 suggest that the islands were not regarded as part of New South Wales. We have seen that a similar phrase in the Queensland Letters Patent of 1859 has been given a restricted interpretation in the light of the Letters Patent of 1872 and 1878. "Adjacent islands" in the 1859 instrument must be taken to mean only islands within 3 miles of the coast, that is to say, islands within the territorial waters of the mainland. The final Letters Patent of 1878 which were followed by the Queensland Coast Islands Act of 1879 annexed islands within the Barrier Reef to Queensland: they made no mention of islands *outside* the Barrier Reef in the Coral Sea.

It could therefore be argued that the phrase "adjacent islands" in the New South Wales Constitution Act is to be given a similarly restricted interpretation, i.e. as extending only to islands within 3 miles of the coastline of New South Wales and as not extending further to include islands outside that area unless expressly mentioned (as was Lord Howe Island). There are dicta in an early Queensland case *R.* v. *Gomez*[43] which suggest that before 1872 the islands of the Barrier Reef were not part of the Colony of New South Wales. This opinion is strengthened by the fact that, in the preamble to the Commissions issued to the Governors of New South Wales in 1863 and 1865 to lease islands which would include islands in the designated area,

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[39]See *R.* v. *Gomez*, 5 Queensland Supreme Court Reports, 189.

[40]See *Australian Encyclopaedia*, IX, 315.

[41]There is only a brief mention of these islands in Cumbrae-Stewart, *The Boundaries of Queensland*, pp. 9, 14. The majority of them lie between 154 and 159 degrees of east longitude.

[42]See *antea*, n. 17.

[43]See 5 Queensland Supreme Court Reports, 189 at pp. 190-1. The case was however concerned with the status of a Torres Strait island. In *R.* v. *Jimmy*, 4 Queensland Supreme Court Reports, 130, the Supreme Court treated Palm Island, which lies almost 11 miles from the eastern coastline, as having been annexed to Queensland by the 1872 Letters Patent.

it was stated that the authority extended only to islands belonging to the Crown and *not within the jurisdiction of a colonial government.* The Governor of New South Wales in leasing Raine Island in 1865 is said to have acted pursuant to this authority.[44]

The argument that the islands in the Pacific, outside the 3-mile limit but contiguous to the coast, were not part of New South Wales in view of the Commissions issued in 1863 and 1868 is a persuasive one. However those Commissions referred to islands lying not only in the Pacific Ocean but also in the Indian Ocean, some of which could not be considered as reasonably adjacent to the Australian coastline, and it could be argued that the islands in the West Coral Sea were already within the jurisdiction of a Colonial Government, i.e. the New South Wales Government, by virtue of the boundaries section of the New South Wales Constitution Act. The Commissions, therefore, in so far as they related to these islands, were in fact confirming an authority which the Governor of New South Wales already had by virtue of the fact they were New South Wales territory. This at least is implicit in the comment made by the Colonial Secretary of Queensland in discussion on the Letters Patent of 1872.[45]

The islands in the West Coral Sea had never been annexed by the Imperial Crown, but there is evidence that some of them had been charted and/or discovered by officers of British vessels.[46] Therefore, whatever title the Imperial Crown had to them—accepting the argument that they were not part of New South Wales in 1855—was an inchoate one, liable to be defeated if any superior title were established by another country.

The writer has not been able to discover any subsequent Commission granted after 1868 to the Governors of New South Wales to lease islands within the area designated. It may well be, therefore, that, when the six colonies federated and new Commissions were issued to the Colonial Governors as Governors of the States of the Commonwealth,[47] the 1868 Commission lapsed and complete authority over the islands was regained by the Imperial authorities.[48]

If this is the case, does Imperial authority over the islands still exist? It would seem not. The writer has not been able to discover any act of the Imperial authorities in the present century which would indicate that Britain has sovereignty over the islands, and the inchoate title which it might have had would seem to have been defeated by a title based on acts of occupation of the Commonwealth of Australia. In 1921, as we have seen, a meteorological station was set up on the major island, Willis Island, while, in the case of one or two of the remaining islands, navigational aids in the form of beacons have been erected.[49]

In international law, a strong case could be made out in favour of the Commonwealth having attained title to the islands by virtue of occupation. International arbitral decisions in the *Island of Palmas Case*[50] and the *Clipperton Island Case*[51] support the propositions firstly, that an inchoate title based on discovery is liable to be defeated by acts which amount to some form of occupation or exercise of sovereignty; secondly, that the acts of occupation necessary to accomplish sovereignty vary according to the circumstances of the territory. Where islands are

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[44]See Cumbrae-Stewart, *The Boundaries of Queensland*, pp. 9-10.

[45]See *Parl. Deb.*, Queensland, 5th Series, 1872, XIV, 861.

[46]See *Australian Encyclopaedia*, IX, 315, as to Willis Island.

[47]The argument is that their status and powers are to be ascertained as from 1901.

[48]Cumbrae-Stewart, however, seemed to think that the Commission was operative: *The Boundaries of Queensland*, p. 14.

[49]For details of these islands and reefs see *The Australian Pilot* (1924), III, 146 *et seq.* (and Supplements).

[50]22 *American Journal of International Law* (1928), p. 867.

[51]26 *American Journal of International Law* (1932), p. 390. These cases are discussed in Lauterpacht's article cited in n. 52.

adjacent to a large continent, the fact of contiguity and some exercise of control over the islands, even though it falls short of formal annexation by the coastal state, would be regarded as sufficient to defeat an inchoate title of another country which has not been exercised for almost a century.[52] On the assumption, therefore, that the islands were not part of New South Wales, but under Imperial sovereignty, the inchoate title of Britain has been defeated by subsequent acts of the Commonwealth of Australia which amount to an effective exercise of sovereignty in the circumstances and in the absence of a superior claim of a third nation. On this view, the islands are territories "otherwise acquired by the Commonwealth" under section 122 of the Commonwealth Constitution. There is a precedent for the acquisition of sovereignty by the Commonwealth by occupation—Heard Island and Macdonald Islands, lying near Antarctica. These islands were occupied by Australia in December 1947, with the acquiescence of the British Government.[53]

In the case of the islands of the West Coral Sea, a similar argument in favour of Commonwealth occupation could be advanced. The most important island has been occupied, and the surrounding islands might be regarded as coming within Commonwealth sovereignty, by reason of their adjacence to Willis Island and the Australian mainland, and by virtue of the fact that certain slight acts of sovereignty (erection of beacons) are sufficient acts of occupation in the light of the size of the islands and their remoteness from other countries.

This conclusion is, of course, dependent on the fact that the islands in 1855 were not part of New South Wales but held by the Imperial Crown on the basis of an inchoate title. If they were part of New South Wales, then no act of the Commonwealth—i.e. of the new political organism brought into being in 1901—could affect the territorial boundaries of New South Wales existing at that date. The territorial boundaries of a State can only be changed with the consent of that State.[54]

There are therefore two possible conclusions which can be reached with regard to islands in the West Coral Sea outside the Barrier Reef:

1. That Britain had an inchoate title to these islands, which were never included in the boundaries of New South Wales because they were not "adjacent" islands, and that this inchoate title has been defeated by Commonwealth occupation sufficient to invest that body with sovereignty over the islands as a territory acquired by the Commonwealth under section 122 of the Constitution;

2. That the islands were part of New South Wales under the Constitution Act of 1855, as being "adjacent" islands, and that the subsequent Letters Patent issued between 1859 and 1878 which established the maritime boundaries of Queensland extended the sovereignty of the Colony of Queensland only to islands lying within a line drawn along the outer edge of the Barrier Reef. The islands, therefore, were never separated from New South Wales, and are part of the State of New South Wales at the present time. In the writer's opinion this second view is to be preferred in the light of arguments advanced earlier. The mere absence of a designation of the eastern longitude in the New South Wales Constitution Act and earlier Commissions marking the limits of adjacent islands does not stand in the way of treating such islands as "adjacent"[55] in the geographical sense of that term. A glance at a map of the area would confirm this conclusion.

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[52]See H. E. Lauterpacht, "Sovereignty over Submarine Areas", 27 *British Year Book of International Law* (1950), 376, esp. at pp. 415-23.

[53]See *Australian Treaty Series* 1951, No. 3: Exchange of Notes between Australia and the United Kingdom on Heard and Macdonald Islands, and see also 1 *Sydney Law Review* (1955), p. 374.

[54]Commonwealth of Australia Constitution, section 123.

[55]It is to be noted that the boundaries of Western Australia defined in instruments in the last century comprise a few small islands which lie at a similar distance from the Western Australian coastline as do some of the Coral Sea Islands off the eastern coastline. Such islands are treated as islands "adjacent" to Western Australia. See O'Connell, *op. cit.*, 199 at p. 245.

This means, of course, that the phrase "adjacent islands" in the New South Wales Constitution Act has a wider meaning than the similar phrase used in the Letters Patent of 1859 which established the Colony of Queensland. A strict interpretation in terms of verbal logic suggests that such a distinction is not sustainable. In a historical context, however, the distinction is sustainable. As we have seen, Norfolk Island and Lord Howe Islands were treated as adjacent islands. The islands of the Barrier Reef and West Coral Sea lie closer to the mainland coastline and fulfil the requirement of adjacence, even though they were not specifically named in the 1855 Act.

On the other hand, the historical developments between 1859 and 1878 in relation to Queensland's boundaries indicate that the word "adjacent" in the 1859 Letters Patent must be given a narrow interpretation. The acts of the Imperial authorities, the slender dicta in the cases, and the parliamentary statements, indicate that the Letters Patent of 1859 only extended to islands within the territorial waters of the mainland.

The final question resolves itself to this: what justification is there for making such a distinction? The answer to this is to be found in the grant of a more extensive jurisdiction to the Australian mother colony in relation to the Pacific islands—a jurisdiction which was not transferred to the northern part of the colony when it was separated in 1859.

From the point of view of the State of Queensland this conclusion, of course, is an undesirable one, based as it is on a historical anomaly and flowing from the fact that the Letters Patent of 1878 and the Coast Islands Act did not extend to the Coral Sea Islands. Whatever hope that Queensland had of a further extension of its boundaries by Letters Patent was defeated by the arrival of federation. Under the Commonwealth Constitution, State boundaries can only be altered under section 123 by a complex method which consists of an Act of the Federal Parliament, Acts of the Parliaments of the States whose boundaries are affected, and referenda in those States.

V

It was stated at the beginning of this paper that the baseline from which territorial waters are to be measured is the low-water line along the coast. However, the Geneva Convention on the Territorial Sea recognizes that this method may be departed from in special circumstances. Article 4(1) of that Convention provides: "In localities where the coast line is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured." Such baselines must not, however, depart to any appreciable extent from the general direction of the coast. Other sections of the Article prescribe further qualifications in the application of the straight baseline procedure.[56] The territorial seas of islands are measured in accordance with the provisions of these articles, an island being defined as a naturally-formed area of land, surrounded by water, *which is above water at high-tide*.[57] However, there is a

[56]Article 4(6) states that the coastal state must clearly indicate straight baselines on charts, to which due publicity must be given. The waters on the landward side of these baselines are internal waters. See Articles 5(1) and (2). The method of drawing straight baselines was approved by the International Court of Justice in the *Anglo-Norwegian Fisheries Case* in respect of large sections of the Norwegian coast. For a discussion of that case see Johnson, 1 *International and Comparative Law Quarterly* (1952), pp. 145 *et seq*. As far as Australia is concerned, the task of drawing the baselines under Article 4 (fringing islands) and under Article 7 (bays) would seem to be the responsibility of the Commonwealth Government which is responsible under the Constitution for external affairs. For a detailed discussion of problems associated with the delineation of baselines, see M. S. McDougal and W. T. Burke, *The Public Order of the Oceans* (New Haven, Conn.: Yale University Press, 1962), Ch. 4.

[57]Article 10.

specific provision which deals with what are called low-tide elevations, i.e. naturally formed areas of land below water at high-tide but above water at low-tide. Such elevations cannot be treated as islands and therefore do not possess territorial belts of their own, but, when they lie within the territorial sea of the mainland or an island, the low-water line on these elevations may be used as a baseline for measuring the territorial sea of the mainland or island.[58]

These articles of the Geneva Convention are particularly relevant to the islands of the Barrier Reef and Coral Sea because of their geographical and geological nature. The Barrier Reef (although it has been described as such for convenience sake in this paper) is not in fact an unbroken reef facing the Queensland coastline: it constitutes in effect a number of reefs. The outer reefs follow a line which varies in distance from the coastline—about 200 miles opposite Rockhampton in Central Queensland and about 10 miles from the nearest coastal point near Cooktown on the North Queensland coast. Inside the line of outer reefs, there are a great number of detached inner reefs. Between the inner and outer reefs, there are a small number of islands some of which are only marked on Admiralty charts. However, between the mainland and the Barrier Reefs properly so called there are a great number of small islands and groups of islands, some within 3 miles of the coastline, others outside that limit. In many cases, these islands are surrounded by fringing reefs. Parts of the Barrier Reefs proper and these fringing reefs are above water at low-water although submerged at high-tide and, if within the 3-mile limit, can be regarded as low-tide elevations from which the breadth of the territorial sea of the mainland or of the islands can be measured.

In view of these geographical features, the task of demarcating the territorial seas of Queensland and also of the islands of the West Coral Sea is a formidable one. It is not proposed here to attempt this task but merely to indicate the considerations which must be borne in mind by those who assume the task.

While the Queensland mainland coastline is not sufficiently indented (as compared, for example, with the Norwegian coastline) to justify the straight baseline method by which outermost points on the coastline can be joined, there are a number of islands which fringe the coastline in its *immediate* vicinity so as to admit of that method in accordance with the second part of Article 4(1) of the Geneva Convention on the Territorial Sea. The territorial sea off the Queensland coastline may therefore be measured from the low-water lines of these islands. Moreover, there are some bays along the coastline to which the 24-mile straight baseline permitted by Article 7 would apply.[59]

In a number of other cases islands are situated within 6 miles of the coastline, and therefore the territorial seas of the mainland and these islands, measured in accordance with the normal rule, will meet. In the case of islands lying more than 6 miles from the mainland, an area of high seas will exist and will vary according to the width of the area lying between the outermost points of the territorial seas of the mainland and the territorial seas of the islands. However, as between the islands themselves, there are a number of cases where the territorial sea of each will meet thus shutting out any area of high seas which might have lain between them.

Finally, many of these islands (both inside and outside the 3-mile limit from the mainland) are surrounded by or adjacent to reefs, parts of which are above water at low-water mark. In these cases, the territorial seas of these islands are to be measured from the low-water line of the low-tide elevations. But where the reefs are more than 3 miles from an island—and this is the case with the major part of the inner and outer reefs—they are not to be regarded as islands, and thus do not have territorial

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[58]Article II. It is geologically possible of course that a low-tide elevation may over a period of time become an island. Some of the islands in the outer Barrier Reef were probably low-tide elevations centuries ago—and more islands will be formed in the centuries to come.

[59]See n. 2.

waters of their own, nor can they be taken into account in drawing the territorial limits of the mainland or islands.

It can be seen, therefore, that in the case of a coastline such as that of Queensland, which is adjacent to a barrier reef, the task of drawing baselines from which territorial seas are to be measured is one which requires recourse to detailed maritime and admiralty charts.

There are one or two random comments in international journals which suggest that all the waters which lie between the mainland coastline and the outer edges of the Barrier Reefs are territorial waters.[60] Recent research has shown that these statements have no sound legal basis.[61] There is nothing in the Convention on the Territorial Sea to suggest that coastlines fronted by a barrier reef are to be treated in a different way from other coastlines, except to the extent permitted by Articles of the Convention relating to the drawing of baselines. The outer reefs cannot be treated as islands, either under international law or under the Coast Islands Act of 1879, so as to enclose all waters lying within them and the mainland coastline. The waters in this area which are outside the territorial seas of islands are therefore to be classed as parts of the high seas. The waters within the territorial seas of islands (both within the Barrier Reefs and in the West Coral Sea) are subject to the territorial sovereignty of the States, which, as we have seen, extends to the resources of the sea-bed.[62].

VI

Finally, reference may be made to the Convention on the Continental Shelf which was signed at Geneva at the same time as the Convention on the Territorial Sea.[63] Under the Convention a country is recognized as having an exclusive right to explore and exploit the resources of the Continental Shelf adjacent to its coastline.[64] The continental shelf is defined as referring to the sea-bed and subsoil of the submarine areas adjacent to the coast to a depth of 200 metres (approximately 650 feet) or beyond that limit to where "the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas".[65] That part of the Australian Continental Shelf adjacent to New South Wales is narrow compared with that part which is opposite Queensland. In the latter case, the 200 metres (or 100 fathoms) line follows the outer edge of the Barrier Reefs. In the West Coral Sea, the islands referred to also have Continental (or rather, Insular) Shelves which have been described as having once formed part of the Continental Shelf of the mainland.[66]

That part of the Continental Shelf which lies outside the territorial waters of Queensland and its islands and the territorial waters of the West Coral Sea islands is *ipso facto* not subject directly to the constitutional powers of the State of Queensland

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[60]See 13 *Transactions of the Grotius Society*, p. 76; 9 *British Year Book of International Law* (1928), p. 123.

[61]See Cumbrae-Stewart, *The Boundaries of Queensland*, pp. 17-18; L. F. Goldie, "Australia's Continental Shelf", 3 *International and Comparative Law Quarterly* (1954), 535 at pp. 544-48; O'Connell, *op. cit.*, 199 at pp. 245-48. This latter article contains a useful survey of State practice in regard to the waters and islands of the Barrier Reef. For details of the islands and reefs see *The Australian Pilot* (1st ed., 1917), Vol. IV.

[62]See n. 5.

[63]For text see *The Law of the Sea*, pp. 24 *et seq.*

[64]Article 2. The resources include not only mineral resources below the sea-bed but also sedentary marine life on the sea-bed.

[65]Article 1. It is to be noted that the status of the superjacent waters as high seas is not affected: Article 3.

[66]See Goldie, *op. cit.*, 535 at p. 568. Goldie's article contains a discussion of the Pearl Fisheries Act 1952-3 (Cwth.) under which Australia has legislated for the control of pearl fisheries on the continental shelf adjacent to Australia's coastline. There is a map of the continental shelf and the zones of control established by regulations under the Act at pp. 536-37 of the article.
See also D. P. O'Connell, "Sedentary Fisheries and the Australian Continental Shelf" 49 *American Journal of International Law* (1955), p. 185.

or the State of New South Wales. It has long been recognized that the States' legislative power is limited to laws for the "peace, order and good government of the States".[67] With respect to the resources of the sea-bed which lies outside the territorial waters of the States, the Commonwealth Parliament alone is the competent Legislature, provided that it acts under a head of power conferred by the Commonwealth Constitution. There is judicial authority to support the proposition that the Commonwealth Parliament may, under the external affairs power, enact legislation to give effect to an international convention which deals with matters of international concern.[68] Pursuant to this power, the Commonwealth Parliament could enact a Continental Shelf Act to provide for the regulation and utilization of the resources of the sea-bed[69] in these areas in accordance with the conditions laid down in the Geneva Convention on the Continental Shelf.*

[67]See R. D. Lumb, *The Constitutions of the Australian States* (St. Lucia: University of Queensland Press, 1963), pp. 76-8; B. A. Helmore, "The Continental Shelf", 27 *Australian Law Journal* (1953), 732 at p. 733.

[68]See *R.* v. *Burgess, ex parte Henry* (1936) 55 C.L.R. 608.

[69]As was pointed out in n. 66, the Commonwealth Parliament has already legislated with regard to pearl fisheries on the Australian continental shelf. This legislation, however, would be supported under the power conferred by section 51(X) of the Commonwealth Constitution to make laws with respect to fisheries in Australian waters beyond territorial limits.

*Since this paper went to press, the Queensland Parliament has passed a Mineral Resources (Adjacent Submarine Areas) Bill claiming rights over the continental shelf adjacent to Queensland's coastline.

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