HIGH COURT OF AUSTRALIA

MASON C.J. BRENNAN, DEANE, DAWSON, TOOHEY, GAUDRON AND MCHUGH JJ.

Port MacDonnell Professional Fishermen's Assn Inc v South Australia

[1989] HCA 49

ORDER

Answer the questions in the special case as follows:

(1) Was the Arrangement and is the Second Arrangement validly authorized by s. 12H(4) of the *Fisheries Act 1952 Cth* and s. 13(1) of the *Fisheries Act 1982 SA*?

Answer: The Second Arrangement, which is to be construed as applying only to so much of the rock lobster fishery as lies within "waters adjacent to the State", is validly authorized by s. 12H(4) of the *Fisheries Act 1952 Cth* and s. 13(1) of the *Fisheries Act 1982 SA*.

(2) Is s. 14 of the *Fisheries Act 1982 SA*:—

(a) within the terms of the power purportedly conferred on the Parliament of South Australia by s. 5 of the *Coastal Waters (State Powers) Act 1980 Cth*?

(b) otherwise a law within the powers of the Parliament of South Australia?

Answer: Section 14 of the *Fisheries Act 1982 SA* is a valid enactment of the Parliament of South Australia.

(3) If the answer to question 2(a) is yes, is s. 5 of the *Coastal Waters (State Powers) Act 1980 Cth* a valid law of the Commonwealth?

Answer: Section 5(c) of the *Coastal Waters (State Powers) Act 1980 Cth* is a valid law of the Commonwealth.

(4) If the answer to question 2(b) is or would otherwise be yes, is s. 14 and are other provisions of the *Fisheries Act 1982 SA* insofar as it or they may have purported to apply to the Outside Fishery and/or may purport to apply to the Outside Defined Fishery (as defined in par. 11 of the Amended State of Claim) inconsistent with the *Fisheries Act 1952 Cth* and thereby invalid by virtue of s. 109 of the Commonwealth of *Australia Constitution*?

Answer: There is no inconsistency between s. 14 of the *Fisheries Act 1982 SA* and the provisions of the *Fisheries Act 1952 Cth*.

(5) Was the Outside Fishery and is the Outside Defined Fishery (as defined in par. 11 of the Amended Statement of Claim) to be managed in accordance with the law of South Australia by virtue of the making of the Arrangement and the Second

Arrangement and the provisions of s. 12L of the *Fisheries Act 1952 Cth* and s. 14 of the *Fisheries Act 1982 SA* or otherwise?

Answer: The fishery the subject of the Second Arrangement (see 1 above) is to be managed in accordance with the law of South Australia by virtue of the making of the Second Arrangement and the provisions of s. 12L of the *Fisheries Act 1952 Cth* and s. 14 of the *Fisheries Act 1982 SA*.

No order as to costs.

Cur. adv. vult.

The Court delivered the following written judgment:—

Oct. 26

MASON C.J., BRENNAN, DEANE, DAWSON, TOOHEY, GAUDRON AND MCHUGH JJ.

This special case raises questions of law concerned with the effect of an arrangement made between the Commonwealth and the State of South Australia for the management of a rock lobster fishery in accordance with the law of South Australia. The arrangement, which is dated 1 November 1988, defines the rock lobster fishery to which it applies as being:

> the fishery for crustaceans of the family Palinuridae (commonly known as rock lobsters) taken with the use of rock lobster pots or by diving (with or without the use of mechanical or self-contained underwater breathing apparatus) and collection by hand or with the use of an implement held in the hand, in the area of waters adjacent to the State bounded by a line —
>
> (a) commencing at the intersection of the southern shore of Australia with the meridian of Longitude which passes through the southernmost point of the boundary between the States of Victoria and South Australia;
>
> (b) running thence south along that meridian to its intersection with the parallel of Latitude 40° South;
>
> (c) thence west along that parallel to its intersection with the outer limit of the Australian fishing zone;
>
> (d) thence north-westerly and south-westerly along that outer limit to its intersection with the meridian of Longitude which passes through the southernmost point of the boundary between the States of South Australia and Western Australia;
>
> (e) thence north along that meridian to its intersection with the southern shore of Australia;
>
> (f) thence easterly and south-easterly along that shore to the point of commencement.

The first-named plaintiff is an association (incorporated pursuant to the *Associations Incorporation Act 1985 SA*) of professional fishermen who fish out of Port MacDonnell in South Australia. Its members include professional fishermen who engage in fishing for southern rock lobster within the above area. The second-named plaintiff, who is the president of the first-named plaintiff, is such a member. The defendants are the State of South Australia and the Commonwealth.

The above-mentioned arrangement ("the second arrangement") superseded an earlier arrangement dated 13 April 1987. The earlier arrangement did not define the

boundaries of the rock lobster fishery to which it applied, speaking of it only as the fishery for rock lobsters "in the area of waters adjacent to South Australia". However, argument in the case was predominantly directed to the second arrangement which confines the fishery to which it applies to an area which extends some 200 nautical miles seaward from the coast of South Australia, bounded on the east and the west by the meridian of longitude which extends from the point where the relevant border of the State meets the coast. These meridians are apparently selected for ease of reference and not to satisfy some other criterion such as equidistance from South Australia and the relevant bordering State. The seaward boundary is that of the Australian fishing zone. That zone is defined, so far as is relevant, in s. 4(1) of the *Fisheries Act 1952 Cth* ("the Commonwealth Fisheries Act") to mean:

> (a) the waters adjacent to Australia and having as their inner limits the baselines by reference to which the territorial limits of Australia are defined for the purposes of international law and as their outer limits lines seaward from those inner limits every point on each of which is distant 200 nautical miles from the point on one of those baselines that is nearest to the first-mentioned point;
>
> but does not include —
>
> (c) waters that are not proclaimed waters;

It is not possible to say that the extent of the area seaward of the rock lobster fishery under the second arrangement is precisely 200 nautical miles because it is only the seaward boundary of that area which is defined by reference to the boundaries of the Australian fishing zone. That means that the seaward boundary is determined by reference to baselines drawn across indentations for the purpose of fixing the limits of the territorial sea. The landward boundary is the coastline itself and not the baselines. The fishery therefore includes some internal waters of the State.

Looking ahead a little, the meridians of longitude which the second arrangement identifies as boundary lines are to be contrasted with the lateral boundaries of the "adjacent" area in respect of South Australia for the purposes of the *Petroleum (Submerged Lands) Act 1967 Cth*. Under that Act, the eastern and western boundaries of the area adjacent to South Australia are constituted by lines plotted to maintain a measure of equidistance between the closest land point of South Australia and the closest land point of the relevant neighbouring State rather than along the relevant meridian of longitude: see ss. 5(1), 5A(1); Sched. 2. It will subsequently be necessary to consider whether the reference in the second arrangement to "the area of waters adjacent to the State" has some further confining effect within the limits of the specifically defined boundary lines under that arrangement.

Legislative context

The second arrangement was purportedly made by the Commonwealth with the State of South Australia pursuant to s. 12H(4) of the Commonwealth *Fisheries Act*. That section is contained in Div. 3 of Pt IVA of the Act which was inserted in 1980. The Part is headed "Co-operation with States and Northern Territory in Management of Fisheries". The full provisions of s. 12H(4) are set out in a later section of this judgment. For the moment, it suffices to quote the directly relevant part of the sub-section:

> The Commonwealth may make an arrangement with a State with respect to a particular fishery *in waters adjacent to the State* —
>
> (b) that the fishery (being a fishery wholly or partly in waters on the seaward side of the coastal waters of the State) is to be managed in accordance with the law of the State. (Emphasis added.)

Section 12L of the Commonwealth *Fisheries Act* provides:

> Where there is in force an arrangement under this Division that provides that a particular fishery is to be managed in accordance with the law of a State, the provisions of this Act other than this Division do not apply to or in relation to that fishery except in relation to foreign boats in proclaimed waters and operations on and from foreign boats, and persons on foreign boats, in proclaimed waters, and in relation to matters that occurred in or in relation to proclaimed waters before the arrangement took effect.

The word "fishery" is defined in s. 12A of the Commonwealth *Fisheries Act* to mean, for the purposes of Pt IVA, a class of activities by way of fishing identified in an arrangement. The matters by which a fishery may be identified include a species of fish, a description of fish by reference to sex or any other characteristic, an area of waters or of seabed, a method of fishing, a class of boats, a class of persons or a purpose of activities. Under s. 7 waters may be declared to be proclaimed waters for the purposes of the Act but may not extend to the coastal waters of, or waters within the limits of, a State. The current proclamation was published on 26 September 1979 and declares, in effect, with immaterial modification, that waters within the Australian fishing zone are proclaimed waters other than waters within territorial limits. Most of the operative sections of the Commonwealth *Fisheries Act* are framed so as to operate only in proclaimed waters and do not, therefore, extend to the coastal waters of a State.

To complete the immediate picture it is necessary to refer to the *Fisheries Act 1982 SA* ("the State Fisheries Act"). That Act in s. 5(1) defines "fishery" in a manner similar to that of the Commonwealth *Fisheries Act*. Section 5(6) provides that the Act shall apply:

> (a) in relation to all waters that are within the limits of the State;
>
> (b) except for purposes relating to a fishery that is to be managed in accordance with the law of the Commonwealth pursuant to an arrangement under Division III of Part II and except for purposes prescribed by paragraph (d) — in relation to any waters of the sea not within the limits of the State that are on the landward side of waters adjacent to the State that are Commonwealth proclaimed waters;
>
> (c) for purposes relating to a fishery that is to be managed in accordance with the law of the State pursuant to an arrangement under Division III of Part II — in relation to any waters to which the legislative powers of the State extend, with respect to that fishery, whether pursuant to section 5 of the *Coastal Waters (State Powers) Act 1980* of the Commonwealth or otherwise;

Division III of Pt II of the State *Fisheries Act* is headed "Arrangements with Respect to the Management of Particular Fisheries" and contains s. 13, which provides in sub-s. (1):

> The State may make an arrangement referred to in section 12H of [the Commonwealth] Act for the management of a particular fishery.

Section 14 of the State Act provides:

> Subject to this section, where there is in force an arrangement that provides that a particular fishery is to be managed in accordance with the law of the State, the provisions of this Act apply to and in relation to the fishery except that those provisions do not apply to or in relation to that fishery in respect of foreign boats in Commonwealth proclaimed waters or operations on or from foreign boats, or persons on foreign boats, in Commonwealth proclaimed

waters or in relation to matters that occurred in or in relation to Commonwealth proclaimed waters before the arrangement took effect.

The *Coastal Waters (State Powers) Act 1980 Cth*, which is referred to in s. 5(6) of the State *Fisheries Act*, was enacted following the decision of this Court inNew South Wales v. The Commonwealth ("the Seas and Submerged Lands Case") [1] . That case upheld the validity of the provision of the *Seas and Submerged Lands Act 1973 Cth* declaring and enacting that "the sovereignty in respect of the territorial sea, and in respect of the airspace over it and in respect of its bed and subsoil, is vested in and exercisable by the Crown in right of the Commonwealth" and decided that the boundaries of the States ended at the low-water mark and at the closing lines of bays and gulfs and that these boundaries did not, as had widely been believed, encompass the territorial sea: see Bonser v. La Macchia [2] .

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(1) (1975) 135 C.L.R. 337.
(2) (1969) 122 C.L.R. 177, at pp. 191-192.

The offshore constitutional settlement

State legislation with respect to fisheries had traditionally controlled fisheries within three nautical miles of the coast. Beyond that territorial sea, the Commonwealth had undoubted power under the express grant by s. 51(x) of the *Constitution* of legislative power with respect to fisheries in Australian waters beyond territorial limits and that power was paramount. After the Seas and Submerged Lands Case was decided, negotiations took place between the Commonwealth and the States which resulted in an offshore constitutional settlement, designed largely to return to the States the jurisdiction and proprietary rights and title which they had previously believed themselves to have over and in the territorial sea and underlying seabed. This was done by the *Coastal Waters (State Powers) Act* and the *Coastal Waters (State Title) Act 1980 Cth*. In addition, provision was made for specific problems arising in relation to offshore mining in adjacent areas under the *Petroleum (Submerged Lands) Act* beyond the territorial sea (*Petroleum (Submerged Lands) Amendment Act 1980 Cth*), in relation to the control of fisheries in the Australian fishing zone beyond the territorial sea (*Fisheries Amendment Act 1980 Cth* introducing Pt IVA), in relation to the remains of ships and associated articles in "waters adjacent to the coast of a State" (*Historic Shipwrecks Amendment Act 1980 Cth*), and in relation to subterranean mining from land and dredging and other works relating to ports and shipping (*Coastal Waters (State Powers) Act*).

Section 5 of the *Coastal Waters (State Powers) Act* provides:

> The legislative powers exercisable from time to time under the constitution of each State extend to the making of —
>
> (a) all such laws of the State as could be made by virtue of those powers if the coastal waters of the State, as extending from time to time, were within the limits of the State, including laws applying in or in relation to the sea-bed and subsoil beneath, and the airspace above, the coastal waters of that State;
>
> (b) laws of the State having effect in or in relation to waters within the adjacent area in respect of the State but beyond the outer limits of the coastal waters of the State, including laws applying in or in relation to the

sea-bed and subsoil beneath, and the airspace above, the first-mentioned waters, being laws with respect to —

(i) subterranean mining from land within the limits of the State; or

(ii) ports, harbours and other shipping facilities, including installations, and dredging and other works, relating thereto, and other coastal works;

Section 3 defines "adjacent area in respect of the State" to mean the same thing as it does under the *Petroleum (Submerged Lands) Act* and "coastal waters of the State" to mean, in relation to each State, the territorial sea to a breadth of not more than three nautical miles, together with any sea on the landward side of the baselines which is not within the limits of the State or a Territory. The *Coastal Waters (State Powers) Act* was enacted pursuant to the request of all of the States under s. 51(xxxviii) of the *Constitution* to enact the legislation in the form in which it was passed and it is expressed in its preamble to be so enacted. Detailed reference to s. 51(xxxviii) is made subsequently in this judgment.

Background facts

In relation to fisheries, the offshore constitutional settlement envisaged the making of arrangements for particular commercial fisheries to be regulated under Commonwealth or State law, if necessary by one of a number of joint authorities to be established by legislation. The management of such fisheries was to be without regard to the three mile limit. See Waugh, Australian Fisheries Law, (Intergovernmental Relations in Victoria Program), (1988). It was as a result of this agreement that Pt IVA was inserted in the Commonwealth *Fisheries Act*. The second arrangement, which was purportedly made pursuant to that Part, provides only for the management in accordance with the law of South Australia of the rock lobster fishery which it identifies, and does not provide for a joint authority to perform that function. The result is that the rock lobster fishery identified in the arrangement is currently being administered under the State *Fisheries Act*. Licences have been issued under that Act permitting the holders to take rock lobster. Most of those licences have been issued to residents of South Australia.

On average each vessel engaged in taking rock lobster in the area identified by the arrangement is manned by two persons. The total number of persons so engaged as licence holders or employees is approximately 638. The majority of these persons are resident in South Australia. In the financial year 1986-1987 fishermen operating from South Australia took 2,208,000 kilograms of rock lobster which had a wholesale value of $32,049,000. Most of the rock lobster taken from the relevant area is received and processed in South Australia and most of the people employed in the processing works and receiving depots, who number several hundred, are South Australian residents. In the towns in South Australia in which vessels engaged in taking rock lobster are based, the relevant fishery is, directly and indirectly, a major source of income and employment. All of the persons presently licensed under the State *Fisheries Act* to take rock lobster operate from ports in South Australia. Some of those fishermen also hold Victorian or Commonwealth licences, or both, to take rock lobster in the waters adjacent to Victoria.

Rock lobster is, and for some years has been, the basis of major fisheries in waters adjacent to the States of South Australia, Victoria and Tasmania. Fishermen operating from ports in South Australia currently produce approximately 50 per cent by weight of the total catch from these fisheries and have done so for several years.

Southern rock lobster inhabits reef communities at various places in southern Australian waters extending from the south-west of Western Australia to about Sydney and extending seaward beyond the coastal waters of the States into the waters of the

Australian fishing zone. There is interchange between the coastal waters of the States and the waters of the Australian fishing zone of rock lobster at the larval, juvenile and adult stages. This can occur as the result of prevailing ocean currents and by benthic movement of the rock lobster associated with foraging and migration.

Southern rock lobster is a finite but renewable resource which may be exploited up to a level which is dependent upon certain biological factors (growth rate, fecundity, reproductive potential, movement patterns and natural mortality rates). Exploitation which removes the stock of rock lobster at a greater rate than that at which it can replace itself is excessive. In a commercial fishery, such as the one in question, the absence of management arrangements limiting the level of exploitation might lead to the depletion of stock to the extent that the commercial exploitation of the fishery would be uneconomic.

The questions in the special case

The following questions of law are raised by the special case:

(1) Was the Arrangement [i.e. the first arrangement] and is the Second Arrangement [i.e. the second arrangement] validly authorised by s. 12H(4) of the *Fisheries Act 1952 Cth* and s. 13(1) of the *Fisheries Act SA*?

(2) Is s. 14 of the *Fisheries Act 1982 SA*:—

(a) within the terms of the power purportedly conferred on the Parliament of South Australia by s. 5 of the *Coastal Waters (State Powers) Act 1980 Cth*?

(b) otherwise a law within the powers of the Parliament of South Australia?

(3) If the answer to question 2(a) is yes, is s. 5 of the *Coastal Waters (State Powers) Act 1980 Cth* a valid law of the Commonwealth?

(4) If the answer to question 2(b) is or would otherwise be yes, is s. 14 and are other provisions of the *Fisheries Act 1982 SA* insofar as it or they may have purported to apply to the Outside Fishery and/or may purport to apply to the Outside Defined Fishery (as defined in par. 11 of the Amended Statement of Claim) inconsistent with the *Fisheries Act 1952 Cth* and thereby invalid by virtue of s. 109 of the Commonwealth of *Australia Constitution*?

(5) Was the Outside Fishery and is the Outside Defined Fishery (as defined in par. 11 of the Amended Statement of Claim) to be managed in accordance with the law of South Australia by virtue of the making of the Arrangement and the Second Arrangement and the provisions of s. 12L of the *Fisheries Act Cth* and s. 14 of the *Fisheries Act SA* or otherwise?

"The Outside Defined Fishery" referred to in questions 4 and 5 is defined in par. 11.1 of the amended statement of claim as that part of the relevant fishery "which is located seaward of or otherwise not within the coastal waters of the State as defined in Section 4 of the Commonwealth *Fisheries Act* ". It would seem that the reference to s. 4 is intended to be a reference to s. 4A. In so far as the questions are directed to the validity of the first arrangement, we have come to the conclusion that it is inappropriate to deal with them on this special case. As has been pointed out, the first arrangement has been superseded by the current one and neither the special case nor the amended pleadings (annexed to the special case) identify any concrete dispute the resolution of which is

dependent upon the validity of the first arrangement. Accordingly, we shall confine our consideration to the current or second arrangement.

The waters adjacent to South Australia: s. 12H(4)

Section 12H(4) of the Commonwealth *Fisheries Act* (set out above) extends only to authorize an arrangement between the Commonwealth and a State with respect to a particular fishery "in waters adjacent to" that State. The area defined by the boundary lines specified in the second arrangement includes a wedge-shaped area of more than 2,000 square kilometres of sea which lies on the Victorian side of the line of equidistance drawn from the intersection of the South Australian-Victorian border with the coastline and which is part of the "adjacent area" in respect of the State of Victoria for the purposes of the *Petroleum (Submerged Lands) Act* ("the wedge-shaped area of overlap"). A threshold question in the present case is whether that area is included in "waters adjacent to" South Australia for the purposes of s. 12H(4) of the Commonwealth *Fisheries Act*. If it is not, the arrangement goes beyond the provisions of s. 12H(4) (and, as a consequence, the provisions of s. 13(1) of the State *Fisheries Act*) if, and to the extent that, it purports to relate to the lobster fishery within that area. It is convenient to turn immediately to a consideration of that question.

The Commonwealth *Fisheries Act* does not, in contrast with the *Petroleum (Submerged Lands) Act*, contain a definition of waters adjacent to a State by reference to specific boundary lines. Section 12A(2) in Pt IVA provides that references in that Part (which includes s. 12H) to the waters adjacent to a State or States are to be "read as references to the coastal waters of the State or States and waters within the Australian fishing zone that are adjacent to the coastal waters of the State or States." In s. 4A, which was inserted at the same time as Pt IVA, there is a definition of coastal waters which, so far as relevant, is as follows:

> (1) For the purposes of this Act, the coastal waters of a State are —
>
> (a) the part or parts of the territorial sea of Australia that is or are adjacent to that State other than any part referred to in sub-section (2); and
>
> (b) any marine or tidal waters that are on the landward side of any part of the territorial sea of Australia and are adjacent to that State but are not within the limits of a State
>
> (2) If at any time the breadth of the territorial sea of Australia is determined or declared to be greater than 3 nautical miles, the coastal waters of a State do not include, for the purposes of this Act, any part of the territorial sea of Australia that would not be within the limits of that territorial sea if the breadth of that territorial sea had continued to be 3 nautical miles.

It was submitted on behalf of South Australia that the absence of any identification in the Commonwealth *Fisheries Act* of specific boundary lines dividing the waters "adjacent" to one State from the waters "adjacent" to an adjoining State indicates a legislative intent that, for the purposes of that Act, references to "coastal waters" and "adjacent" waters of a State are to be given a "flexible" meaning. This would avoid any need for the artificial division of a particular fishery which is peculiarly associated with one State but extends into what are, if regard is had to lines of equidistance, the "coastal waters" or "adjacent" waters of a bordering State. The result of such a "flexible" approach would be that, within the area of flexibility, waters would be adjacent waters of more than one State for the purposes of the Commonwealth *Fisheries Act*. To encompass the wedge-shaped area of overlap in "waters adjacent to" South Australia, the area of flexibility would need to include some thousands of square kilometres on the Victorian side of the line of equidistance. Presumably the area of flexibility would, on

this argument, also include a corresponding area on the South Australian side of that line.

This "flexible" approach to the identification of coastal waters and adjacent waters (i.e. "waters adjacent to") does not lie well with the general scheme of the offshore constitutional settlement which was effected by the complex of legislative provisions of which Pt IVA formed a part. That general scheme was predicated upon the division of waters surrounding Australia into discrete areas adjacent to a State or Territory and referred to as the "adjacent area in respect of", or as "waters adjacent to", the particular State or Territory. The primary identification of those discrete adjacent areas was to be found in the *Petroleum (Submerged Lands) Act* which, by detailed descriptions of boundaries (Sched. 2), identified what it called the "adjacent area" of a State or Territory. As has been mentioned, the boundary adopted by the *Petroleum (Submerged Lands) Act* as the dividing line between the adjacent areas in respect of adjoining States (or an adjoining State and the Northern Territory) was what was seen as representing the line of equidistance. Those identified dividing lines were then taken up, by reference, in some of the legislation implementing the offshore constitutional settlement. In particular, the various Coastal Waters Acts, conferring jurisdiction and title upon the States and the Northern Territory in respect of coastal waters and the underlying seabed, defined the coastal waters of the individual States and the Northern Territory as the part or parts of the territorial sea "within the adjacent area" in respect of the State or Territory. The *Coastal Waters (State Powers) Act* and the *Coastal Waters (Northern Territory Powers) Act 1980 Cth* conferred or confirmed the legislative competence of the relevant State or the Northern Territory with respect to subterranean mining from the land and coastal works within that "adjacent area". The various Coastal Waters Acts all either directly or indirectly defined the adjacent area as "the area the boundary of which is described under the heading" referring to the relevant State or the Northern Territory in Sched. 2 to the *Petroleum (Submerged Lands) Act* as in force immediately before their commencement (1 January 1982). The *Petroleum (Submerged Lands) Amendment Act*, which commenced operation on 14 February 1983, adjusted the adjacent areas of the various States and the Northern Territory for the purposes of the *Petroleum (Submerged Lands) Act* by confining the areas defined in Sched. 2 to the outer limits of the continental shelf. They remained, however, discrete areas with what was treated as the line of equidistance constituting the boundary between the adjacent areas of adjoining States (or a State and the Northern Territory). The *Historic Shipwrecks Amendment Act* used the phrase "waters adjacent to the coast" of a State or of the Northern Territory. It defined that phrase in s. 5 as comprising "so much of the waters within" the boundaries of the area "referring to that State or Territory in Schedule 2 to the *Petroleum (Submerged Lands) Act* as are within the outer limit of the continental shelf of Australia". In summary and putting to one side the *Fisheries Amendment Act*, the Commonwealth legislation carrying the constitutional offshore settlement into effect consistently uses references to "adjacent area" and "waters adjacent" to refer to discrete areas of water identified by fixed boundaries. The outer boundary of the relevant area varies according to the purposes for which the area is being defined: the three nautical mile limit in the case of "coastal waters"; the defined outer limit in Sched. 2 to the *Petroleum (Submerged Lands) Act* in the case of subterranean mining from land and coastal works; the outer limit of the continental shelf in the case of the "adjacent area" or "waters adjacent" for the purposes of petroleum exploration and exploitation and historic shipwrecks. The boundary between the "adjacent" area or waters of a State or Territory and the "adjacent" area or waters of an adjoining State or Territory is, in all cases where it is specifically identified, the line of equidistance as identified in the *Petroleum (Submerged Lands) Act*.

The Commonwealth *Fisheries Act* contains nothing to indicate a legislative intent that, in contrast to the other legislation implementing the offshore settlement, references to waters "adjacent" to a State or Territory are to be understood as referring to indefinite areas which overlap the waters "adjacent" to an adjoining State. To the contrary, its provisions point in the opposite direction. The definition of coastal waters in s. 4A — "the part or parts of the territorial sea of Australia that is or are adjacent to that State or

Territory" — suggests a division of the territorial sea into discrete parts. Indeed, in the context of the provision of the *Coastal Waters (State Powers) Act* (s. 5(a)) that a State's legislative power is to extend to its coastal waters (as defined for the purposes of that Act) as if those waters "were within the limits of the State", it is difficult to envisage how the Commonwealth *Fisheries Act* could sensibly treat part of such "coastal waters" as also falling within the "coastal waters" of an adjoining State for the purposes of fisheries legislation. In our opinion, the reference to the part or parts of the territorial sea that are "adjacent" to that "State or Territory" in the definition of coastal waters in s. 4A of the Commonwealth *Fisheries Act* must be construed as being a reference to a discrete area separated from the "coastal waters" of an adjoining State or Territory by a fixed boundary. And, that being so, the phrase "waters adjacent to a State or States" in s. 12A(2) should be construed in the same way. Thus, references to "waters adjacent to a State or States" in Pt IVA, which s. 12A(2) requires to be read as references "to the coastal waters of the State or States and waters that are adjacent to the coastal waters of the State or States", should be understood as references to areas of waters (coastal and adjacent) separated by fixed lateral boundaries. That construction, with its acceptance of consistency in the notion of "adjacent" as regards both coastal and non-coastal waters, accords with s. 12H(4), which assumes that within the three nautical mile limit the coastal waters and adjacent waters of a State correspond, in that it divides the waters "adjacent" to a State into but two categories, namely, the State's "coastal waters" and "waters on the seaward side of the coastal waters".

When one turns to the substantive provisions of Pt IVA of the Commonwealth *Fisheries Act*, one finds strong indications of a legislative intent or assumption that references to "waters adjacent" to a State or Territory are to be understood as references to discrete areas separated from the adjacent waters of a bordering State or Territory by fixed boundary lines. The critical provisions in that regard are s. 12H(1), (2), (3) and (4). Those sub-sections read:

> (1) the Commonwealth may make an arrangement with the State or States that is or are represented on a Joint Authority that the Joint Authority is to have the management of a particular fishery in waters adjacent to that State or to those States or any of those States.
>
> (2) An arrangement under sub-section (1) with only one State shall provide either that —
>
> (a) the fishery is to be managed in accordance with the law of the Commonwealth; or
>
> (b) the fishery is to be managed in accordance with the law of that State.
>
> (3) An arrangement under sub-section (1) with 2 or more States shall provide that the fishery is to be managed in accordance with the law of the Commonwealth.
>
> (4) The Commonwealth may make an arrangement with a State with respect to a particular fishery in waters adjacent to the State, not being a fishery to which an arrangement under sub-section (1) applies —
>
> (a) that the fishery (being a fishery wholly or partly in the coastal waters of the State) is to be managed in accordance with the law of the Commonwealth; or
>
> (b) that the fishery (being a fishery wholly or partly in waters on the seaward side of the coastal waters of the State) is to be managed in accordance with the law of the State.

The provisions of s. 12H(1), (2) and (4) appear to us to be predicated upon an assumption that a State will have exclusive authority to make an arrangement with the Commonwealth in relation to a fishery within waters adjacent to it. Such an arrangement can apply either Commonwealth law or the law of the particular State for the management of that fishery. If an area of water could be "adjacent" to two adjoining States for the purposes of Pt IVA, s. 12H(1), (2) and (4) would authorize conflicting arrangements between the Commonwealth and each of those States for the management of a particular fishery within that area. Moreover, such an arrangement with one State applying the law of that State to a fishery in waters which were also adjacent to another State would conflict with a legislative intent disclosed by the provisions of s. 12H(1) and (3), namely, that where a fishery extends into waters adjacent to two or more States, any arrangement should be between the Commonwealth and those States and should provide for the application of Commonwealth law. To construe the references to "waters adjacent to" a State in s. 12H(1) and (4) as being to discrete areas of water does not necessarily involve the artificial division of a fishery between different areas for management purposes. Nor does it preclude the use of meridians of longitude to identify a particular fishery. All that it involves is the consequence that, when a fishery extends into the adjacent waters of more than one State the complete fishery can be made the subject of a single arrangement only if the States in whose adjacent waters the fishery lies are all parties to that arrangement. There is nothing particularly surprising about that consequence. Indeed, it would be somewhat surprising if the State parties to the offshore constitutional settlement intended that one State could, by arrangement with the Commonwealth alone, assume control and management of particular fishing activities extending into the coastal or adjacent waters of another State against the wishes of that other State. It is true that, where the complete fishery is managed under a single arrangement in such a case, the applicable law will be the law of the Commonwealth. That would, however, seem to accord with the legislative intent manifested by s. 12H(1) and (3).

For the above reasons, we would construe the references to the "waters adjacent to" a State in Pt IVA of the Commonwealth *Fisheries Act* in the manner for which the plaintiffs contend, that is to say, as references to discrete areas of water separated from the waters adjacent to an adjoining State by a fixed boundary line. The Act does not, in terms, identify the various boundary lines between adjoining States. Were it not for other Commonwealth legislation carrying the offshore constitutional settlement into effect, the legislature might be taken to have intended those boundary lines to be lines of equidistance determined in accordance with principles of international law. But in the context of that other Commonwealth legislation, we infer that those boundary lines are the lateral lines identified in Sched. 2 to the *Petroleum (Submerged Lands) Act* carried out to the point of intersection with the outer limit of the Australian fishing zone. The question of the existence or extent of any divergence between the lines so identified and the lines of equidistance determined in accordance with principles of international law was not investigated in the course of argument. Indeed, as we followed the argument, it was common ground that, if the waters adjacent to South Australia for the purposes of Pt IVA were separated from the waters adjacent to Victoria by a fixed boundary line, the boundary identified by the *Petroleum (Submerged Lands) Act* was the appropriate one.

It follows that the second arrangement could not, consistently with the provisions of s. 12H(4) of the Commonwealth *Fisheries Act* and s. 13(1) of the State *Fisheries Act*, extend to waters on the Victorian side of the line of equidistance dividing South Australian adjacent waters from Victorian adjacent waters. That does not, however, mean that the second arrangement is necessarily void. The arrangement itself identifies the area of water to which it refers as "the area of waters adjacent to the State bounded by" the identified boundary lines. Prima facie, one would read the reference to "the area of waters adjacent to the State" as having a meaning corresponding to the reference to "waters adjacent to the State" in s. 12H(4) of the Commonwealth *Fisheries Act* since

that reference in s. 12H(4) applies — directly in the case of the Commonwealth and indirectly (through s. 13(1) of the State *Fisheries Act*) in the case of South Australia — to confine the statutory grant of authority to make such an arrangement. That being so, there is no difficulty in reading the second arrangement, which operates as an instrument of subordinate legislation, in a way which will preserve its validity as within authority, that is to say, as confined to the rock lobster fishery within so much of the area within the identified boundary lines as lies within the "waters adjacent to the State" for the purposes of s. 12H(4). It is unnecessary to pursue the question whether the process involved in so confining the second arrangement is better seen, in the context of the express reference to "waters adjacent to the State", as one of construing it so that it is within available power (cf., e.g., D'Emden v. Pedder [3] ; Attorney-General (Vict.) v. The Commonwealth [4]) or as one of identifying an invalid part which can be set aside or disregarded without radically altering the nature of what remains (cf., e.g., Dunkley v. Evans [5] ; Thames Water Authority v. Elmbridge Borough Council [6]). On either approach, the applicable principles require that the second arrangement be read as so confined.

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(3) (1904) 1 C.L.R. 91, at p. 119.
(4) (1945) 71 C.L.R. 237, at p. 267.
(5) [1981] 1 W.L.R. 1522, at pp. 1524-1525; [1981] 3 All E.R. 285, at pp. 287-288.
(6) [1983] Q.B. 570, at pp. 580-581.

In the result, acceptance of the plaintiffs' construction of the phrase "waters adjacent to the State" in s. 12H(4) of the Commonwealth *Fisheries Act* leads not to invalidity but to a confinement of the reach of the second arrangement. It was not submitted that the second arrangement was invalid or ineffective by reason of any other suggested defect in its terms.

State *Fisheries Act*, s. 14

The balance of the plaintiffs' attack upon the applicability of the State *Fisheries Act* to govern the rock lobster fishery relates to matters of legislative competence. In particular, the plaintiffs submit that the provision of s. 14 of the State *Fisheries Act* that, where there is in force an arrangement with the Commonwealth that provides that a particular fishery is to be managed in accordance with South Australian law, the provisions of the State Act apply (subject to the specified exceptions) to and in relation to that fishery, is beyond the legislative competence of the Parliament of South Australia at least to the extent that it would apply the provisions of the State Act to or in relation to so much of the rock lobster fishery identified by the second arrangement as is beyond the State's three nautical mile "coastal waters". The plaintiffs do not question that the State Act validly applies to govern fisheries within the internal waters of South Australia. Nor have they argued that, putting to one side any question of inconsistency with a law of the Commonwealth, the regulation of fisheries within the State's coastal waters is beyond the legislative competence of the Parliament of South Australia. In issue is the validity of s. 14 of the State Act in so far as it would apply the provisions of that Act to the rock lobster fishery in the Commonwealth proclaimed waters which lie outside the State's coastal waters but within the adjacent waters identified by the second arrangement. Obviously, those adjacent waters are not part of the territory of South Australia, which does not extend seaward beyond the low-water mark, except where the coastline is indented by bays or gulfs (in which case the closing lines mark the boundary) and except for Kangaroo Island which is an offshore island: Raptis (A.) & Son v. South Australia [7] . There are two bases on which the argument for valid extra-territorial operation of the State Act rests: first, that the legislative power of the State of

South Australia, unaided by any power conferred by the *Coastal Waters (State Powers) Act*, is sufficient to give to the State Act extra-territorial operation within the arrangement area; and, second, that s. 5(c) of the *Coastal Waters (State Powers) Act* confers power on the Parliament of South Australia to give that extra-territorial operation to the State Act. It is convenient first to consider the legislative power of South Australia apart from the power purportedly conferred by s. 5(c) of the *Coastal Waters (State Powers) Act*.

(7) (1977) 138 C.L.R. 346.

Independent legislative power of States

In the nineteenth century, when territorial limits on the operation of colonial laws were insisted on by the Imperial government, the Law Officers advised that colonial fishery legislation limited to the territorial sea be allowed. Some of the colonial laws so allowed are listed by O'Connell and Riordan, Opinions on Imperial Constitutional Law (1971), pp. 158-159. But it does not appear that operation beyond the territorial sea was wholly denied if the law purported to apply to a transaction which occurred partly within the territorial sea. In 1886, a *Western Australian Act* required a ship fishing for pearl shell to take out a licence, to land all pearl shell taken during the currency of the licence, to pay customs duty thereon and, on export, to pay export duty. The Law Officers were asked to report on the operation of the Act and upon its enforcement against ships of three classes: those which fished within the three mile limit, those which fished partly within and partly beyond the three mile limit, and those which fished wholly beyond the three mile limit. The Law Officers reported:

> (1.) *That* in our opinion the provisions of the Act of 1886, in respect of which complaint has been made, were within the competence of the Colonial Legislature.
>
> (2.) The course taken by the Colonial Government in levying customs and export duties under the Act can be legally upheld, both as regards ships which fish entirely within three miles of the shore, and as regards ships which fish partly within and partly beyond the three-mile limit.
>
> (3.) In our opinion the provisions of the Act cannot be properly enforced against the vessels [fishing wholly beyond the three-mile limit], unless such vessels have taken a license, or have in fact been used or employed by persons engaged in a pearl-shell fishery within the three-mile limit, in one or other of the ways enumerated in section 1 of the Act of 1886. (ibid., p. 197)

Whatever constitutional theory underlay this Report, the notion that colonial fishery laws operated only within the limits of the territorial sea did not survive the observation of Lord Macmillan in Croft v. Dunphy [8] :

> To what distance seaward the territory of a state is to be taken as extending is a question of international law upon which their Lordships do not deem it necessary or proper to pronounce. But whatever be the limits of territorial waters in the international sense, it has long been recognized that for certain purposes, notably those of police, revenue, public health and fisheries, a state

> may enact laws affecting the seas surrounding its coasts to a distance seaward which exceeds the ordinary limits of its territory.

The limits of extra-territorial operation of a colonial or State law were ultimately found to inhere in the grant of power to the legislature. In Reg. v. Foster; Ex parte Eastern and Australian Steamship Co. Ltd. [9] , Windeyer J. pointed out that the terms in which legislative power had been granted to a colony or State — "peace, welfare, and good government" or "peace, order, and good government" — had

> become the accepted touchstone of whatever territorial limitations still existed upon the powers of subordinate legislatures in British dependencies (see Johnson v. Commissioner of Stamp Duties [10] and cases there referred to). That the requirements of peace, order, and good government provide the only limitation of the validity of any extra-territorial legislation otherwise within power has been accepted by this Court since Croft v. Dunphy (e.g. Trustees Executors and Agency Co. Ltd. v. Federal Commissioner of Taxation [11] , per Evatt J.; Crowe v. The Commonwealth [12] , per Starke J.).

Then, in Bonser v. La Macchia [13] , Barwick C.J. said:

> Of course, the colonies were competent to make laws which operated extra-territorially — that is to say, beyond their land margins and in and on the high seas, not limited to the three-mile belt of the territorial sea. But this legislative power of the colony was derived, in my opinion, from the plenary nature of the power to make laws for the peace, order and good government of the territory assigned to the colony: Croft v. Dunphy and Broken Hill South Ltd. v. Commissioner of Taxation (N.S.W.) [14] .

The Governor of the Colony of South Australia with the advice and consent of the Legislative Council was invested with power to make laws for the peace, welfare and good government of the Colony (*The Australian Constitutions Act 1850 Imp* (13 & 14 Vict. c. 59), s. 14) and that power is vested in the Parliament of the State of South Australia: *The Constitution Act 1856 SA*, s. 1; Commonwealth Constitution, s. 107; *Constitution Act 1934 SA*, s. 5.

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(8) [1933] A.C. 156, at p. 162.
(9) (1959) 103 C.L.R. 256, at p. 307.
(10) [1956] A.C. 331; [1957] S.R. (N.S.W.) 313.
(11) (1933) 49 C.L.R. 220, at pp. 228-241.
(12) (1935) 54 C.L.R. 69, at p. 85.
(13) (1969) 122 C.L.R., at p. 189.
(14) (1937) 56 C.L.R. 337.

In Bonser v. La Macchia Windeyer J., adhering to the view which he had stated in Reg. v. Foster; Ex parte Eastern and Australian Steamship Co. Ltd. [15] , said:

> My view therefore is that the legislatures of the Australian States have power to make laws about fishing at sea: but saying that does not presuppose that they have any sovereignty over the open sea or any title to the subjacent land of any part of that sea. The laws which they make must not be inconsistent with Commonwealth law. And, generally speaking, they will be read as referring only to the off-shore waters of the particular State, which are sometimes conveniently, but misleadingly, called its territorial waters: e.g., Green v. Burgess [16] ; cf. Munro v. Lombardo [17] . But this territorial restriction

> arises rather as a matter of construction than of power. The power of a State legislature to make laws which operate upon persons, things and events beyond the State is not limited by three miles of sea. It depends upon relationship to the State

The same view was adopted in a succession of cases:Reg. v. Bull [18] , per Gibbs J.; [19] , per Stephen J.; [20] , per Mason J.; the Seas and Submerged Lands Case [21] , per Stephen J.; [22] , per Mason J.; *Pearce v. Florenca* [23] , per Gibbs J.; [24] , per Mason J.; Robinson v. Western Australian Museum [25] , per Mason J.; and, recently, by the Court in *Union Steamship Co. of Australia Pty. Ltd. v. King* [26] . Thus, in *Pearce v. Florenca* [23] , Gibbs J. said:

> As Lord Macmillan pointed out in Croft v. Dunphy, it has long been recognized that for certain purposes, including fisheries, a State may enact laws affecting the seas surrounding its coasts beyond its territorial limits. Windeyer J. expressed similar views in Bonser v. La Macchia. Such power is not limited to off-shore waters. However, where the law does not operate beyond off-shore waters its validity is in my opinion perfectly clear. A law to regulate fishing within off-shore waters has a close connexion with the State and can truly be described as a law for the peace, order and good government of the State. Such a law is within the competence of a State legislature.

And in Robinson v. Western Australian Museum [25] , Mason J. referred to State laws relating to fishing and fisheries in territorial waters and beyond as "examples of laws having a valid extra-territorial operation, there being a sufficient connexion with the peace, order and good government of the State".

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(15) (1969) 122 C.L.R., at p. 226.
(16) [1960] V.R. 158.
(17) [1964] W.A.R. 63.
(18) (1974) 131 C.L.R. 203, at p. 263.
(19) (1974) 131 C.L.R., at p. 271.
(20) (1974) 131 C.L.R., at pp. 280-281.
(21) (1975) 135 C.L.R., at p. 443.
(22) (1975) 135 C.L.R., at pp. 468-469.
(23) (1976) 135 C.L.R. 507, at p. 520.
(24) (1975) 135 C.L.R., at p. 522.
(25) (1977) 138 C.L.R. 283, at p. 331.
(26) (1988) 166 C.L.R. 1.
(27) (1976) 135 C.L.R. 507, at p. 520.
(28) (1977) 138 C.L.R. 283, at p. 331.

It is now established that what is essential to the extra-territorial operation of a State law is a connexion between the enacting State and the extra-territorial persons, things and events on which a law operates. *Union Steamship v. King* gave effect to that rule. It is unnecessary to rehearse the authorities relating to the extra-territorial operation of State legislation recently reviewed in that case, but it is desirable to recall that the Court agreed [27] with the comments of Gibbs J. in *Pearce v. Florenca* [28] that the test of

> a relevant connexion between the persons or circumstances on which the legislation operates and the State should be liberally applied, and that legislation should be held valid if there is any real connexion — even a remote or general connexion — between the subject matter of the legislation and the State

.It follows that the limitation on the extra-territorial operation of the State *Fisheries Act* depends not on the distance of the arrangement area from the seaward boundary of the State's territory but on the existence and nature of a connexion between South Australia and the activities which constitute the fishery in the assigned area.

(29) (1988) 166 C.L.R., at p. 14.
(30) (1976) 135 C.L.R., at p. 518.

The circumstances of this case set out earlier demonstrate a real and substantial connexion. The fishery described in the arrangement is a finite resource available for exploitation and exploited by South Australian residents; it is a significant source of South Australian trade and employment. Since the area of water referred to in the second arrangement is to be construed as confined to waters on the South Australian side of the lines of equidistance, the land territory of South Australia is the closest land territory to the fishery. A law for the management of the fishery is a law for the peace, welfare and good government of South Australia. But it does not necessarily follow from that conclusion that s. 14 of the State *Fisheries Act* is effective to prescribe the extra-territorial operation of the Act. Section 14 fails in its intended effect if it is inconsistent with a valid law of the Commonwealth or if the extra-territorial operation claimed by it for the Act exceeds what might properly be claimed having regard to the legislative powers which adjoining States might exercise over the same fishery.

No inconsistency with a law of the Commonwealth

Putting to one side the provisions of s. 5(c) of the *Coastal Waters (State Powers) Act* (see below), possible inconsistency with Commonwealth law may be shortly disposed of. Clearly the State *Fisheries Act* does not purport "to vest or make exercisable any sovereignty or sovereign rights" and thus escapes any possible inconsistency with s. 16(b) of the *Seas and Submerged Lands Act*; see Robinson v. Western Australian Museum [29] , per Gibbs J. Nor can the operation claimed for the State *Fisheries Act* by s. 14 conflict in any way with the Commonwealth *Fisheries Act*. Section 12L of that Act withdraws the operation of that Act from the precise field which s. 14 of the State *Fisheries Act* prescribes as the field of operation of the State *Fisheries Act*. It withdraws the operation of the Commonwealth Act from a particular fishery when there is an arrangement in force under Div. 3 of Pt IVA of that Act for the management of the fishery.

(31) (1977) 138 C.L.R., at p. 306.

The validity of s. 12L does not depend upon the validity of Pt IVA generally. Although s. 12L has effect when an arrangement is "in force under this Division", the true meaning of that phrase must be determined on the assumption, which Parliament must have made, that Pt IVA is valid. The requisite force of the arrangement is the force which arises from conformity with the text of Div. 3 of Pt IVA as enacted. Apart from the submission based on the meaning of "waters adjacent to the State" in s. 12H(4), no challenge is made to the coming into force under Div. 3 of Pt IVA of the second arrangement. It follows that the Commonwealth *Fisheries Act* has no operation within the area defined by that arrangement.

No inconsistency with the law of another State

A problem of greater difficulty would have arisen if the fishery defined by the arrangement had a real connexion with two States, each of which enacted a law for the management of the fishery. The Constitution contains no express paramountcy provision similar to s. 109 by reference to which conflicts between competing laws of different States are to be resolved. If the second arrangement had been construed as extending to waters on the Victorian side of the line of equidistance, there would obviously have been grounds for arguing that the Victorian nexus with activities in these waters was as strong as or stronger than the South Australian nexus. As has been seen, however, the second arrangement does not extend into such waters. Where, as here, there is no suggestion of the direct operation of the law of one State in the territory of another, the problem of conflicting State laws arises only if there be laws of two or more States which, by their terms or in their operation, affect the same persons, transactions or relationships. In the present case, there is no competing law of a State other than South Australia purporting to apply to or in relation to the fishery to which the second arrangement applies. That being so, there is no real question of any relevant inconsistency between the law of South Australia and the law of another State.

Coastal Waters (State Powers) Act, s. 5(c)

Our conclusion that the operation of s. 14 of the State *Fisheries Act* to apply the provisions of that Act to and in relation to the fishery the subject of the second arrangement is within the independent legislative competence of the South Australian Parliament makes it strictly unnecessary, for the resolution of the dispute between the parties, that we determine whether s. 5(c) of the *Coastal Waters (State Powers) Act* is a valid enactment of the Commonwealth Parliament. If s. 5(c) be invalid, the independent validity of that operation of s. 14 of the State Act will be unaffected. If s. 5(c) be valid, it will provide a basis in Commonwealth legislation for that operation of s. 14 of the State Act. The Court has, however, heard full argument on the question of the validity of s. 5(c) and it is appropriate that we express the views which we have formed in relation to it.

Section 5(c) reads as follows:

> The legislative powers exercisable from time to time under the constitution of each State extend to the making of —
>
> (c) laws of the State with respect to fisheries in Australian waters beyond the outer limits of the coastal waters of the State, being laws applying to or in relation to those fisheries only to the extent to which those fisheries are, under an arrangement to which the Commonwealth and the State are parties, to be managed in accordance with the laws of the State.

Section 7(b) makes clear that any legislative power conferred by s. 5(c) is intended to supplement and not to supplant the legislative powers already possessed by the State Parliament. It provides:

> Nothing in this Act shall be taken to —
>
> (b) derogate from any power existing, apart from this Act, to make laws of a State having extra-territorial effect; or

Plainly, the provisions of s. 7 are effective to prevent s. 5(c) being construed as confining the pre-existing State legislative power with respect to fisheries in waters adjacent to it.

Constitution, s. 51(xxxviii)

The primary submission advanced by the defendants on this aspect of the case was that s. 5(c) is a valid exercise of the legislative power conferred by s. 51(xxxviii) of the *Constitution* with respect to:

> The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia.

It is common ground that the *Coastal Waters (State Powers) Act* was enacted at the request of the Parliament of each of the six States expressed through the relevant State's *Constitutional Powers (Coastal Waters) Act*.

There are three preliminary problems about the construction of s. 51(xxxviii) which should be addressed. The first concerns the construction of the words "at the establishment of this Constitution". Do those words refer to the point of time immediately before or immediately after that establishment? The preferable view appears to us to be that they refer to the point of time immediately before. In that regard, the reference to the Federal Council of Australasia is all but compelling since it was never envisaged that the Federal Council would survive the commencement of the federation. The result of that view is that the scope of the legislative power conferred by s. 51(xxxviii) need not be confined by, but may overlap, the legislative powers conferred upon the Commonwealth Parliament by the other paragraphs of s. 51.

While the reference to the Federal Council of Australasia helps resolve the first preliminary problem, it gives rise to the second. Even immediately before the establishment of the Constitution on 1 January 1901, no powers at all were exercisable by the Federal Council since it had ceased to exist on 9 July 1900 with the repeal of the *Federal Council of Australasia Act 1885 Imp* by cl. 7 of the covering clauses of the Commonwealth Constitution. The point is of little real significance, however, since there was no power which could have been exercised by the Federal Council if it had still existed which could not also have been exercised by the United Kingdom Parliament. Indeed, the earlier abolition of the Federal Council obviated the need to read "or" where last occurring in par. (xxxviii) as "and/or" in order to avoid any powers of the Federal Council actually diminishing the grant of power contained in that paragraph.

The third preliminary problem of construction is a more significant one for the purposes of the present case. It concerns the phrase "within the Commonwealth". It has sometimes been suggested (see, e.g., Quick and Garran, Annotated Constitution of the Australian Commonwealth (1901), pp. 650-651; Wynes, Legislative, Executive and Judicial Powers in Australia, 5th ed. (1976), p. 173) that the effect of that phrase is to exclude laws having an extra-territorial operation from the scope of par. (xxxviii). So to construe par. (xxxviii) is, however, to override the evident purport of its words and to ignore the purpose which it was intended to serve and which is reflected in the words "within the Commonwealth".

It is legitimate to have regard to the Convention Debates for the purpose of identifying the subject to which a provision of the Constitution was addressed (see Cole v. Whitfield [30]). That subject was, in the case of s. 51(xxxviii), clearly identified by Griffith, the Chairman of the Constitutional Committee responsible for the drafting of the clause, in the course of the 1891 Convention Debates. On 18 March 1891, speaking on a proposal by Sir George Grey that "provision should be made in the federal constitution which will enable each state to make, vary, or annul its constitution" (Official Report of the National Australasian Convention Debates, Sydney (1891), p. 486), Griffith later said (ibid., pp. 490-491):

> I certainly agree with those who have said that after the establishment of a federal constitution in Australia there should be no necessity to refer to the British Parliament to do anything for Australia, either in changing a constitution or in anything else.
>
> It is rather unfortunate that we have not had the proposal in its present form before us in print. It is that provision should be made to enable the states to make, vary, or annul their constitutions. They have constitutions now, and they have also the power in one way or another to alter them; but it seems to me that the general ruling direction which should be given is this: that provision should be made in the federal constitution to enable the federal parliament to exercise with respect to Australia those powers with respect to individual states which, at the present time, can be exercised only by the British Parliament. It would be entirely inconsistent with the whole theory of what we propose to do if a state of Australia, desiring to alter its constitution, had to go past the federal government to the British Parliament for the ratification of that alteration.

On 31 March 1891, Griffith referred to and expanded upon these earlier remarks in explaining the clause which was to become par. (xxxviii) (ibid., p. 524):

> We are aware, sir, that there are many things now upon which the legislatures and governments of the several Australian colonies may agree, and upon which they may desire to see a law established; but we are obliged, if we want that law made, to go to the Parliament of the United Kingdom, and ask them to be good enough to make the law for us; and when it is made we will obey it. I contend, for myself, as I have had an opportunity of saying before, that after the federal parliament is established anything which the legislatures of Australia want done in the way of legislation should be done *within Australia*, and the parliament of the commonwealth should have that power. It is not proposed by this provision to enable the parliament of the commonwealth to interfere with the state legislatures; but only, when the state legislatures agree in requesting such legislation, to pass it, so that there shall be no longer any necessity to have recourse to a parliament *beyond our own shores* when once this constitution has been passed by the Parliament of the United Kingdom. (Emphasis added.)

In other words, the primary subject to which par. (xxxviii) was addressed was the perceived need to ensure that legislative powers necessary for the purposes of the new nation could be exercised locally notwithstanding that, prior to federation, they were beyond the competence of local legislatures. In that context, there is no valid reason why the words "within the Commonwealth" should be given a more constrictive operation than that which flows from their ordinary grammatical construction. On that ordinary grammatical construction, the words refer to the location of the *exercise* of legislative power of the designated kind and not to the area of operation of the laws made by the exercise of such power. It is not necessary that we decide whether "within the Commonwealth" should be construed as referring to the political structure of the federation or to the geographical place. On either construction, their effect is to introduce the notion of the local exercise of legislative power as distinct from enactment by an external legislature such as the Parliament of the United Kingdom.

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(32) (1988) 165 C.L.R. 360, at pp. 387-392.

In the light of the above, we turn to the identification of the overall content of the grant of power contained in s. 51(xxxviii). As the references to the United Kingdom Parliament and the Federal Council of Australasia make plain, the "power" to which the paragraph refers is legislative power. Shortly stated, the effect of s. 51(xxxviii) is to empower the Commonwealth Parliament to make laws with respect to the local exercise of any legislative power which, before federation, could not be exercised by the legislatures of the former Australian colonies. In the early days of the Constitution, there may well have been some inhibition against giving that grant of legislative power its full scope and effect in that it could have been seen as controlled by the then status of the Commonwealth itself within the British Empire. Today, any room for such inhibition has long been denied by "the silent operation of constitutional principles" in the context of complete independence and international sovereignty (see The Commonwealth v. Kreglinger & Fernau Ltd. and Bardsley [31] , per Isaacs J., quoting Cooper v. Stuart [32] , per Lord Watson (for the Privy Council)). That being so, there is no extrinsic reason why s. 51(xxxviii) should not be given the broad interpretation which befits it as a constitutional provision with a national purpose of a fundamental kind. Indeed, the reasons justifying the approach that, in the absence of some countervailing indication in the context or in the rest of the Constitution, "the Court should always lean to the broader interpretation" (see Jumbunna Coal Mine, N. L. v. Victorian Coal Miners' Association [33] , per O'Connor J.), are applicable with more than ordinary force to par. (xxxviii) for two reasons. First, that it is clear that one of the functions which par. (xxxviii) was intended to serve was that of plugging gaps which might otherwise exist in the overall plenitude of the legislative powers exercisable by Commonwealth and State Parliaments under the Constitution. Secondly, the grant of power contained in par. (xxxviii) does not represent the enhancement of Commonwealth legislative power at the cost of the diminution or potential diminution of the effectiveness of State legislative power. Indeed, the contrary is the case since one of the more obvious examples of a law with respect to the exercise within the Commonwealth of a legislative power of the kind described in par. (xxxviii) is a law providing that a particular legislative power of that kind may be exercised by a designated local legislature such as the Commonwealth Parliament itself or the Parliament (or Parliaments) of a State (or States). That being so, par. (xxxviii) can properly be seen as representing both actual and potential enhancement of State legislative powers — actual in that it confers, by implication, power upon the Parliament of a State to participate in the legislative process which the paragraph requires, namely request (or concurrence) by a State Parliament and enactment by the Commonwealth Parliament; potential in that the State Parliaments are potential recipients of legislative power under a law made pursuant to the paragraph.

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(33) (1926) 37 C.L.R. 393, at p. 413.
(34) (1889) 14 App. Cas. 286, at p. 293.
(35) (1908) 6 C.L.R. 309, at pp. 367-368.

Is s. 5(c) a valid law pursuant to s. 51(xxxviii)?

Section 5(c) of the *Coastal Waters (State Powers) Act* does not in terms confer legislative power. It provides that the legislative powers exercisable by the States extend to the making of laws of the designated category. Its purported operation is to confirm the existence of the legislative power to make that category of law to the extent that it already existed and to confer that particular legislative power if, and to the extent that, it did not already exist. One possible broad characterization of s. 5(c) is as a law with respect to the power to make laws of the designated category. If that were the only

permissible characterization of a law which, like s. 5(c), provides that a State Parliament possesses power to make laws of a designated category, the requirements of par. (xxxviii) would be satisfied only if the power to make laws of the designated category could, at the establishment of the Constitution, have been exercised only by the Parliament of the United Kingdom. To the extent that a colonial parliament had power, the power of the Parliament of the United Kingdom would not have been exclusive. That would mean that par. (xxxviii) was partially ineffective to serve its intended function of providing for the local exercise of "any" power which was previously exercisable only by the United Kingdom Parliament since it would not extend to a law which confirmed, as distinct from conferred, State legislative power. The result would be that a law enacted in accordance with the procedural requirement of par. (xxxviii) to remove doubts about the existence of a particular State legislative power could only be within that paragraph if it were first found that the particular State legislative power did not previously exist at all. The result in the present case would be that s. 5(c) was a valid exercise of the legislative power conferred by s. 51(xxxviii) if, and only to the extent that, the legislative power to which it refers goes beyond the already existing legislative powers of the State of South Australia which we have held to be adequate to support the provisions of s. 14 of the State *Fisheries Act*. That being so, s. 5(c) of the *Coastal Waters (State Powers) Act* would provide no supplementary basis in Commonwealth legislation for the provisions of s. 14 of the State *Fisheries Act*.

A law can, however, ordinarily be properly characterized in a number of different ways. In determining characterization for the purposes of par. (xxxviii), we may take as a starting point some relevant legislative power which could, at the establishment of the Constitution, be exercised only by the United Kingdom Parliament. If no such relevant legislative power can be identified, that will be the end of the matter. If such a relevant legislative power can be identified, the question will then arise whether the particular law can properly be characterized as a law with respect to the exercise of that legislative power. In the case of s. 5(c), there is an obviously relevant legislative power which could, at the establishment of the Constitution, be exercised only by the United Kingdom Parliament. That power is the power to control by external (in the sense of external to the relevant State Constitution) legislation the extent of the legislative powers of the States (then Colonies) under their respective Constitutions by conferring, confirming or confining State legislative power or by confirming the validity of particular State (then Colonial) laws. Some of the provisions of the *Imperial Statutes* 13 & 14 Vict. c. 59 (*An Act for the better Government of Her Majesty's* Australian *Colonies*) and 28 & 29 Vict. c. 63 (*An Act to remove Doubts as to the Validity of Colonial Laws*) provide ready examples of the exercise by the United Kingdom Parliament of that formerly exclusive legislative power. Implicit in s. 5(c) is the assumption and exercise, by the Commonwealth Parliament at the request of the State Parliaments, of that legislative power in order to confirm and, to the extent necessary, confer the particular State legislative power. That being so and in the context of the settled broad interpretation of the words "with respect to" in s. 51, s. 5(c) can properly be characterized, for the purposes of par. (xxxviii), as a law with respect to the exercise of that formerly exclusive legislative power of the United Kingdom Parliament. It follows that s. 5(c) satisfies the requirement of s. 51(xxxviii) that it be a law "with respect to [t]he exercise within the Commonwealth, at the request of the Parliaments of all the States directly concerned, of [a] power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom ". Obviously, s. 5(c) is a law for the peace, order and good government of the Commonwealth in that it provides for the enactment of laws for the management of fisheries in Australian waters. There remains for consideration the question whether the qualification in the opening words of s. 51 "subject to this Constitution" confines the grant of power in par. (xxxviii) in a way which would preclude s. 5(c) from coming within its terms.

The only provision of the Constitution which arguably confines the grant of power contained in par. (xxxviii) in a manner which would affect the validity of s. 5(c) of the *Coastal Waters (State Powers) Act* is s. 106 which relevantly provides that "[t]he Constitution of each State shall, subject to this Constitution, continue as at the

establishment of the Commonwealth until altered in accordance with the Constitution of the State". It is debatable whether a Commonwealth law confirming and conferring legislative power upon the Parliament of a State can properly be seen as in conflict with s. 106's provision for the continuance of the Constitution of the State. It is, however, unnecessary for present purposes that we pursue that question since we are of the view that, as the purpose of s. 51(xxxviii) of the *Constitution* is to ensure that a plenitude of residual legislative power is vested in and exercisable in co-operation by the Parliaments of the Commonwealth and the States, the dilemma which is posed by the inclusion of the words "subject to this Constitution" in both par. (xxxviii) and s. 106 must be resolved in favour of the grant of power in par. (xxxviii). The result is that the continuance of the Constitution of a State pursuant to s. 106 is subject to any Commonwealth law enacted pursuant to the grant of legislative power in par. (xxxviii). It follows that s. 5(c) is a valid law of the Commonwealth. It is unnecessary to examine whether s. 5(c) can also be justified by reference to one or both of the two other heads of Commonwealth legislative power upon which reliance was placed by the Commonwealth, namely, s. 51(x) ("Fisheries in Australian waters beyond territorial limits") and s. 51(xxix) ("External affairs").

Answers to the questions in the special case

In the light of the foregoing and limiting ourselves to what is necessary for the purposes of the present litigation, we answer the questions asked in the special case as follows:

1. The Second Arrangement, which is to be construed as applying only to so much of the rock lobster fishery as lies within "waters adjacent to the State", is validly authorized by s. 12H(4) of the *Fisheries Act 1952 Cth* and s. 13(1) of the *Fisheries Act 1982 SA*.

2. Section 14 of the *Fisheries Act 1982 SA* is a valid enactment of the Parliament of South Australia.

3. Section 5(c) of the *Coastal Waters (State Powers) Act 1980 Cth* is a valid law of the Commonwealth.

4. There is no inconsistency between s. 14 of the *Fisheries Act 1982 SA* and the provisions of the *Fisheries Act 1952 Cth*.

5. The fishery the subject of the Second Arrangement (see 1 above) is to be managed in accordance with the law of South Australia by virtue of the making of the Second Arrangement and the provisions of s. 12L of the *Fisheries Act 1952 Cth* and s. 14 of the *Fisheries Act 1982 SA*.

In accordance with the agreement of the parties, there is no order as to the costs of the special case.
