Commonwealth Practice—
I International Law

A. Nationality and Citizenship

By H. B. Connell*

The Citizenship Act 1969 represents the first comprehensive review of the area of Commonwealth law in twenty years. With the incorporation of the changes embodied in this amending Act, the Principal Act was reprinted in consolidated form and renamed more simply the Citizenship Act 1948-1969.

Under the provisions of the new Act, a citizen of a Commonwealth country, including an Australian citizen, has the "status of a British subject". Under the previous Act he was, by virtue of that citizenship, a "British subject". The Minister said the terminology was agreed to because the possible alternative "Commonwealth citizen" would have been highly confusing in Australia which is itself a "Commonwealth".

The government has recognized the growing sense of Australian, as against British, identity by providing that primacy is given to the expression "Australian citizen" whenever a statement or declaration on national status has to be made.

To facilitate earlier naturalization in certain cases, the Act has been amended to permit the grant of citizenship after three years' residence to persons who satisfy the Ministry of Immigration that they can read and write English proficiently, and are in other respects well qualified for citizenship.

In contradistinction to the previous situation, when children born abroad could be registered as Australian citizens only if their fathers were Australian citizens, the Act now permits such registration where either the mother or the father is an Australian citizen.

Provision has also been made, in conformity with the United Nations Convention on the Reduction of Statelessness, that a child found in Australia shall be deemed an Australian citizen by birth.

Apart from the above provisions the Act updates the list of Commonwealth countries in the Principal Act s. 7 (2), to account for recent changes. The Act does not, however, do anything to repair the anomaly of the Republic of South Africa continuing to be regarded as a Commonwealth country and the use of special formula clauses for Irish citizens. If as one member remarked s. 7 (2) was no longer to be regarded as a list of Commonwealth countries but rather a group acquiring most favoured nation treatment this would, it is submitted, be a marked change of policy and would necessitate close consideration of the continued use of the concept of the status of a British

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subject. In 1948, Ireland was an anomaly and was treated as such by recognizing the need of a special provision. Is now South Africa not in this position? It may be thought that one of two solutions present themselves if it is the view of the government to persist granting favoured treatment to these two countries. Either both countries should be listed in s. 7 (2) and repeal ss. 8 and 9, or it is submitted South Africa should have a separate section bestowing status as with Ireland. Logically and consistently the present arrangement should not be allowed to persist.

B. Immunities

1. Diplomatic

(a) Traffic offences.—Senator Ormonde asked upon notice in the Senate the following question: "Is it true that diplomatic immunity is enjoyed by diplomats and their car drivers who ignore and offend against traffic rules? If this is so, will the leader of the Government ask the Prime Minister to consider withdrawing this immunity?"

The Minister for External Affairs on 15 April 1969 provided the following answer[1]:—

> "It has been a long-established custom under international law for the receiving country to grant immunity from the civil and criminal jurisdiction of its courts to the diplomatic representatives of a foreign State. These practices of international law were clarified by the Vienna Convention on Diplomatic Relations 1961, which was enacted into Australian law by the Diplomatic Privileges and Immunities Act 1967. Articles 31 to 40 of the Convention deal with the question of immunity. However, Article 41 states that it is the duty of diplomatic personnel to respect the laws and regulations of the receiving State. Cases of traffic breaches, like the infringement of any laws by diplomatic and other members of the staffs of Foreign Missions, are brought to the attention of the Mission concerned, with a view to preventing a recurrence of the infringement. Should the matter be sufficiently serious, consideration would be given to asking the Mission concerned to have the officer transferred from Australia. It is considered that these procedures are an adequate form of control.
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> "The Government does not propose any alteration of the Diplomatic Privileges and Immunities Act to restrict the degree of immunity at present accorded to members of Diplomatic Missions in Australia. The Vienna Convention has gained widespread acceptance throughout the world as providing a balanced and proper standard to be applied, and it would not be to Australia's overall advantage to depart from the terms of the Convention."

(b) Sales Tax.—Mr. Lee (Liberal) on 21 May 1969 asked what Sales Tax concessions are applicable to foreign diplomatic staffs, whether there was evidence of trading in these concessions, and how our sales tax concessions compared with those available to our diplomatic representatives overseas.

The Acting Minister for External Affairs (Mr. Fairhall) replied:—

> "Sales tax concessions available to members of diplomatic missions in Australia are confined to imported goods and excisable goods of Australian origin. In addition, under an arrangement administered by

1 Senate Vol. 40, p. 771.

> the Department of External Affairs, Australian cars can be bought free of sales tax but only under certain conditions. Cars bought free of sales tax cannot be sold in Australia under two years without the sales tax being paid. To the extent that there have been some sales, but strictly under the conditions I have referred to, there is no evidence of any trading, nor is there any evidence of diplomatic missions taking advantage of these concessions. I think the honourable gentleman might be advised that the average country overseas treats our diplomatic missions on about similiar terms, but there are a few countries whose concessions to our diplomats are even better than ours to theirs."

It should be recognized that sales tax is a concession over and beyond that required by the Vienna Convention. A diplomatic agent need not be exempted from an indirect tax of a kind which is normally incorporated in the price of goods or services.[2] It is, however, the practice of a number of States to grant such exemption either wholly or in part with respect to sales tax. Australia, therefore, could be expected to react on a reciprocal basis.

In fact, Australia has provided statutorily for sales tax exemption by s. 10 of the Diplomatic Privileges and Immunities Act 1967, though query how effective the sanction is that is contained in sub-section (3).

2. Special missions

Two important statements have been made by the Australian delegate (Sir Kenneth Bailey) to the Sixth Committee of the United Nations on the draft convention on Special Missions. On the whole, Australia has been unenthusiastic towards the draft convention and has counselled caution.

On 11 October 1968 he said:—

> "... It seems to us necessary, therefore, for further, and close, thought to be given to the standard pattern of privileges and immunities to be adopted in the draft convention. The principle involved seems to be fairly generally agreed: I mean the principle that privileges and immunities should be restricted to those which are necessary for the proper functioning of the special mission concerned. But what is needed, we think, is closer consideration of the way in which this principle should be worked out in respect of the broad categories of special missions that are most commonly sent and received.
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> "The Australian delegation recognizes the inherent difficulties of framing a definition which is required to cover such a great diversity of types as is the definition of Special Missions. We recognize also the necessity for distinguishing a special mission properly so called from the very amorphous category of visits under official auspices, in respect of the latter of which categories no question of a special regime of privileges and immunities would presumably arise. Australia is a country that lies geographically on the periphery of the world's great centres of population and political organization. In the nature of things, therefore, Australia itself is in the habit of sending a large number of official representatives abroad, whether strictly in the category of Special Missions or otherwise. Accordingly, the question of definition in Australian eyes acquires special practical everyday significance. As at present advised, the Australian delegation does not feel either that the definition embodied in the draft articles supplies a sufficiently clear

2 Vienna Convention on Diplomatic Relations, Art. 34 (a).

answer to the kind of problems that have arisen in our own experience, or that we can offer at the moment a satisfactory alternative.

"There remains the question of how the further consideration of the draft articles should proceed. The delegation of Australia, like several other delegations, is not wholly convinced of the necessity for a formal convention to deal with special missions in general, but is prepared to concede for present purposes that such a convention may well be desirable."

Again, on 31 October 1969, Sir Kenneth Bailey was equally cool towards the project. *Inter alia* he said:—

"There has been a great deal of State practice in sending and receiving of Special Missions, but it is in no sense uniform. Special Missions themselves have been and are of the most diverse character—political, military, economic, humanitarian, police, transport, water supply, health and so on. I am not quite sure whether in saying that Special Missions from the point of view of privileges and immunities fall not into two but into 42 categories the distinguished Expert Consultant intended the figure to represent an arithmetical computation or used it rather as a kind of dramatic gesture. On either interpretation, he certainly established for us the point that the task of the Commission in preparing the present articles was basically a task *de lege ferenda,* in which the major decisions to be made were in many cases political rather than juridical in character." ... "One result of the enormous increase in international contacts since World War II has been an increasing demand on all Governments to confer and recognize rights to privileges and immunities of an ever-extending number of representatives of foreign Governments and international organizations. This is not always a popular process, particularly since, as the distinguished representative of Ceylon said with such cogency yesterday, it necessarily represents in greater or lesser degree financial concessions and a derogation from the principle of equality before the law."

He then went on to quote his own Government's views embodied in a comment on the 1965 draft articles and contained in the 19th Session report of the International Law Commission[3]:—

"The wide scope of the draft articles causes the Australian Government particular concern because of the intention to extend to all missions that come within the articles a range of privileges and immunities based on those contained in the Vienna Convention on Diplomatic Relations, which deals of course with permanent diplomatic missions. The Australian Government does not believe that the extension of this wide range of privileges and immunities to all types of special missions would be justified. It considers that the grant of privileges and immunities should be determined by functional necessity; i.e., they should be limited strictly to those required to ensure the efficient discharge of the functions of the special mission and should have regard to the temporary nature of the mission in that connexion. It is also necessary to have regard to the status of the person who is the head of the special mission. Standards of privileges and immunities that would be appropriate in the case of high level missions, whose heads hold high offices of States, should not be made automatically applicable to other cases."

Australia has exhibited some reluctance in its approach to international immunities conventions. To the end of 1969:—

1. It has acceded to the Convention on the Privileges and Immunities of the United Nations.

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3 P. 28.

2. It has not acceded to the Convention on the Privileges and Immunities of the Specialized Agencies and has, therefore, not applied the Convention to any one of the agencies, though as a matter of practice it may have done so.

3. Australia signed the Vienna Convention on Diplomatic Relations on 30 March 1962. Ratification, however, did not take place until 26 January 1968.

4. Australia signed the Vienna Convention on Consular Relations on 31 March 1964, but has not ratified it.

5. The Convention on Special Missions only opened for Signature at New York on 16 December 1969. Australia, however, from the statements of policy above may take some time before it is convinced that it should accede.

In 1969, the International Law Commission also reported on the subject of privileges and immunities of State representatives to international organizations.

C. Territory

1. Coral Sea Islands Territory—Acquisition:—On 2 September 1969, the Governor-General gave his assent to the Coral Sea Islands Act the object of which Act was to acquire for the Commonwealth of Australia all islands within certain defined limits of latitude and longitude situated in the Coral Sea. These islands were by section 3 of the Act declared to be a Territory of the Commonwealth by the name of Coral Sea Islands Territory.

The Act provides that the Governor-General may make Ordinances for the peace, order and good government of the Territory (s. 5 (1)). The Courts of Norfolk Island are to have jurisdiction in the Territory (s. 5).

This Act is interesting from the point of view that whilst many states of the world are busy dispensing with their appendages, Australia is still acquiring. Since 1950, Australia has acquired Heard and McDonald Islands (1953), accepted the Cocos (Keeling) Islands (1955), accepted Christmas Island (1958), and now acquired the Coral Sea Islands. Various policy factors have determined the acceptance and acquisition of these territories.[4] In the case of the Coral Sea Islands, Australian fishing and mining interests in the seas and on the shelf surrounding these islands necessitated Australia's acquisition of the islands thus preventing later claims by other interested powers, in an area where Australia has the best title.

In justification of the acquisition, the Minister of Territories, Mr. Barnes, in introducing the Bill to the House of Representatives, alluded to various Acts of Sovereignty by the Commonwealth. He said, "A lighthouse has been erected on Bougainville Reef and beacons are operating on Frederick Reef and Li Lou Bay. A meteorological station

4 Some legal considerations arising from these acquisitions and cessions are discussed in *International Law in Australia,* Chapter XII (Law Book Co. 1965).

has operated in the Willis Group since 1921 and there is an unmanned weather station on Cato Island. They have been regularly visited by Royal Australian Navy Vessels. Survey parties from the Division of National Mapping in the Department of National Development have completed a survey of most of the islands." Additionally, now, of course, is the Coral Sea Islands Act itelf, arising from which there has been, as yet, no international protest.

The Minister foreshadowed that the Petroleum (Submerged Lands) Act 1967 would be extended to these islands in the Coral Sea and to their adjacent submerged lands. Each island has, of course, its own territorial sea and continental shelf.

2. State and Federal Off-shore Jurisdiction:—On 19 August 1969, Mr. Wilson (Liberal) addressed a question to the Attorney-General (Mr. Bowen) concerning the decision of the High Court in the case of *Bonser* v. *La Macchia*[5] as to the question of jurisdiction over Australia's off-shore areas. In reply the Attorney-General said:—

> "In the case of *Bonser* v. *La Macchia,* a fisherman who was operating six and one half miles off the New South Wales coast was convicted of using a mesh which was too large in breach of the Commonwealth Fisheries Act, which applies in what is called Australian waters. A constitutional point was raised and it went to the High Court. All justices held that he was rightly convicted and that the Act was valid. But it is true that two justices, the Chief Justice and Mr. Justice Windeyer, expressed the view that the Territory of New South Wales ceased at low water mark. The other justices did not find it necessary to decide that particular point. Therefore, at the moment one could say that there is no binding decision of the High Court on the point.
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> "As to State and Commonwealth legislation, this operates mainly in the fisheries and mining areas. So far as fisheries are concerned, the existing position is that the State fisheries legislation operates out to three miles, and the Commonwealth Fisheries Act operates beyond that point. If one accepts the judgments of the two justices, the State would have power to enact its fisheries legislation as extra-territorial legislation. But the consequence would follow that if the Commonwealth chose to legislate over fisheries within the three-mile limit, its legislation would become paramount and would operate so as to set aside the State legislation. The present system which has been operating for very many years has been working satisfactorily.
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> "So far as mining of off-shore oil is concerned, there already is joint legislation in similar terms passed by the Commonwealth and the States, which honourable members are aware was negotiated. The Commonwealth negotiators were aware of the possibility of asserting a claim to territory certainly outside of the three-mile limit and possibly within the three-mile limit below low water mark. On the other hand, there was State awareness of the possibility of disrupting such claims and, in any event, this State power to legislate extra-territorially, and the possibility also of the State threatening to deny ports or land mass in the State to anyone operating under a Commonwealth lease, if the Commonwealth went it alone. The course which was taken was to resolve the difficulties and doubts and to give security to people who were taking leases by co-operating and combination between the Commonwealth and the States. That was done in the off-shore legislation. There are other minerals to be dealt with, and it will be a

5 43 A.L.J.R. 275.

question of deciding how this should be done, bearing in mind what has been said by the judges. This matter is currently under discussion."[6]

3. Queensland-Papua-New Guinea Boundary:—On 5 June 1968, the Independent Labour Member, Mr. Benson, addressed a question to the Attorney-General concerning the boundary between the State of Queensland and the Territory of Papua-New Guinea. He was concerned that the islands of Boigu and Saibai presently within the State of Queensland were within two miles of the Papuan coast and that the area surrounding these islands should be proclaimed Australian territorial waters.

The Attorney-General, Mr. Bowen, gave the following reply:—

> "When independence is granted to Papua and New Guinea the question may have to be faced as to whether these two islands, which are two miles off the shore of Papua (I thought it was one and a half miles) should in some way go to that newly independent nation. But leaving that problem aside, they are at present part of the territory of Queensland. Territorial waters extend in a three-mile radius and include other islands between the tip of Cape York Peninsula and Papua. A problem which I have been considering for some time is whether we can assume some control over the Torres Strait which would assist us to get a greater control of the Gulf of Carpentaria. When Sir Kenneth Bailey was in Australia early this year I took the opportunity to discuss this matter with him. He is a world authority on this field of law. I am currently having conferences on this matter and on the Great Barrier Reef with my Solicitor-General and advisers in my Department who are experienced in this field of law."

The suggestion by the Attorney-General that some of the off-shore islands in Torres Strait might be ceded to the Territory of Papua-New Guinea when it becomes independent is bound to be controversial to a Queenslander and will present some constitutional problems. With the new international rules about fishing and the Continental Shelf the value of these islands to Queensland rests in the possibilities of exploitation of the undersea resources.

Queensland has been under pressure since the latter part of the 19th century to release areas of Torres Strait. So far it has vigorously resisted all advances. The history of these boundary disputes in Torres Strait is shortly told by Van der Veur in his book, *Search for New Guinea's Boundaries*.[7]

4. Exclusive Fishing Zone:—The Attorney-General, Mr. Bowen, on 18 September 1969, made the following answer to the Liberal Member for Griffiths, Mr. Donald Cameron, on the seizure of a Nationalist Chinese fishing vessel off the Queensland coast:—

> "... As my colleague, the Minister for Primary Industry, announced to the House on Tuesday, there was an arrest of the Chinese vessel by HMAS 'Bayonet'. The vessel was said to be fishing about the West

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6 A very recent article by Professor D. P. O'Connell discusses comparatively this question as it affects Commonwealth countries. See Journal of Maritime Law and Commerce, vol. 1, No. 3, 1970, p. 389. "The Federal Problem Concerning the Maritime Domain in Commonwealth Countries."

7 Van der Veur, *Search for New Guinea's Boundaries*, A.N.U. Press, 1966, chapter 3.

Melville Passage off the north coast of Queensland and within the 12-mile limit. The vessel was taken into Cairns. My information is that Commonwealth police officers and Crown law officers are at present investigating the facts of the matter to determine whether charges should be laid against the captain and crew and possibly some action taken against the vessel. Penalties under the Commonwealth Fisheries Act range up to a fine of $10,000 and in some cases confiscation of the vessel." ... "So far as assurances of the Ambassador are concerned, it is clear that steps have been taken by the Government of Taiwan to prevent this sort of incident occurring. We have received assurances from that Government and I have no reason to suppose that its instructions have not been fully carried out. A country is not in all circumstances able to control the actions of individual nationals."

The Act referred to is the Fisheries Act 1952-1968 (Com.). In 1967, s. 4 of the Principal Act was amended to make provision for an exclusive fishing zone extending 12 miles seawards from the baseline from which the territorial sea is measured. This was a unilateral action taken by Australia after studying the procedure and practice adopted by Canada, New Zealand and U.S.A. Unlicensed foreign vessels and crews fishing within these exclusive limits face the prospect of the prescribed penalties in s. 13AA of the Act.

5. Waters of the Great Barrier Reef and the Gulf of Carpentaria:— The Labour Member for Dawson, Dr. Patterson, introduced an urgency motion into the House of Representatives on 30 May 1968, concerning the possible conversion to internal waters of the Gulf of Carpentaria and of all the off-shore areas of the Great Barrier Reef.

The Attorney-General, Mr. Bowen, in reply outlined the government position on this question. Amongst other things he said:—

"To give effect to the motion, it would be necessary to seal off the waters inside the outer line of the Great Barrier Reef and the waters of the Gulf of Carpentaria and to make those waters technically internal waters of Australia. Australia's territorial area would be measured then from the outer limits of the line of the Great Barrier Reef and from the straight line across the top of the Gulf of Carpentaria. Action of this kind certainly would raise important questions of international law and international policy. As a great island continent, Australia is dependent on keeping open its sea and air routes to other countries, particularly in the region of South-East Asia. I think there was a glancing reference in the speech of the honourable member for Dawson to the effect that we were at present in dispute with other countries in relation to closing off areas of sea by joining islands. Australia has even greater interests to take into account and to weigh in the scale beyond those of the fishing problem which seems to be exercising the mind of the honourable member for Dawson.

"I would not wish, by anything that I say today, when I come to discuss the legal position to foreclose the possibility in the event of changes in the international law of Australia taking some action to make wider claims other than those it is making at the present time. Probably no other field of international law is more in a state of flux than this field. There is a considerable amount of change and even the territorial limits claimed by different countries vary very widely, some of the South American countries claiming up to 200 miles.

"Concerning settled international law, I think the honourable member realizes that the claim that he wishes us to make would be protested immediately and that we could not uphold what we had done if we were taken before the International Court of Justice. I think the

honourable member realizes this. But he still wishes us to make the claim as a gesture. However, if we do so, that would raise in itself a considerable problem for Australia not only in the way that I have mentioned in relation to sea and air lanes but also in relation to the attitude that has been taken always by the United States of America and the United Kingdom. Our action would bring Australia into conflict with those countries.

"I wish to say a word as to the position both as regards the Great Barrier Reef and the Gulf of Carpentaria. So far as the Great Barrier Reef is concerned, it is generally understood by members here that the territorial water goes out from the three-mile limit measured from the low water mark. Currently, the Commonwealth has announced baselines and is drawing a map to show where the baselines around the whole of the coast of Australia are. This is a very lengthy, and, indeed, an extremely expensive mapping operation. But it is well on the way and this will make clear where these limits are. It has been necessary to apply the 1958 convention to a number of bays and islands and to make decisions as to the applicability of international law in drawing these baselines. But the territorial limit is three miles out.

"The House is aware also that the Government has recently, by amendments to the Fisheries Act, extended the fishing limit out to 12 miles. The honourable member for Dawson rather treats this Act with a degree of scorn. The fact is that this will be of importance to the fishing industry. It will be enforced to the best of our ability. Australia has such a long coastline that the problems of enforcement are very great indeed. But as has been announced, the Minister for Defence, Mr. Fairhall, is taking action in conjunction with the Minister for Primary Industry, Mr. Anthony, to use the naval and air forces of the Commonwealth specifically in relation to this task. The Commonwealth is presently in consultation with other nations which seek to come into the 12-mile limit area. It is simply not true to say that this Act is to be a dead letter and that the 12-mile limit provision will not be observed. New Zealand has had the experience of extending its limit to the 12 mile mark and is finding that it is getting the benefit of this extension. The Commonwealth Government has extended the Australian limit. As I say, conferences are in progress at the present time with those who wish to get particular rights which perhaps would impinge on what we have done.

"The other thing of course, and this particularly applies to the Great Barrier Reef itself, is that the Commonwealth Government has legislative power in regard to the continental shelf. So far as there are islands and so far as the Great Barrier Reef itself at certain points is above high water at all times, these areas are the territory of Queensland. There is a territorial area of three miles around the Reef. There would be a fishing limit of 12 miles around it. This, the honourable member for Dawson says, is difficult for fishermen. I do not think that it is as difficult as the honourable member says. His attack really is on the international law rules. He just does not like them because they create difficulties. Every nation of the world has these difficulties. It is simply not helpful to say that these rules lead to difficulties in determining whether a fisherman is inside or outside the 12 mile limit. There has been no great practical difficulty in the past in determining these matters.

"I come now to that part of the Great Barrier Reef, this is the major part of it, that is below water at high tide. This is not the territory of Queensland; it is part of the continental shelf of Australia. The continental shelf of Australia extends out beyond the Reef and it includes the portions of the Reef to which I have referred. This gives us power to legislate with respect to fish which are attached to the Reef and with respect to minerals and other matters on the sea bed.

As the House will be aware, we have, concerning fish, the Pearl Fisheries Act which deals with certain types of fish, trochus shell, pearl shell, green snail, bêche-de-mer and so on. It would be possible to extend the provisions of this Act. This is under consideration, as a further step, at the present time, with the Minister for Primary Industry in consultation with Queensland so that this legislation would cover what it does not now cover—for example, clams on the Great Barrier Reef. If it is made an offence in breach of the Act to take these things when the Act is amended, it would be a matter of policing the provision to see whether any foreign fishermen or any Australian national took those things from the Reef in breach of the Act . . . ."

"As regards the Gulf of Carpentaria, the honourable member knows the position there. This matter has been discussed in the House on other occasions, but still the honourable member persists in citing the precedent of Hudson Bay and stating that we should claim for Australia the Gulf of Carpentaria. I would say simply that because of the width and configuration of the Gulf of Carpentaria, it is a type of bay which normally, under international law, has been accepted as unclaimable. I do not wish to foreclose Australia's position should there be any change in future thinking on this matter of international law, but under the ordinary rules we are entitled to territorial waters extending three miles from the shores of the Gulf. We already have fishing rights in the waters extending 12 miles from the shores of the Gulf.

"The honourable member has said that we should close off the Gulf. The Gulf measures 320 nautical miles across. It is clear from Article VII of the Convention on the Territorial Sea and the Contiguous Zone, which we signed in 1963, that we are not entitled to close off the Gulf as internal waters. Two cases are referred to in Article VII where, in spite of the existence of a wide mouth, such as we have in the Gulf of Carpentaria, a special claim may be made. One case is that of a so-called historic bay. The other is where the straight base line system provided for in Article IV is applied. Article IV does not help us so far as the Gulf of Carpentaria is concerned.

"All that remains for us is to consider whether we should claim the Gulf as an historic bay. I suppose it is on this provision that the honourable member would found his argument: Hudson Bay is an historic bay and therefore we should be able to claim the Gulf of Carpentaria as an historic bay. The difference between the two areas is so marked that it is not possible to base a claim on the Hudson Bay precedent. If one studies the map one will see the difference in configuration between the two areas. But there is also a difference in their histories. There is only one practical entrance to Hudson Bay; there is a channel into the Atlantic. That channel or strait is 500 miles long. The eastern entrance is 35 miles wide and the western entrance is 45 miles wide. That is a narrow strait. Hudson Bay is virtually a land-locked sea.

"But this is not the only matter of difference between Hudson Bay and the Gulf of Carpentaria. Exclusive occupation of Hudson Bay has been held since 1670, first by the Hudson Bay Company and later by its successor, the Canadian Government, who in fact excluded people from the Bay and have therefore complied with the rules which would make it an historic bay under Canada's exclusive jurisdiction. Unfortunately we cannot make this claim in relation to the Gulf of Carpentaria. In the past we have not acted in such a way as to be able to claim that we have excluded people from the area and made it an historic bay. Therefore we do not have the necessary foundation on which to base a claim that the Gulf of Carpentaria is an historic bay. To cite Hudson Bay as a precedent serves no purpose."

One of the administrative difficulties that the Government faces and which the Attorney-General recognizes is the problem Australia

has in adequately policing its off-shore areas. Australia has one of the longest coast-lines of any country in the world and certainly one of the most open. The Soviet Union and Canada, for instance, are protected by the virtual inaccessibility of their Northern coasts. In the past, Australia has used either its Navy or Air Force for some *ad hoc* patrolling. With the increase in the area of exclusiveness off-shore, this method of patrol is hardly sufficient. Attention, no doubt, will have to be turned to consideration of a coast-guard service using modern vessels and aircraft. This is a rather costly operation but appears now to be a necessity. This service could also have customs functions and might well have moderate defence potential.

Following the urgency motion, Dr. Patterson further asked the Attorney-General, Mr. Bowen, on 7 June 1968 whether Australia was inhibited from taking unilateral action to close off the waters of the Great Barrier Reef because of the attitude it has already taken to Indonesian claims concerning waters within the Indonesian archipelago.

The Attorney-General replied:—

> "Australia has objected[8] to Indonesia that Indonesian claims to draw baselines connecting the outer islands of the Indonesian archipelago are not in accordance with recognized principles of international law.
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> "The whole point with regard to the Great Barrier Reef is that other means than the drawing of baselines are available for fully preserving the reef and its resources, including live and dead coral and resources such as clams. Some measures are already in existence. The Commonwealth is discussing with Queensland what further legislation is needed, particularly to protect the coral reefs themselves. All these positive steps can be taken in accordance with recognized rules of international law relating to the resources of the continental shelf. They are in fact in line with recommendations that have been made to the Commonwealth and Queensland Governments by the Great Barrier Reef Committee,[9] a well-known private body of experts which devotes its attention to matters affecting conservation and the proper utilization of the reef."

D. Extradition

Amendments were passed during 1968 to the Principal Acts on Extradition—Extradition (Commonwealth Countries) Act 1966 and Extradition (Foreign States) Act 1966. Australia in its eagerness to implement generally the Scheme for the Rendition of Fugitive Offenders formulated at a Conference of Commonwealth Law Ministers in London in 1966 was the first to legislate in conformity with the

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8 Australia, as is well known, has objected to the archipelagic claims embodied presently in municipal regulations of both Indonesia and the Philippines. The success of such claims would result in the Java, Flores, Banda, Celebes, and Sulu Seas and other off-shore areas becoming internal waters of Indonesia and the Philippines. These areas, apart from the comparatively small Territorial Sea belt surrounding the various islands, is presently High Seas.

9 This is a reference to a legal sub-committee of the Great Barrier Reef Association. The committee was convened by Dr. R. D. Lumb, of the Law Faculty, University of Queensland.

Scheme but introduced a modification into its legislation to the specialty rule relating to the trial of a person for a lesser offence. This modification, however, was not in the terms of the exception to the specialty rules allowed by the Scheme. Other Commonwealth countries, however, when they legislated, did not follow the Australian lead and retained the Scheme exactly. As a result, Australia amended so that Australian law would conform with the London Scheme.

E. Recognition

1. Countries not recognized by Australia:—The Labour member for Corio (Mr. Scholes) asked upon notice the following question:—

> "1. What governments which are in control of nations are not accorded diplomatic recognition by the Australian Government?
> 2. Does Australia have trade arrangements with any of these countries?"

The Minister for External Affairs, Mr. Hasluck, on 13 June 1968 made the following reply:—

> "1. It is a matter of judgment whether a 'government' exercises de facto control over a country (or a part of a country). Among the governments which are recognized by some countries but not recognized by Australia are Communist China, North Vietnam, North Korea, East Germany, Rhodesia and Biafra.
> 2. The Austraian Government does not have trade 'arrangements' with any régime it does not recognize. Non-recognition does not, of course, in itself prevent trade being carried on by other agencies or by individuals with the countries concerned."

2. Effect of recognition upon Statehood:—The Liberal Member, Mr. Killen, asked a series of questions on Southern Rhodesia towards the end of 1968 one of which evoked an interesting reply from the Minister of External Affairs, Mr. Hasluck, in so much as it indicated the prevailing government view on the effect of recognition on Statehood.

Mr. Killen had asked, "What criteria does the Government use to determine the existence of a State in international law?" On 19 September 1968, Mr. Hasluck replied as follows:—

> "The question of the presence of the normal requirements of Statehood would be examined. However, recognition, as the sovereign act by which the existence of a State at international law is acknowledged, is finally a matter for the Government in each particular case."

This view consistently follows that given by a former Minister (Mr. Casey) in relation to China and commented upon in the previous Yearbook.[10] The views expressed indicate that the Government goes close to accepting the constitutive theory of recognition as to its nature, function and effect. Mr. Killen was at pains to point out that a former Labour Minister for External Affairs, Dr. Evatt, argued strongly in the Security Council in 1947 during the Netherlands-Indonesia dispute that the Republic of Indonesia was already constituted a state in international law. This view was strongly challenged by the Netherlands. To have held the Evatt view would give support to the declaratory theory that recognition was merely a formal ack-

10 1967 A.Y.I.L. p. 239.

nowledgement of what already existed in fact. It is not altogether clear, but it may be that theoretically the present opposition in Federal Parliament would support such a theory thus accepting a position rather closer to that held by Great Britain over the years.

F. Law of Treaties

On 23 May 1969, the Vienna Convention on the Law of Treaties was opened for signature. Australia participated in both sessions of the Conference which finally led to the adoption of the Convention. Owing to the many important issues this Convention raises, a full discussion of Australian Governmental attitudes will be held over to the next Yearbook.