The Tax Institute

# State Taxes Conference

## Jurisdictional boundaries and immunities – Come and get me

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# 1. Foreign Princes, Far Waters, & Outer Space†

This is a journey through the quiet backwaters of jurisdictional boundaries and State immunities, which we will explore through worked examples.

A difficult idea, in egalitarian times, is why one sort of actor might claim to be immune from taxes; court processes (whether adjudication or execution); or otherwise able to claim immunity or privilege. Another actor, even in the same transaction, may have none of these privileges and immunities, even though that person is engaging in similar businesses.

A further conceptual challenge is about the boundaries of a State or Territory. We do not think much about this. We think it is obvious, and much of the time there are obvious answers.

But could a transaction on a ship at sea off of a State, or on the International Space Station (***ISS***) (as it passes over a State) be subject to taxation in, for example, that State? Where must property be, for the property to be within a State?

We know that the ISS is in low earth orbit. Does it make a difference if a transaction is signed in a higher orbit; on the Moon; or in orbit around another object? What if the property or person related to the transaction is in orbit, or elsewhere in space?

Where I have workers at desks or on mine sites in a jurisdiction, plainly I must consider payroll tax there.

But what of workers on oil and gas platforms, workers laying pipes and cables in the deep oceans; or a worker operating a robot from, say, Singapore instead of sending a worker into the dangerous environment of the coastal sea or deep ocean?

† I acknowledge with gratitude the comments of Mr Robert Parker. Any remaining errors are mine.

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# 2. Scenario

This scenario has no basis in fact. I do not suggest that any of the states, territories or countries would act in the way portrayed in this fictional example. And names are fictionalised, not intending that any person, living or dead, be purportedly represented in the worked example. Anyone claiming to be misrepresented, despite that disclaimer, should advise and the name will be changed.

## 2.1 The liquified natural mutton pipeline

### 2.1.1 The LNMP

The superabundance of sheep in New Zealand is a potential source of greenhouse-reducing energy. On a net basis, consuming mutton reduces methane production in New Zealand. And mutton can be liquified using a simple process one step along from the traditional process of canning mutton, seen in colonial times.

Thus, the Queensland, New South Wales and Victorian Governments have asked for expressions of interest in building a pipeline from Dunedin's Port Otago, to any one or more of 3 ports in Australia:

- Port Melbourne,
- Newcastle and
- Gladstone,

for the transport of Liquified Natural Mutton (***LNM***). Each port has nearby a powerhouse (or pipes onshore to a powerhouse) that can be adapted to burning the fat-rich goodness of LNM.

The LNM Pipeline (***LNMP***) is visionary, as there is a constant, inexhaustible supply of mutton, which does not vary materially with wind or sunshine.

As we will see, the proponent favours Gladstone.

### 2.1.2 The GPPC

In conjunction with the import of LNM, the States are willing to export peak electrical power generated by wind and solar.

The expression of interest for the LNMP thus asks about capability to lay parallel high voltage electricity cables along the course of the LNMP (the ***trunk line***). This is the first leg of an anticipated Greater Pacific Power Cable (***GPPC***).

One purpose of the GPPC, as the trunk line runs along the length of the LNMP, is to power compressors and de-watering stations *en route* (at depth).

But the substantial purpose is export of green electricity to the Pacific. New Zealand is two, or sometimes three, hours ahead of the eastern States. Solar production in Queensland, in summer, would power New Zealand's peak early evening demands.

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## 2.2 Who is interested?

There is only one person with sufficient vision to bring this together.

Space entrepreneur, Melon Tusk, is alerted to this ambitious proposal on Twitter. She is excited because she has previously worked on another Australian power scheme and knows the strength of the administrations in Australia with which she will be dealing.

She is just preparing for launch aboard her private space vehicle to inaugurate a new means of supply to the International Space Station (***ISS***). As part of the *quid pro quo* for providing a new and reliable resupply vehicle, Melon Tusk has been granted a small amount of office space in one corner of the ISS from which to do business during the next 60 days. She is very excited and thinks that she can conclude the deal and begin physical works on the pipeline and cable during that time.

### 2.2.1 Structuring

Melon never puts a project on balance sheet, if she can help it. For that matter, no Australian State wants this kind of risky project on balance sheet, also.

Having vision is one thing. Finding an ultimate owner is the key. The strongest balance sheets, with capital available in the region (*and I am making this up for the purpose of the exercise*) are in Singapore and Taiwan.

Melon calls her contacts in their respective sovereign wealth funds.

Both sovereign wealth funds are interested. Sale to them would leave Melon as the visionary, tolling ownership by foreign States for say three decades. There would be an overriding royalty based on volume and usage, on both the pipe and the power cable.

But first, Melon decides she is best able to extract a return by doing preliminary “proof of concept” work. The States have specified that the pipes will be a self-burrowing metallic compound, but this causes complications laying a parallel power cable.

### 2.2.2 The project comes together

Melon is given exclusive rights to prove concept. The Premiers of the 3 States sign during a National Cabinet meeting held in person in Canberra; and Melon signs on the ISS, from her dedicated office space.

Melon makes things happen. In the first 30 days, while she is aboard the ISS, she:

- Co-opts production of sufficient self-burrowing pipe to span the first 500km from Gladstone, out into the Pacific.
- Buys liquefaction, compressing and de-watering facilities, and places them at plant dumps at Port Otago and harbour land at Gladstone.
- Licenses intellectual property in:
    - self-burrowing LNM pipes, and
    - oceanography needed to settle on a final pathway.

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- Commissions research at Chancellors University of Queensland (***ChUQ***) to overcome the electrostatic issues between self-burrowing LNM pipes and electrical cable in the deep oceans.
- Charters four pipe/cable-laying ships, which are committed by their charters to 3 years' work exclusively on the project. The charterparties require the ships to reflag in Australia at a home port of Kingston, Norfolk Island, or Gladstone, Queensland, at Tusk's option. (She designates two for Kingston and two for Gladstone.) The charterparties contain options to step in, or purchase, in favour of the proponent of the scheme.

Melon has spoken with the Prime Minister of New Zealand, who is enthusiastic about the idea of Dunedin having new industry. The PM has already offered the city block previously occupied by the Cadbury plant.[1] Both New Zealand's central government, and the port authority, will do everything possible to increase income tax and harbour dues, respectively.

The regulatory issues are therefore only in Australia for the purpose of this scenario.

[1] In truth, the new Dunedin Hospital is being built on this site.

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# 3. Land Boundaries

The scenario is deliberately concentrated on maritime boundaries, rather than the arcane and diverse land boundaries on the continent of Australia. There is no general principle to be derived from close examination of Australian land boundaries, except this – the closest study particularly of colonial records is required owing to anomalies in how boundaries were set.

## 3.1 Examples from Victoria

### 3.1.1 Murray River – Victoria–New South Wales

To give an idea of the difficulties of the land boundaries, I first mention *R v Graham.*[2] The accused shot the deceased twice in the head. Either of the two shots might have killed the man instantly. The first shot hit the deceased while he was above the top of the southern bank of the Murray River. There was a question of fact as to whether the second shot hit the deceased at a time when the deceased had fallen down the bank into the river. This was a live question for the jury because the victim would have been in New South Wales if, when struck by the second shot, he had fallen down the bank into the river.

I do not draw any general rule from that case, except that it is necessary to study the land boundaries carefully to understand where, for various historical and accidental reasons, each State or Territory begins and ends.

There is no point simply knowing that part of the boundary between Victoria and New South Wales is at the top of the southern bank of the Murray River. This will not allow you to derive any general principle. As Greg Taylor shows in *The Constitution of Victoria*[3]:

> The **boundary with New South Wales** runs from Cape Howe to the source of the River Murray along the 'Black-Allan Line', and the along the top of the southern bank of the River Murray until it reaches the eastern boundary of South Australia. …
>
> Difficulty arises when the waters of the Murray temporarily divide around an island: it must then be decided whether one section of the waters is the sole stream of the Murray, or both are. In both recorded cases in which this issue has been raised so far it has been decided that the Murray is the northern stream only, with the result that the land forming the island concerned is in Victoria up to the top of the island's northern bank.

For completeness, it should be noted that Victoria gave up on a third island, Puggarmilly Island, since the main channel of the Murray River flowed to the south of that island.[4]

The decision of the Privy Council in relation to Pental Island does not seem to be a judicial decision. It contains no reasons, but the NSW Parliamentary papers set out at length the facts and arguments.[5]

[2] [1984] VR 649.
[3] The Federation Press, Sydney, 2006, page 13.
[4] Cumbrae-Stewart, "Australian Boundaries" (1965) 5 UQLJ 1, 8.
[5] (1872-1873) 1 Votes & Proceedings, Legislative Assembly, pages 519-520.

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### 3.1.2 Survey error – Victoria-South Australia[6]

The boundary between South Australia and Victoria is even more peculiar. According to Taylor[7] the border was initially fixed by the Letters Patent creating the Province of South Australia in 1836. The line was meant to lie along the 141st degree of east longitude.

Owing to survey error, it was marked out about 3.6 kilometres to the west. Victoria therefore has more land than it should have had under the Letters Patent. However, and by virtue of a decision of the Privy Council, the boundary truly lies now on the original survey line.[8] As Taylor notes, it is thus important that the location of the originally surveyed line should not be lost. But, at least at time of publication in 2006, Taylor commented that the border was becoming hard to find, if not "entirely beyond recovery".

Owing to this error in demarcation, "a short portion of the boundary between Victoria and South Australia also runs along the Murray River in order to restore the eastern boundary of South Australia to its true meridian when it becomes the boundary of that State with New South Wales rather than Victoria". The obscurities about this short section of the boundary owe to "the existence of the South Australia/Victoria river boundary [being] … the result of a surveyor's error anyway".[9]

### 3.1.3 85 metre land boundary – Victoria-Tasmania

The boundary between Victoria and Tasmania was fixed at 39 degrees 12 minutes of south latitude, and this determines which islands in Bass Strait belong to Victoria. Boundary Islet is on that line and thus there is an 85 metre long land boundary between Victoria and Tasmania.[10]

## 3.2 New South Wales issues

There is also a detailed treatment of the land boundaries from the perspective of New South Wales in Anne Twomey's *The Constitution of New South Wales*.[11]

To select only two remarkable historical facts from Twomey's account:

- New Zealand was informally a dependency of New South Wales , and then for a few months in 1840 a formal dependency of New South Wales until separated by Letters Patent of 16 November 1840;
- For reasons not explained, when South Australia was separated from New South Wales in 1836, there remained a strip of land between South Australia and Western Australia between the 129th and 132nd meridians which was still New South Wales, and was known as "No Man's Land". That was only fixed (in favour of South Australia) in 1861.[12]

[6] There is a more detailed account in Carney, "A legal and historical overview of the land borders of the Australian States" (2016) 90 ALJ 579, 586-590. See also Moore, "Proving State borders" (2006) 80 ALJ 587.
[7] Greg Taylor, *The Constitution of Victoria*, page 15.
[8] *State of South Australia v State of Victoria* [1914] AC 283.
[9] Taylor, ibid, page 16.
[10] Taylor, ibid, page 17.
[11] The Federation Press, Sydney, 2004, pages 37-45.
[12] Twomey, ibid, pages 38-39.

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The combined effect of reading Taylor[13] and Twomey[14] is to show that there are no general principles for determining land boundaries in Australia, but rather you must make a careful study of colonial documents, and make allowances for court decisions and interstate settlements on points of difficulty.

[13] See footnote 7
[14] See footnote 11

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# 4. Maritime delimitations

Maritime jurisdiction and boundaries have always been taken seriously, but the systemisation of the boundaries gained impetus in the 20th Century.

There remain many unresolved difficulties, and peculiar difficulties face any analysis of Australia because of its colonial history and current federal structure.

## 4.1 Customary international law

While this discussion must remain practical, it is fair to warn that there are many difficult issues that remain. Discussion usually begins with customary international law as it evolved from ancient times, including differences of view which arose more from realpolitik than principle.

Only to give a flavour for this, the discussion in:

- *The Oxford Handbook of the Law of the Sea*, Chapter 1, begins with a Papal bull of 14 May 1493 by which Pope Alexander VI gave to Spain all territories (discovered or undiscovered) on one side of a line, and gave Portugal all such territories on the other side of that line. This was formalised in 1494 as the Treaty of Tordesillas;[15]
- Derrington & White on *Australian Maritime Law*, reference the origins of maritime law in major ports such as Rhodes, Venice and Genoa, and the codification of principles during the expansion of the Roman Empire.[16]

The example given by Mr Treves, in *The Oxford Handbook of the Law of the Sea* is particularly telling, however, since it goes on to show how claims about territory and sovereignty could only realistically be asserted to the extent that they were enforceable at the time. Mr Treves notes that the Spanish and Portuguese claims were "not generally accepted", and indeed Queen Elizabeth I in 1602 gave instructions to her envoys, sent to meet Danish representatives in Bremen, on the following basis:

> The English envoys were to reject Danish claims of 'property' of the seas and, referring to English and Venetian practice, to stipulate that although 'property' of the sea 'at some small distance from the coast maie yield some Oversight and Jurisdiction', such oversight and jurisdiction did not include prohibition of fishing and much less passage of ships and merchandise, as such prohibition was excluded by the Law of Nations.[17]

One practical rule depended on how far a cannon shot might fall. The immediate objection was that cannon were of different capability, which led one author to suggest a deemed three-mile distance.[18] This somehow stuck but was not universally accepted.

Immediately we see that evolution in technology would lead to developments in the practical ability to exert control, and would thus impact ultimately on customary international law.

[15] Rothwell and Others, *The Oxford of Handbook of the Law of the Sea*, Chapter 1, "Historical development of the law of the sea" by Tullio Treves, page 3.
[16] Derrington & White, *Australian Maritime Law* (4th Edition), page 2.
[17] Treves, *The Oxford Handbook of the Law of the Sea*, page 3.
[18] Ibid, page 5. The gentleman concerned was Ferdinando Galliani in a book published in 1782.

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## 4.2 19th & 20th Century developments

In 1876, one of the strongest English courts imaginable was assembled as a Court for Crown Cases Reserved. Mr Keyn was indicted for manslaughter in the Central Criminal Court in London. He was a foreigner. He was in command of a foreign ship. That ship was passing within three miles of the English shore. The ship was on a voyage to a foreign port, in the West Indies, carrying the mail from a port in Germany. Whilst within the three miles, his ship ran into a British ship. His ship sank the British ship and caused the drowning of a passenger on the British ship.

The victim, Jessie Young, was a passenger on the British steamer, *Strathclyde*, which was embarked from London to Bombay.

The prisoner's ship, *Franconia*, was a German vessel under the German flag. It had embarked from Hamburg with Mr Keyn in command. Almost all the 73 crew were German, and there was a French pilot. She was carrying the mail from Hamburg to St Thomas in the West Indies. She had put in at Grimsby to take onboard an English pilot to take her down channel to a certain point. After that it was intended that she touch at Havre, to land the English pilot and also a French pilot onboard whose duty it was to conduct her from off Dungeness to Havre. Then she was to go to St Thomas.

The prisoner's counsel objected that the Central Criminal Court had no jurisdiction. The trial judge ruled, without giving reasons, that the court did have jurisdiction. The defence case then proceeded, and the jury found the prisoner guilty. The question for the opinion of the Court for Crown Cases Reserved was whether the Central Criminal Court did have jurisdiction.

The matter was argued over two days in May 1876 before a number of very senior judges. But the court was divided and the case was directed to be re-argued. It was then argued over five days before a panel comprising the Chief Justices of two common law courts, the Chief Baron of Exchequer, the last judge of the (then) recently dissolved High Court of Admiralty,[19] the other Barons of Exchequer, and what may have been the balance of the common law judges available.[20] Though the court remained divided, by majority it was found that the English criminal law exerted through the Central Criminal Court had no jurisdiction to try the prisoner for the offence charged.

The decision is complex, and harks back to competition between the Court of Admiralty, on the one hand, and the common law courts on the other hand. There were spirited dissents on the basis that the sea within three miles of the coast of England is part of the territory of England; and alternatively on the basis that the prisoner's ship (having run into a British ship and sunk it) caused the death of a passenger onboard a British ship, something which was said to be within the jurisdiction of the Central Criminal Court.

Nevertheless, the surprising result was that the strongest judges in England, by majority, had found that there was no jurisdiction in the Central Criminal Court to try an offence within three miles of the English coast.

That decision was key to the substantial constitutional debates of the 1970s in Australia.

It is fair to say, and has been said, that the Commonwealth Parliament did little to address offshore issues in the first half of the 20th Century. However, the development of offshore oil and gas, and the

[19] Phillimore J's peculiar position, as the only civil law expert, is explained in Holdsworth, *A History of English Law*, Volume 16 pp 146-147.
[20] The panel was Cockburn CJ, Lord Coleridge CJ, Kelly CB, Sir R Phillimore, Bramwell, Pollock & Amphlett BB, Lush, Brett, Grove, Denman, Archibald, Field and Lindley JJ.

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increased interest of the Commonwealth in international affairs led to a development in 1975 which was to shake relations between the Commonwealth and the States.[21]

## 4.3 1970s constitutional tussle

The following account under this heading 4.3 is largely reliant on Derrington & White, *Australian Maritime Law* (4th Edition), as the most recent authoritative source:[22] I acknowledge my debt to that work.

By the *Seas and Submerged Lands Act 1973 (Cth)*, the Commonwealth "claimed commonwealth jurisdiction from the baselines outward over the territorial sea and inward over the internal waters of Australia on the landward side of the baselines except those waters within any bay, gulf, estuary, river, creek, inlet, port or harbour that were within the limits of the state at Federation and so remained".[23]

### 4.3.1 Base lines

The reference to "baselines" has been described as follows:[24]

> Baselines are the 'zero mark' for measuring the breadth of the territorial sea, contiguous zone, exclusive economic zone, and, in most circumstances, the continental shelf, and are the starting point for delimitation between neighbouring States claiming overlapping maritime areas. Baselines are 'a major ingredient' when used to delineate maritime zone outer limits and to delimit those zones between States. Baselines are the only ingredient when used to designate the outer limits of internal waters separating areas in which States enjoy unimpeded sovereignty from the territorial sea beyond.

The highly technical question is how you draw the baseline.

All else failing, the low-waterline acts as baseline.

But the drawing of baselines can depend on:

- fringes of islands,
- whether you can close a bay (with a line across its mouth),
- how you deal with other features such as rivers mouths, port works, and archipelagos.

Today, we will not attempt to consider this highly technical area of the law. All that we need understand is that we are usually dependent on large scale maps drawn by the Commonwealth, purportedly in accordance with the requirements of some instrument such as the UNCLOS, as the asserted baselines from which much else follows.

[21] Derrington & White, ibid, Heading 1.1.4 page 50.
[22] Derrington & White, above, from page 50.
[23] Ibid, page 50.
[24] Rothwell and Others, *The Oxford Handbook of the Law of the Sea*, in the chapter on "baselines" by Lathrop, at page 70.

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The Commonwealth by that 1973 Act made a claim "in respect of the sea, the seabed and sub-soil", and the baselines used were those shown "on large-scale Commonwealth charts … determined as provided in UNCLOS".[25]

### 4.3.2 1975 Constitutional Case

The result of this legislation was the *Seas and Submerged Lands Case* (1975) 135 CLR 337. I have already mentioned the landmark decision of the English Court of Crown Cases Reserved, *R v Keyn*. On the basis that the common law jurisdiction "stopped at the low water mark or the baselines such as the line directly across the mouth of a river …", and subject only to statutory assertion of a broader extension of the common law to the sea, the majority of the High Court of Australia found the legislation to be valid. But the Commonwealth's success did not lead to unalloyed joy:[26]

> The commonwealth win … proved administratively difficult, and the resulting amount of administration of, in effect, state boating and shipping was not convenient to the commonwealth and some years of conflict, uncertainty and then negotiation ensued.

In 1979, the Offshore Coastal Settlement (***OCS***) was finalised. By a series of Acts passed by State legislatures, requesting the passage of Commonwealth legislation, the current regime was largely put in place.[27]

As Derrington & White say:[28]

> The Coastal Waters (State Powers) Act 1980 (Cth) gave the states' legislative powers over their respective adjacent "coastal waters". Beyond the coast waters the states had powers over subterranean mining that was adjacent to the land of the state and also over ports, harbours, and other shipping facilities, installations, and dredging. The width of the "coastal waters" which were defined as the then width of the territorial sea of three nautical miles, except that if its width be extended, as it later was, the states' powers in the coastal waters still remained only out to the three mile limit. The coastal waters also included the waters to the landward side of the baseline of the territorial sea which are the "internal waters". There was no need to deal with "inland waters", such as ports, rivers, and dams, as they were clearly states' waters and never the subject of a claim by the Commonwealth.

The other major piece of the puzzle was Commonwealth legislation to vest title in the seabed, the water column, and airspace above, the coastal waters as within the limits of a State. This was done by the *Coastal Waters (State Title) Act 1980 (Cth)*. The title given to the States was subject to:

- any pre-existing title of someone else;
- "the right of the Commonwealth to use the area for communications, safety of navigation, quarantine, defence, or to authorise the construction and use of undersea pipelines"; and
- "any title under the Great Barrier Reef Marine Park Act 1975 (Cth)".[29]

The effect of the coastal waters legislation was not, however, to extend the boundaries of the States. Rather, title in certain land and rights is conferred on the States and Territories. Legislative power is granted in relation to that additional space. But this does not alter the limits of any State, as this

[25] Derrington & White, ibid, page 51.
[26] Derrington & White, ibid, page 52.
[27] Ibid, page 52.
[28] Ibid, page 52.
[29] Paraphrased and quoted from Derrington & White, ibid, page 53.

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would have required the Parliament to follow the process in section 123 of the Commonwealth Constitution.[30]

Derrington & White comment that the result of the laws giving effect to the Offshore Constitutional Settlement 1979 "are too complex, detailed and lengthy" to discuss within their then present work. But one of those authors, Dr White, has separately written *Australian Offshore Laws* (2009) which deals in greater depth with a variety of issues arising.[31]

But in general terms, Derrington & White described the OCS 1979, and the legislation giving effect to it, as having "left an unsatisfactory situation" where the "resulting matrix of laws means that mercantile shipping, defence and other government shipping, fisheries, environmental regulation, offshore oil and gas, and offshore native title are too much for the Australian federal constitutional structure to deal with".[32]

Just briefly, the issue of pipelines is restricted to regulation, relevantly, of petroleum pipelines. But the term "petroleum" is defined in the *Offshore Petroleum and Greenhouse Gas Storage Act 2006 (Cth)*, section 7, as "any naturally occurring hydrocarbon, whether in a gaseous, liquid or solid state", a naturally occurring mixture of such hydrocarbons, or further certain other mixtures between hydrocarbons and hydrogen sulphide, nitrogen, helium and carbon dioxide. Presumably a processed product such as LNM would not fall within this, though the substantial energy content of LNM comes from the fatty goodness of New Zealand mutton.

For completeness, there is a deal of international custom and international law concerning undersea cables and pipes. We need not consider that in any depth here, but there will always be sensitivities where a proposed course of a pipe or cable may cross existing pipes or cables. Further, there will always be an issue where a pipe or cable must run through waters within the continental shelf or EEZ (let alone closer waters) of another nation State.[33]

[30] *Lavender v Director of Fisheries* (2018) 336 FLR 37, from [183], per Basten JA, the other members of the Court of Appeal concurring.
[31] See Derrington & White, ibid, pages 53-54 and White, *Australian Offshore Laws* (The Federation Press, Sydney, 2009).
[32] Derrington & White, ibid, page 54.
[33] See, for example, the brief treatment by Andreone in her chapter on "The exclusive economic zone", in Rothwell & Others, *The Oxford Handbook of the Law of the Sea*, see generally pages 178, 189, 206-208, 212-214 in that work.

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# 5. Outer Space

The precise delimitation of "outer space" as a matter of international law remains uncertain. For certain domestic legislative reasons, Australia has adopted a delimitation, but the scope of that is limited.

The *Outer Space* Treaty[34] provided by Article 2 that outer space, including the moon and other celestial bodies, are not subject to "national appropriation by claim of sovereignty, by means of use or occupation, or by any other means". The *Space (Launches and Returns) Act 2018* (Cth) only sets 100 kilometres for the purpose of regulating those things which are regarded as "space objects" for the purposes of giving effect to Australia's obligations, including obligations to do with compensation and regulation of launches.

It follows, then, that it would be a matter of customary international law (if any such law could be proved) as to what constitutes "outer space".

The common law precept was that a person who owned land owned everything under that land, and everything out to the heavens above that land.

But the idea, even 100 years ago, that a nation state might claim sovereignty over the heavens, that (at that time) could not be reached by that nation state, would have seemed peculiar. The denial of sovereignty in the treaty of 1966, ratified by Australia, would accord with the idea that once you are in "outer space", whatever that means, Australia and its component parts can claim no sovereignty.

## 5.1 Extra territoriality of space legislation

Though the Commonwealth, or a State or Territory, might be unable to claim sovereignty over some part of the ocean, or over some part of outer space, does not necessarily prevent that polity purporting to legislate to govern behaviour or other matters in that place.

The outright denial of sovereignty over outer space in the 1966 treaty, ratified by Australia, is not as simple as it looks. For example, the *Space (Launches and Returns) Act 2018* (Cth) provides by section 6A that the Act applies both within and outside Australia. A person is brought into the scope of that legislation as a "responsible party" in terms of section 8 simply by being an Australian national. Section 14 prohibits an Australian national from launching a space object from outside Australia unless the launch is authorised by Australian legislation or other overseas permits. Thus, the launch of a space object, being an object relevantly defined as something where the whole or part of it is to go into or come back from an area beyond the distance of 100 kilometres above mean sea level, could constitute an offence under Commonwealth legislation, if done without permit by an Australian national from outer space.

Beyond that, however, it may be something of a stretch to assert that legislation of an Australian State or Territory would be for the peace, order or good government of that polity if it purported to levy revenue in relation to some activity or thing in outer space.

[34] "Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies", 19 December 1966.

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# 6. Immunities of Foreign States

The issue of foreign state immunity can be arcane, and the present review in the United Kingdom indicates that it continues to require review.[35]

In former times, there was a "rule of absolute immunity".[36] However:[37]

> In this century socialist states and others have come to engage in trading activities (acts jure gestionis) in addition to the public functions traditionally associated with states (acts jure imperii). As a result, most municipal legal systems have now changed to a doctrine of restrictive immunity by which a foreign state is allowed immunity for acts jure imperii, but not acts jure gestionis. O'Connell suggests that in this situation
>
> > the most that can be said of customary international law is that it enjoins immunity from the judicial process only in respect of governmental activities that pertain to administration, and does not compel it in respect of other activities which are more truly commercial than administrative.

Australia, like the United Kingdom,[38] has specific legislation now governing foreign state immunities: *Foreign States Immunities Act 1985 (Cth)*. Note the *Foreign States Immunities (Taxation) Regulations 2018* (Cth), which provide that a foreign state has no immunity in relation to

- duties, land taxes, payroll taxes, certain other listed imposts of the various States and Territories, and
- the machinery provisions of the respective administration laws of the States.

Section 20 of the principal legislation provides the foreign state is not immune "in a proceeding insofar as the proceeding concerns an obligation imposed on it by or under a provision of a law of Australia with respect to taxation" where that provision is prescribed in those regulations.

Although this has been carefully thought out, there is nevertheless a distinction between immunity from taxation, as such, and the immunities from adjudication and execution dealt with by section 20 of the principal Act. Whether that distinction excites a modern court is another matter. But the distinction is pointed out by Fox & Webb, *The Law of State Immunity* (3rd Edition), pages 210-211. The distinction does appear to have legs based on *R v Inland Revenue Commissioners, ex parte, Camacq Corporation*.[39]

Thus, if there truly is a *lacuna*, such that the Commonwealth legislature has mistakenly forgotten to deal expressly with immunity from taxation (as opposed to immunity from adjudication or execution), the position under customary international law set out at the beginning of this section of the paper may apply.

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[35] Refer to the House of Commons and House of Lords Joint Committee on Human Rights paper, "Proposal for a draft State Immunity Act 1978 (Remedial) Order 2022: State Immunity & the Right of Access to a Court", Second Report of Session 2022-23. This document was published on 12 July 2022 as HC 280 and HL Paper 42. And the objective of the document is to provide comments and recommendations in relation to the Government's proposed draft Remedial Order concerning "the immunity that foreign states have from domestic law in respect of employment disputes brought by workers in diplomatic missions or consular posts in the UK", in light of a finding of incompatibility with the European Convention on Human Rights.
[36] Harris, *Cases and Materials on International Law* (2nd Edition), page 266.
[37] Ibid, pages 266-267.
[38] *State Immunity Act 1978 (UK)*.
[39] [1990] 1 All ER 184, 188-189 per Dillon LJ. Note also reported at [1990] 1 WLR 191; (1989) 62 TC 651, affirming the decision of Kennedy J reported at [1990] 1 All ER 173; (1989) 62 TC 651.

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# 7. Transactions in Scenario

## 7.1 Preliminaries – signing, location of document

Recall that there was an exchange of correspondence between Melon Tusk and the State Premiers inaugurating the project. The Premiers signed in Canberra, and Melon signed on the ISS.

Conscious that the basis for nexus has moved on in most cases, I nevertheless deal briefly with the consequences of signing and reception of a document in a jurisdiction.

### 7.1.1 Signing

While I am not suggesting that there is a dutiable transaction by such a preliminary document, it is nevertheless worth bearing in mind that taxes imposed by reference to place of execution could be operated by execution by one or other of the parties.[40]

As to recognition of electronic signatures, see now the *Electronic Transactions (Queensland) Act 2001*, and parallel Commonwealth,[41] State and Territory legislation.

### 7.1.2 Reception of document to a State[42]

Taxes operated by reference to receipt of a document into a place would have been fundamentally changed with the electronic age. So, I recall in the 1990s advising against receipt into Queensland by email of a scanned, pre-1982 document, and I would advise the same today out of abundance of caution.

The broad definition of "document" in some interpretation Acts, as including electronic documents, and the operation of laws recognising electronic signatures, would change the complexion of these older bases of charging duty.[43]

## 7.2 Engagement of welders, and cable and pipelaying personnel

### 7.2.1 Employing the workers

Melon Tusk is operating through Delaware registered companies to engage all workers, services and ships.

[40] See the current definition in section 490 of the *Duties Act 2001 (Qd).*

[41] The Commonwealth also has the *Electronic Transactions 1999*. As best I can presently determine, Australia has not yet acceded to the *United Nations Convention on the Use of Electronic Communications in International Contracts*, but that may not be of much assistance where the communication is between Canberra and a satellite.

[42] See for example the consequences under Queensland laws of reception of a document into the State in *Commissioner of Stamps (Qld) v Wienholt* (1915) 20 CLR 531

[43] Refer to the commentary in *Stamp Duties Queensland* by Mr Jeff Mann, volume 1, from paragraph [300]. The *Stamp Act 1894*, section 4(2)(a)(ii) imposed duty by reference to place of execution, but subparagraph (i) imposed duty also by reference to the document being first brought into Queensland.

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Acting on advice, Melon Tusk has set up a specific Delaware corporation to employ any workers on the mainland of Australia, and has sourced a local director to assist with all compliance issues. Otherwise, workers are engaged through separate Delaware companies with no Australian director and no Australian registered office.

Adopting novel construction techniques, involving commencement of works at multiple sites with a view to joining up pipes and cables on a progressive basis, Melon Tusk engages skilled personnel in New Zealand immediately.

Signing contracts of employment virtually from the ISS office from which she is operating, she has engaged a full workforce for ships presently under Australian flag with home ports of Kingston, Norfolk Island, and Gladstone, Queensland. She engages welders, and cable and pipelayers.

She also engages skilled robot operators to work from a base in Singapore, because some of the work at depth is so dangerous that it is best undertaken remotely.

Only now does Melon ask whether the companies used must register for and pay payroll tax in Australia. She has identified personnel at the following sites:

- The stores dump on harbour land at Gladstone.
- Aboard ship at various points including between Curtis Island and the mainland, further out to sea but within three miles of the baseline off of Gladstone, beyond those three miles but within 12 miles of the baseline (within Australian territorial waters but beyond Queensland waters), within the exclusive economic zone (200 nautical miles off of the territorial boundary); and on the high seas but working on a project which will ultimately link up between Gladstone and Dunedin.

- The ISS, on Melon Tusk's own salary and emoluments. Should she ask the nation states controlling the international space station to ensure that it orbits less frequently, if ever, over Australia or any of its claimed seas or exclusive economic zone?

- Robot operators at laboratories in Singapore, employing machines at the same various points where the ships are likely to be operating.

### 7.2.2 Payroll tax nexus

**Gladstone** –

The workers at the Port of Gladstone who are performing services concerning receipt and dispatch of plant, inventories and technical checks are all employed by the Delaware company which deals only with onshore workers. Plainly there is a payroll tax issue here.

**Aboard ships, spaceships & elsewhere** –

However, there are workers:

- on ships;

- in New Zealand and Singapore, and

- Melon Tusk is an employee of one of the Delaware companies as well. She is currently in orbit.

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We thus turn to the pattern legislation on the eastern seaboard dealing with nexus of payroll tax. This is exemplified in Queensland by sections 9-9C of the *Payroll Tax Act 1971 (Qd)*.

Referring to Ruling PTA039.1, we can address it as follows:

- Test 1 – employee's principal place of residence – all the other workers were engaged either in New Zealand or Singapore. It is unlikely any would have a principal place of residence in Australia. Melon Tusk resides in Aruba, and avoids physical presence in high-tax jurisdictions.
- Test 2 – employer's ABN address or principal place of business – the Delaware corporations dealing with the offshore workers are not registered for an Australian business number and have no Australian principal place of business.
- Test 3 – where the wages are paid or payable – New Zealand and Singapore workers are unlikely to have opened Australian bank accounts to receive wages. Melon Tusk has no Australian bank account.
- Test 4 – services performed mainly in Queensland? – Since the services are being provided on ships, on the sea floor, from laboratories in Singapore where remote workers are manipulating robotic controls, and from outer space, this is unlikely to resolve in favour of Queensland. Care where the works are performed within a bay or port in Queensland, since the Commonwealth gives up on parts of its ambit claim by section 10 of the 1973 Act, by the exclusions in section 14 of that Act. Gladstone, and in particular the ports behind Curtis Island are particularly tricky in this context.[44]

## 7.3 Sell-down

Two weeks into the project, and Melon Tusk is delirious that her expert international team has laid pipe at various on the ocean floor where the ships mentioned above have been. The pipes are not yet linked up but form one substantial and enormously expensive project upon which there has been vast activity during those two short weeks.

Melon has now negotiated sale, under one of 2 structures, either:

- of all her project companies' right, title and interest as proponent of the scheme, and in all the assets and rights (including rights to purchase ships, and title to all stores, and laid and unlaid cables and pipelines); or

- of all her shares in the project companies.

Melon asserts that the headquarters of the activities are at the card table set up in one corner of the ISS. The mean orbit of the ISS is said to be something above 400 kilometres.[45]

Various structures for sale are considered, but they have the following common features:

- The project companies are Delaware corporations controlled by Melon Tusk.
- The buyer is a sovereign wealth fund of either Singapore, Taiwan, or some combination of both.

[44] Thus Horseshoe Bay on Magnetic Island is an internal water, caught for the Commonwealth under section 10, but then excluded from the Commonwealth's claim by section 14 (and thus part of Queensland): *Connolly and GBRMPA* (2007) 99 ALD 600 (Downes P and Kelly SM).
[45] Refer to the article on "International Space Station" on Wikipedia, viewed 22 July 2022.

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- One of Melon Tusk's company retains an overriding royalty based on volume of LNM (or any other substance) pumped through the pipe, and on user of the power cable.
- The documentation will be signed for the proponent aboard the ISS at Melon Tusk's card table.
- Under powers of attorney executed in each of Singapore and/or Taiwan, and sent up by small shuttle rocket to the ISS – one of the astronauts aboard the ISS is appointed to, and will, sign on behalf of the respective sovereign wealth fund or funds.

This is truly an outer space exercise. Although generally of less concern under present duties laws, note that all execution occurs aboard the ISS. See previous comments as to the consequences under previous laws, which depended on place of execution, and whether a document was received within a jurisdiction.

### 7.3.1 Brief issues concerning stamp duty on sell down

The first point to note is that we are dealing with shares in a company.

However, so that we can assess whether that is the more favourable way to go, we should also consider what would have happened if it had been a sale of assets. If it were a sale of assets, there would have been plant located at the stores dump in Gladstone.

There would also have been plant on the sea floor at various places between Gladstone and Dunedin. The plant in Gladstone is obviously property in Queensland, though there would have to be a question as to whether it was dutiable property at the time.

The plant on the sea floor is not "in Queensland" since Queensland ends at the low water mark.

It is true that section 47A of the *Acts Interpretation Act 1954 (Qd)* provides that the laws of Queensland apply in and in relation to the coastal waters of Queensland, and the seabed and subsoil beneath (and the airspace above) the coastal waters of Queensland, as if the coastal waters of Queensland were within the limits of the State.

Pointedly, that is a deeming operating by use of the words "as if".

It does not mean that Queensland extends beyond the low water mark. That result could only be achieved using the constitutional mechanism under section 123 of the Commonwealth Constitution to change Queensland's boundaries. That has not occurred.

What are we to make of, for example, two expressions in section 10(1) of the *Duties Act 2001 (Qd)*:

- "land in Queensland"; and
- "a chattel in Queensland"?

I leave to one side the other forms of dutiable property, but these two raise obvious questions.

The key is the expression "in Queensland". Pipes laid beyond the lowest astronomical tide are not "in Queensland". For a contemporary discussion of Constitutional arrangements, see the fisheries litigation, *Wren Fishing Pty Ltd v Queensland.*[46] But see the difficult issues especially about bays, ports and harbours, mentioned above, footnote 44, where it seems these historic claims fall within the State.

[46] [2020] QSC 363, upheld [2022] QCA 13.

I acknowledge that this argument is balanced. But we are not dealing with language empowering regulation of things, but rather language identifying things. They are identified by location - "in Queensland".

Indeed, depending on the arrangement with the State and the Commonwealth, it is possible that Melon Tusk needed and has obtained a right of way, and has something in the nature of an interest in land. But again, this is outside Queensland, if I am right in my analysis above.

The ships, robots and other laying equipment are at sea, though there is an interesting question about location of a ship. For some purposes, a ship on the high seas is regarded as being legally located at its home port.[47]

There must be a question as to whether a business has commenced here, and thus whether there is a goodwill.[48] The intellectual property which has been generated will be a mixture of know-how (which is located on a hard drive aboard the ISS), copyright (which would be asserted as a matter of Commonwealth law), and potentially patentable inventions (again able to be asserted as a matter of Commonwealth law).

As can be seen, only a small fraction of the enormous amount of capital employed is within the boundaries of any Australian State.

If the item sold is instead, as in intended, shares in Delaware corporations – the question will then be whether those corporations are landholder corporations. Given that the only items thought to be onshore are items of IP and chattels at a stores dump in Gladstone, this is unlikely. Even though the pipes are self-burrowing (and quickly form part of the ocean bottom where lying on sand, silt or mud), the pipelines and cables (which travel with them) are unlikely to be within the limits of any Australian State. Thus, there is no land within any Australian State.

The pipes and cables must come ashore, but assume for the time being that Melon Tusk has been well advised, and that the landing points in Australia have not been commenced, and nothing is even in Gladstone harbour.

### 7.3.2 Sovereign immunity

I mention, without resolving, the issue of sovereign immunity. I will not detail any arguments about the ROC (Taiwan) as that is a political matter that no one here is interested in. But we have to be aware of the issue, should it need to be resolved.

In terms of Singapore, there must be a question as to whether a sovereign wealth fund is acting as the State of Singapore, or is really essentially in commerce.[49]

In any case, note that section 20 of the *Foreign States Immunities Act 1985*, read with the corresponding regulation, purports to exclude from immunity liability for stamp duty. As noted above, there is a question about how this has been done, because section 20 of the Commonwealth Act only deals with questions of adjudication and execution of a court, without dealing with the anterior issue of immunity from taxation *per se*.

[47] Refer to the commentary in *Australian Stamp Duties Law*, paragraph 6.1200. If the ship is in territorial waters, actual *situs* is relevant instead of deemed situs.
[48] The apportionment provisions in sections 26-27 of the *Duties Act 2001 (Qd)* would operate on a nil quantum of supplies, leading to nil value of apportioned goodwill, in any case at this early stage.
[49] See, generally, Fox & Webb, *The Law of State Immunity*, page 356 *et seq*.

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## 7.4 Exercise of step-in rights

Just before the sale to the sovereign wealth funds can complete, Melon Tusk becomes dissatisfied with the owners of one of the three ships under charter party.

She exercises her step-in rights, including the right to purchase the ship. She does not know precisely where the ship is at the time that the right is exercised, but it is at one of four locations:

- Riding within the coastal waters, just off of Gladstone.
- Outside Queensland coastal waters but within territorial waters of Australia (that is, somewhere in the nine miles between the 12-mile limit and the three-mile limit, off of the baseline).
- Somewhere outside the 12-mile territorial limit, but within the exclusive economic zone.
- Somewhere beyond the exclusive economic zone, on the high seas.

Melon has had to act so quickly that she does not know whether this ship is an Australian flagged ship with home port in Kingston, Norfolk Island, or in Gladstone, Queensland.

### 7.4.1 Where are ships?

The point here is that a ship can be deemed to be at its home port, if on the high seas. The case law about this seems to predate more developed concepts of the continental shelf and the Exclusive Economic Zone. But a ship which is within the territorial waters of a country is taken to be in those waters, rather than being deemed to be at its home port, at least for the limited purposes for which the deeming operates.

## 7.5 Sovereign wealth funds sell down

The LNMP and the trunk lines for the GPPC have been laid. LNM is being pumped successfully from Otago to Gladstone, and green electricity from Australia is not only powering the pumping stations and dewatering stations, but delivering base load power for much of the South Island of New Zealand already.

Melon Tusk's overriding royalty was drafted carefully in her favour, so that the sovereign wealth funds are finding it less attractive to hold these enormous assets on their books, given the modest return on investment being reported to the respective governments.

They look to sell down their rights.

Assume that the self-healing, self-burrowing pipelines have become increasingly integrated into the sea floor, at least where there is not a rocky bottom or other obstacle to incorporation. The cable follows the pipeline, and has increasingly become buried on the sea floor, which is part of the expected design.

The sovereign wealth funds reveal to you that they, too, invested in the opportunity through Delaware registered companies limited by shares. They now seek to sell down from their respective 100% interests in each of these Delaware companies, to other ordinary investment companies which do not have the characteristics of sovereign wealth funds.

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### 7.5.1 Sell down – shares in Delaware companies

At the time of the sell down, it is quite possible that works in Gladstone landing the LNMP and trunk GPPC have been completed. There would be no doubt that those works would be worth more than $2 million. There would be no doubt that those works would be substantially within the State of Queensland.

But the works beyond the low water mark would be beyond the State of Queensland, and thus there is no prospect of landholder duty on such works out into the Pacific and across to Dunedin.

The simple involvement of a sovereign wealth fund in sale is unlikely to be relevant to final liability for duty on a purchaser, and in any case, there is the ability to charge Queensland land with the burden of landholder duty that must be considered.

### 7.5.2 Taxing dealings in a foreign company's shares by reference to property of the company

And finally we cannot escape the extraterritoriality question.

While not intending to solve the issue today, the important question which arises quite often is how far a State can purport to tax a dealing in shares of a foreign company, especially where the basis of *nexus* is that it – or more commonly, a distant subsidiary – has land in the State. We see this repeatedly in practice.

The basic rule is still that in *Broken Hill South Ltd (Public Officer) v Commissioner of Taxation (NSW)*.[50]

> The power to make laws for the peace, order and good government of a State does not enable the State Parliament to impose by reference to some act, matter or thing occurring outside the State a liability upon a person unconnected with the State whether by domicil, residence of otherwise. But it is within the competence of the State legislature to make any fact, circumstance, occurrence or thing in or connected with the territory the occasion of the imposition upon any person concerned therein of a liability to taxation or of any other liability. It is also within the competence of the legislature to base the imposition of liability on no more than the relation of the person to the territory. The relation may consist in presence within the territory, residence, domicil, carrying on business there, or even remoter connections. If a connection exists, it is for the legislature to decide how far it should go in the exercise of its powers.

So for example it is commonplace for the States to regulate fisheries in their waters, even where this is not part of the State. I have already given an example of the Commonwealth regulating behaviour of an Australian national, anywhere in the world or outside this world.[51]

Mere incorporation of a company in NSW was sufficient, without more, to attract duty on a transfer of its shares.[52]

[50] (1937) 56 CLR 337, 375
[51] See heading 5.1.
[52] *Myer Emporium v Commissioner of Stamp Duties* [1967] 2 NSWR 230

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# 8. Enforceability of Tax Laws Beyond the Seas

It has been a fundamental tenet of international relations that the tax law of one country cannot be enforced, directly or indirectly, in another country. See most recently the decision of the Privy Council in *Webb v Webb*.[53]

Note that this principle has gradually been eroded by treaty. Thus, the *Chatfield* litigation in New Zealand concerned the attempted indirect enforcement of South Korean income tax laws in New Zealand, through the making of enquiries under the Exchange of Information article in the Korean-New Zealand double tax agreement. Exchange of information occurs regularly, both on a bulk basis, and on a bespoke basis, under the Double Tax Agreements and Tax Information Exchange Agreements.[54]

Of greater interest to the States and Territories may be the *Convention on Mutual Administrative Assistance in Tax Matters* (also known as the *Multilateral Convention on Mutual Administrative Assistance in Tax Matters*). Australia is party to this. The taxes covered article, Article 2, seems very broad indeed, extending to "any other taxes", and including such taxes "imposed on behalf of political subdivisions or local authorities" of a nation which is party.

I do not know why the Australian States and Territories are not using this more often, but perhaps there is some technical reason or perhaps the Australian Taxation Office has not encouraged its use, as the ATO would wind up administering the relationship with the foreign state.

But apart from exchange of information under Chapter III Section 1, there is to be "Assistance in recovery" under Article 11.

This document, like most OECD documents, is locked down at the OECD website. However, a copy appears at the New Zealand legislation website, being a schedule to the *Double Tax Agreements (Mutual Administrative Assistance) Order 2013 (NZ)*.[55]

[53] [2020] WTLR 1461; [2020] UKPC 22, from paragraph [32].
[54] The *Chatfield* litigation was extensive and complex, but see the final denial of leave to appeal to the New Zealand Supreme Court in [2019] NZSC 84, being an attempt at appeal by the Commissioner from a decision of the New Zealand Court of Appeal reported at [2019] 2 NZLR 832.
[55] See - https://www.legislation.govt.nz/regulation/public/2013/0437/latest/096be8ed80c5da54.pdf

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# 9. Conclusions

The above scenario indicates the sensitivities that arise with boundaries and borders, and in dealings with foreign states.

It is not possible to give definitive solutions, for a fanciful scenario. The purpose has been to raise the questions about the application of the law to various junctions between nation States, and raise issues concerning the boundaries, between federated States, and with the sea and airspace.

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