

The Story behind the Land Borders of the Australian States

- A Legal and Historical Overview

Delivered by Dr Gerard Carney

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Introduction

I think it is safe to say that every Australian is able to draw roughly the land borders of the six Australian States and of the Northern Territory. Less well known is the history behind these borders. This lecture attempts to trace that history in terms of *when, how* and *why* these borders were drawn where they are.

Time does not permit consideration of the coastline boundaries, which were determined by a majority of the High Court in the *Seas and Submerged Lands Act Case* in 1975 to lie at the low-water mark.¹ So, my apology to Tasmania which barely rates a mention in this lecture! Nor do I cover the boundary of the Australian Capital Territory within New South Wales. Geographical barriers are usually the most effective land borders, such as mountain ranges, rivers, lakes, gorges, or deserts. All of these geographical features have played some role in the drawing of Australia's boundaries. But their role has been a secondary one on the mainland due to the extraordinary distances involved, and the fact that the internal geography of the continent was largely unknown at the time the UK authorities felt the need to define Australia's land borders.

Instead, primary reliance was placed on the meridian lines of longitude (measured from the prime meridian at Greenwich²) and parallels of latitude (measured from the equator) – referred to by one commentator as those “celestially-described boundaries”. Why particular lines of longitude and latitude were selected is not entirely clear.

¹ *New South Wales v Commonwealth* (1975) 135 CLR 337.

² The Greenwich prime meridian was internationally adopted in 1884 at the International Meridian Conference at Washington DC, although it was adopted by Britain well before that.

A significant determinate of a nation's boundary is, of course, international law. In this respect, many may be surprised by the fact that the first land boundary created by the British on this continent in 1786 can be traced to a treaty between Portugal and Spain in 1494.

An important role often overlooked is that of the early surveyors of this continent whose arduous task was to physically mark out the actual boundaries between the colonies. They had to undertake complex calculations to arrive at the most accurate measurements then possible, knowing that their instruments denied them the mathematical accuracy they so earnestly sought. They also had to cope with a harsh environment which threatened their very survival. Nor was their ordeal over, when years later, some of their work is the subject of constitutional challenge in this Court!

So a study of Australia's land boundaries involves the intersection of politics, constitutional and international law, geography, science, and at least up to the 19th century, stories of human endurance.

The most practical way to tell this story is to do so chronologically.

Pre-European settlement

Before European settlement of Australia, what was the position as far as territorial boundaries were concerned? Ronald and Catherine Berndt's classic work, *The World of the First Australians*³, describes an ancient continent inhabited by around 500 tribes, each having a territory from which they believed they had been created. In *Mabo v Queensland No2*, Deane and Gaudron JJ observed that in 1788: "The boundaries of their traditional lands were likely to be long-standing and defined."⁴

1770

When Captain Cook "took possession", in the name of His Majesty George III, of the whole eastern coast of Australia in August 1770 at Possession Island, it seems that he did not bother to accord this territory a new name. Hawkesworth, the editor of his Journal, is credited with deriving the name: *New South Wales*. Nor did Captain Cook define any western boundary for this new British possession. He only purported to take possession of the coastline which he saw and which he felt sure no European had previously seen, namely, from the northern tip of Cape York, south to Point Hicks. For this reason, he did not take possession further south, especially since Abel Tasman had, during his first voyage on 3 December 1642, purported to take possession on behalf of the Prince of

³ Second edition 1977, Ure Smith Sydney, espec at 32-33.

⁴ (1992) 175 CLR 1 at 99.

Holland of an unidentified part of Van Diemen's Land.⁵ Accordingly, the precise area of the new British possession remained obscure.

1786

This was remedied in 1786 when the boundaries of the first British colony in the Pacific Ocean were defined by the two commissions issued to Captain Arthur Phillip appointing him Governor of the penal settlement of New South Wales.⁶ Both commissions defined the boundaries of New South Wales as extending from the Northern Cape of Cape York to the southern coast of Van Diemen's Land and west to 135° east longitude, including the "adjacent Pacific Islands".

Selection of 135° east longitude (which I will refer to as the 135 meridian) meant that New South Wales extended from the eastern coastline across almost half of the continent. The western half of the continent remained unclaimed by any foreign power, and continued to be referred to as New Holland.

Map 1

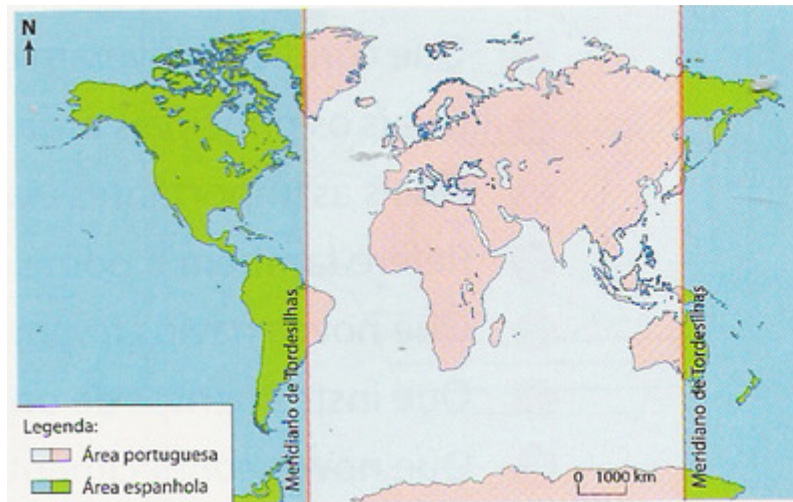


⁵ Bill Gammage, "Early Boundaries of New South Wales" *Historical Studies*, vol 19 no 77, 1981, at p 524.

⁶ *Historical Records of New South Wales Series I* vol I pp1-8.

Why was the 135 meridian chosen? The answer seems to have its origins in an agreement reached between Spain and Portugal by the *Treaty of Tordesillas* on 7 June 1494.

Map 2



By this treaty, they divided between them the world outside Europe, then thought to be flat, by reference to a line of longitude 370 leagues west of the Cape Verde Islands. This was the supposed mid-point of the Atlantic Ocean between Europe and the recently discovered New World. This agreement slightly adjusted in Portugal's favour the settlement brokered the year before by Pope Alexander VI and proclaimed in a Papal Bull.⁷ Under the 1494 Treaty, Portugal had dominion over all lands *east* of the Tordesillas Line, while Spain had dominion over all lands *west* of that line.⁸

The circumnavigation of the globe by Ferdinand Magellan from 1519 to 1522 effectively converted the dominions of Portugal and Spain into hemispheres. This led, however, to a dispute over the specific meridian defining their respective hemispheres in the Pacific (referred to as the anti-meridian) because they calculated the Tordesillas Line from different points in the Cape Verde Islands. Portugal calculated the Tordesillas Line further west at effectively 51° west longitude, the anti-meridian of which is 129° east longitude. Whereas Spain calculated the Tordesillas Line east of Portugal's line at effectively at 45° west longitude, the anti-meridian of which is 135° east longitude (ie the 135 meridian).⁹

⁷ The Papal Line of 1493 issued by Pope Alexander VI was 100 leagues west of the Cape Verde Islands: see Leslie R Marchant, "The Political Division of Australia 1479-1829: The Historical Development of the Western Australian Border" *Cartography*, vol 29, no 1 June 2000, at p 33.

⁸ Cf the Treaty of Alcacovas of 1479 which gave the northern hemisphere above 27 degrees north latitude to Spain and the southern hemisphere to Portugal. This latitude is at the southern edge of the Canary Islands.

⁹ Bill Gammage, "Early Boundaries of New South Wales" *Historical Studies*, vol 19 no 77, 1981, at p 529.

It seems that at least by the end of the 16th century the Spanish view prevailed with the anti-meridian of the Tordesillas Line being commonly accepted at the 135 meridian.¹⁰ This enabled Spain to develop its monopoly over the Americas and the Pacific Ocean during the ensuing three centuries.

Consequently, the Dutchman, Abel Tasman, in 1644 named only the western half of the new continent as New Holland, leaving the eastern half as *Terra Australis* within the dominion of Spain.¹¹ This avoided any additional conflict with Spain, against whom Holland was fighting for independence, while at the same time assuming control of the East Indies from the Portuguese.¹²

This appears to explain why in 1786 the British selected the 135 meridian as the western boundary of New South Wales, leaving untouched the western half of the continent known as New Holland. They did not wish to offend the Dutch before signing them up with Prussia and Holland in 1788 to form the Triple Alliance¹³ as a buffer to the French.

While this may explain why the British did not lay claim to the whole continent, it does not explain why the Portuguese line at 129° East longitude (which I will refer to hereafter as the 129 meridian) was not selected. A possible explanation was the need to keep clear of Timor to avoid any possible conflict with Portuguese and Dutch control over that island.¹⁴

Although priority was given in 1788 to ensuring no offence to the Dutch, the British remained mindful of the Spanish claim to *Terra Australis* and, in particular, to Spain's claim of exclusive sovereignty and navigation rights in the Pacific. However, this claim dissolved with the loss of French naval support following the French Revolution in 1789. Spain was then forced to concede by a Convention of 28 October 1790, Britain's rights to navigate, fish, trade in and settle any unoccupied areas of the Pacific Ocean.¹⁵

Nonetheless, potential French and Dutch claims led to growing concern at the commencement of the 19th century over the future of the western half of the continent. The Dutch regained ambitions in the East Indies following the defeat of Napoleon in 1815 and after the return of Java from the

¹⁰ See Leslie R Marchant, "The Political Division of Australia 1479-1829: The Historical Development of the Western Australian Border" *Cartography*, vol 29, no 2 December 2000, Part II at p 5; Bill Gammage, "Early Boundaries of New South Wales" *Historical Studies*, vol 19 no 77, 1981, at 529 cites OHK Spate, *The Spanish Lake*, Canberra 1979 at 56. See also David Taylor, *The States of a Nation – The Politics and Surveys of the Australian State Borders*, NSW Department of Lands, 2006, at 26-27 and 30.

¹¹ See Robert J King, "Terra Australis, New Holland and New South Wales: The Treaty of Tordesillas and Australia", *The Globe*, No 47 1998, 35-55.

¹² Holland achieved independence from Spain in 1647 by the Treaty of Munster.

¹³ See K McIntyre, *The Secret Discovery of Australia*, at 355.

¹⁴ See Bill Gammage, "Early Boundaries of New South Wales" *Historical Studies*, vol 19 no 77, 1981, at 531.

¹⁵ Robert J King, "Terra Australis, New Holland and New South Wales: The Treaty of Tordesillas and Australia", *The Globe*, No 47 1998, at 51-52.

British in 1816. Concern over French ambitions was expressed by Governor Macquarie in a despatch to Under-Secretary Henry Goulburn in 1817, in which he emphasised: "... the great importance, both in respect to the Mother Country and the future prosperity of this Colony, of preventing the French or any other European Nation from forming any Settlement in any part of this Continent, and ... the expediency and necessity of using every possible means and precaution to frustrate the present intentions of the French Government in this instance."¹⁶

Heightened European interest in New Holland in the 1820s strengthened the case for British trading settlements along the northern coast of the continent, west of the 135 meridian beyond the jurisdiction of New South Wales. Accordingly, on instructions from the Admiralty, Captain Bremer of HMS *Tamar* in September 1824 took possession on behalf of HM George IV of the "North Coast of New Holland or Australia" between the 129 and 135¹⁷ meridians, including all islands off the coast.¹⁸ Settlements were soon established at Port Essington and at Fort Dundas on Melville Island with convict volunteers.

These developments in the north led to a decision in Britain to move the western boundary of New South Wales from the 135 meridian to the 129 meridian.¹⁹ This appears to have been done in 1825 by the issue of the commission to the new Governor of New South Wales, Sir Ralph Darling.

1825

Governor Darling's commission of 16 July 1825 prescribed the western boundary of the colony to be the 129 meridian.²⁰ The selection of this meridian accommodated the new settlements at Port Essington and Melville Island, and seems likely to have been made both to accord with the Portuguese anti-meridian line under the Treaty of Tordesillas and to prevent any Dutch settlements east of that line.²¹

¹⁶ Despatch dated 24 September 1817: HRA Series I vol IX pp 488-9. Note 84 highlights that it was in this despatch that the first official use of "Australia" occurred.

¹⁷ Leslie R Marchant, "The Political Division of Australia 1479-1829: The Historical Development of the Western Australian Border" *Cartography*, vol 29, no 2 December 2000, Part II at p 1 suggests that that meridian was selected because this allowed for ships to safely sail around the western side of Bathurst Island to enter Beagle Gulf and Van Diemen Gulf.

¹⁸ Report from Captain Bremer to Earl Bathurst, 12 Nov 1824 at Melville Island: HRA Series III vol V p 781.

¹⁹ See ACV Melbourne, *Early Constitutional Development in Australia*, edited by RB Joyce, St Lucia University of Queensland Press, 1963, at 107.

²⁰ HRA Series I vol XI p 109.

²¹ Bill Gammage, "Early Boundaries of New South Wales" *Historical Studies*, vol 19 no 77, 1981, at 531: HRA Series III vol 6 p 752. See also Robert J King, "Terra Australis, New Holland and New South Wales: The Treaty of Tordesillas and Australia", *The Globe*, No 47 1998, at 52.

Governor Darling's commission also redefined the southern boundary of New South Wales as the most southern point of the mainland at Wilson's Promontory, in order to give effect to the establishment of Van Diemen's Land as a separate colony from 3 December 1825.

Map 3



It is significant to note that this western extension of New South Wales to the 129 meridian in 1825 preceded in 1829 the “taking of possession” of the remainder of the continent, west of the 129 meridian, to establish the colony of Western Australia. This means that Western Australia is the only State never to have been part of New South Wales. It also explains s 4 of the *Constitution Act 1902* (NSW), which re-enacts s VXVI of the *Constitution Act 1855* (NSW), by continuing to describe the territory of New South Wales as the whole of the eastern part of the continent from the 154th meridian to the 129th meridian (except for the territory of Victoria, South Australia²² and Queensland). Accordingly, Western Australia avoids the embarrassment of being described by Dr Edward Jenks in his *History of the Australasian Colonies* in 1896 as one of the “Daughter Colonies of NSW”!

Western Australia

Although Governor Darling established a military base at Albany in King George's Sound in December 1826 to prevent any French or Dutch annexation of the western part of the continent, no formal act

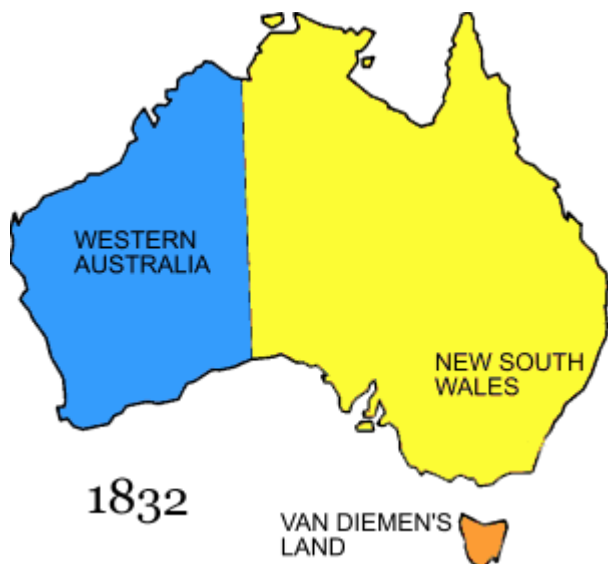
²² As at 1902 - thereby also excluding the Northern Territory which was then part of South Australia.

of British possession occurred west of the 129 meridian until Captain Fremantle, commander of HMS *Challenger*, left Cape Town and landed at the Swan River on 2 May 1829 whereupon he took formal possession “of the whole of the West Coast of New Holland”.²³ Twelve days later, the *Swan River Act* (Imp) (10 Geo IV c22) received royal assent to provide for the establishment of the colony of Western Australia. Captain James Stirling then sailed up the Swan River on the *Parmelia* on 1 June 1829 to take formal possession of Western Australia by proclamation on 18 June 1829.

The 1829 Imperial Act did not define the limits of Western Australia except to say that no part of the colonies of New South Wales and Van Diemen’s Land shall be comprised in the new colony. Its territorial limits were later defined by the Letters Patent and Commission issued to Governor Stirling dated 4 March 1831 - as extending in the north from Cape Londonderry, to West Cape Howe in the south, and in the west to the 129 meridian (ie the Portuguese anti-meridian).

Accordingly, from at least 4 March 1831, the entire continent of Australia was finally encompassed in the two colonies of New South Wales and Western Australia with their contiguous border at the 129 meridian. At this time, no other mainland colony had been created by separation from New South Wales. The first colony to do so was South Australia.

Map 4



South Australia

South Australia is territorially the most promiscuous of the Australian States, being the only State which has a border with every other mainland State and the Northern Territory.

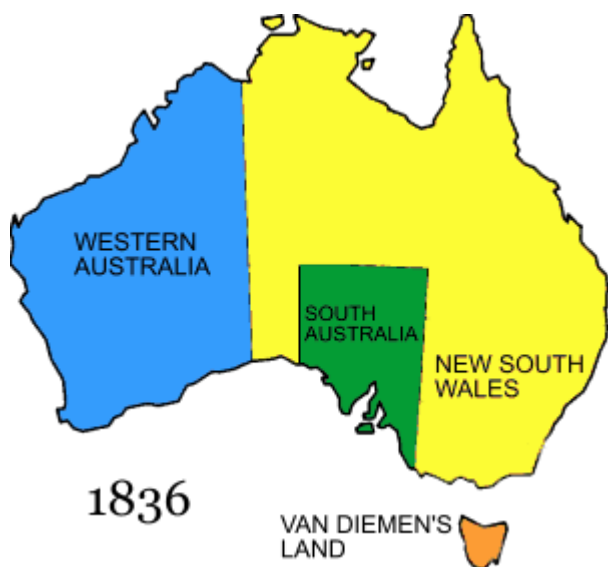
²³ Advised in a despatch Fremantle to Croker, Secretary to the Admiralty, 8 October 1829.

In 1829, as Captain Stirling was achieving his long awaited ambition of sailing up the Swan River to establish the settlement of Perth, Edward Gibbon Wakefield was publishing his pamphlet in London entitled: *A Letter from Sydney* (1829, edited by Robert Gouger).²⁴ This paper outlined his plans for establishing a free settlement in Australia by selling Crown land at a substantial price to fund infrastructure and the migration of appropriate free settlers.

While South Australians proudly boast that their State was the only Australian colony never to have been a penal settlement, it is ironic that Wakefield devised and wrote his scheme for a free settlement while serving time in Newgate Gaol for abduction of an heiress!

After considerable lobbying by Wakefield and his supporters, and apparently²⁵ without consulting the NSW Government, the *South Australian Colonisation Act 1834* (Imp) (4 & 5 Will IV c 95) was enacted by the Imperial Parliament to empower the King in Council to establish one or more “provinces” and to define their boundaries within the area of “Australia” bounded on the north at 26 degrees south latitude, on the south by the Indian Ocean, on the west at 132 degrees longitude, and on the east at 141 degrees longitude, including Kangaroo Island and all adjacent islands *and bays*.

Map 5



So why the selection of the northern boundary at the 26th parallel, the eastern boundary at the 141 meridian, and the western boundary at the 132 meridian?

²⁴ Originally a series of letters. Also see Wakefield, *A View of the Art of Colonization, with present reference to the British Empire* (London, Parker 1849).

²⁵ According to WD Campbell, “An Account of the Boundaries of the Australasian Colonies” *The Surveyor* Vol VII Part I, 5-34, at p 12 (no authority cited).

Especially puzzling is the western boundary at the 132 meridian which left between South Australia and Western Australia, an area of NSW referred to as *No Man's Land* of approximately 80,000 square miles.

I have been unable so far to ascertain any clear explanation for any of these South Australian boundaries.²⁶ The issue is significant given that South Australia's eastern and northern boundaries remain the boundaries of the five mainland States and the largest Commonwealth territory.

The earliest reference to the proposed boundaries of South Australia, which I have found, is a pamphlet of 32 pages, published in 1831, entitled: *Proposal to His Majesty's Government for founding a Colony on the Southern Coast of Australia*.²⁷ This proposal emanated from a group of gentlemen (known as the National Colonisation Society)²⁸ who met on 3 August 1831 in the London chambers of solicitor, William Tooke, chaired by Colonel Torrens MP. They recommended a settlement on Kangaroo Island or on the mainland between the 132 and 141 meridians. Although much of what was proposed was not adopted by the Imperial authorities, these proposed western and eastern boundaries were adopted.

As for the northern boundary at the 26th parallel, I have uncovered no explanation for its selection. The 1831 proposal did not refer to any northern boundary. This was probably due to the fact that they had no idea what was in the interior of the continent at that time. It is possible that the Colonial Office picked the 26th parallel simply because it was half way across the continent.

[Since delivering this lecture at the High Court on 10 April 2013, further information²⁹ has come to hand which indicates that the promoters of the new colony preferred to leave the northern boundary undefined in the hope that the colony might extend all the way north to the Indian Ocean. It has been suggested that the Counsel to the Colonial Office, James Stephen, warned against such extravagant territorial claims, whereupon a northern border at the 20th parallel was proposed. This was altered to the Tropic of Capricorn³⁰ by the 1834 Bill but was further lowered to the 26th parallel following debate in the House of Commons, possibly due to the influence of Francis Baring MP, who

²⁶ See the "Colonial Office: Correspondence relative to South Australia, published by the House of Commons 1841"—cited in A Grenfell Price, *The Foundation and Settlement of South Australia 1829-1845*, Facsimile ed 1973 of 1st publication by F W Preece, Adelaide 1924, fn 66 at p 23.

²⁷ <http://ia600307.us.archive.org/33/items/proposaltohisma00londgoog/proposaltohisma00londgoog.pdf>; see also HRA Series I vol XVI in note 205 at p 882.

²⁸ See Douglas Pike, *Paradise of Dissent – South Australia 1829-1857*, Melbourne University Press 2nd ed 1967 at 58.

²⁹ Jack Cross, *Great Central State – The Foundation of the Northern Territory*, Wakefield Press, South Australia 2011 at 1-4.

³⁰ Proposed by the South Australian Association in their *South Australian Outline of the Plan of a Proposed Colony to be founded on the South Coast of Australia; with an account of the Soil, Climate* (Ridgeway, London, 1834, p 6).

was intent on limiting potential competition from Australia while selling his vast land holdings in America.³¹ It has been suggested that “no sooner was the new colony settled after 1836 than some South Australians began to draw the boundary northwards again in their own imagination”!^{32]}

As for the western boundary at the 132 meridian, here again I have been unable to find any official explanation. While this meridian had only been legally defined as the eastern boundary of Western Australia several months before the 1831 proposal, it had been the western boundary of NSW since 1825. One possible explanation is that the promoters of the new colony did not want its boundaries to be contiguous with any other colony (except for NSW) in order to distance the free settler society as far as possible from any convict influence. In leaving an area between South Australia and Western Australia technically part of NSW, it certainly created a messy jurisdictional situation!

A more likely explanation is geographic. The 1831 pamphlet includes a detailed description of the major bays and features of the southern coast of Australia by way of extracts from Captain Matthew Flinders’ journal published in 1813. The pamphlet’s extracts begin in the west with Flinders’ description of Fowler’s Bay which lies a little east of the 132 meridian, then continue with descriptions of the major bays east along the coast including Port Lincoln and Kangaroo Island, and ends with Encounter Bay where Flinders’ discoveries terminated upon meeting the French. The pamphlet then refers to Sturt’s discovery of the mouth of the River Murray, its connection with the Darling River, and its extensive tributaries as far as the Blue Mountains near Sydney.

The reason why the 1831 pamphlet begins in the west with Fowler’s Bay may be gleaned from Flinders’ journal itself³³ and the geography of the southern coastline which he navigated. The coast west of the 132 meridian across to the 129 meridian comprises the spectacular and inaccessible cliffs of the Great Australian Bight. Fowler’s Bay near the 132 meridian is the first protected bay which Flinders found where he could go ashore. He named it after his first lieutenant.³⁴ Flinders’ detailed description of the coastline east from Fowler’s Bay to the Spencer Gulf indicated opportunities for shipping and trading.

³¹ Jack Cross, *Great Central State – The Foundation of the Northern Territory*, Wakefield Press, South Australia 2011 at 3-4; see *Hansard’s Parliamentary Debates* (3) vol XXV c.701.

³² *Ibid* at 4.

³³ Matthew Flinders, *A Voyage to Terra Australis; Undertaken for the purpose of completing the discovery of that vast country, and prosecuted in the years 1801, 1802, and 1803, in His Majesty’s Ship The Investigator, and subsequently in the armed vessel Porpoise, arrival of the Cumberland Schooner; with an account of the Shipwreck of the Porpoise, arrival of the Cumberland at Mauritius, and the imprisonment of the Commander for six and a half years in the Island*, London 1814, published by G & J Nicol, Pall Mall, Vol 1.

³⁴ *Ibid* at p 104.

Flinders also acknowledged that his navigation east from Cape Nuyts, beginning with Fowler's Bay, marked the beginning of European discovery of that part of the southern coast.³⁵ Dutch explorers (Captain Francois Thyssen and Peter Nutys,) had reached just west of that point before turning away from the coast in 1627. Similarly the French in 1793 (French Admiral D'Entrecasteaux). So it is possible that the 1831 pamphlet recommended the 132 meridian as the original western boundary of South Australia since the coastline was only of potential use and value that far west, apart from being the stretch of southern coast which Flinders was first to navigate.

As for the eastern boundary with NSW at the 141meridian, here again there seems to be little by way of official explanation. But it is consistent with ensuring for the new colony the perceived commercial and trading advantages flowing from the River Murray, as well as access to the fertile land on the York Peninsula and Kangaroo Island.³⁶

Once the statutory prerequisites of the 1834 Act were satisfied, the Province of South Australia was established by Letters Patent dated 19 February 1836. It became a Crown colony following the financial collapse of the province in May 1841.

Each of its borders with Western Australia, Victoria, New South Wales, Queensland and the Northern Territory now warrant specific mention.

Border with Western Australia

"No Man's Land", between South Australia's western border at the 132 meridian and the WA border at the 129 meridian, remained part of New South Wales until 1861.

South Australia sought for many years to have this area annexed to the colony. Section 66 of the *Constitution Act 1855 (Imp)* authorised the Queen to detach this area from NSW. In 1858, the NSW Government were prepared to transfer the area to SA because it was: useless to NSW; would become a burden on NSW public finance if settlers did go there; was only capable of being effectively regulated by South Australia; and was inaccessible to NSW. The Legislative Council, however, was not convinced. Members raised concern over the lack of evidence that the area was in fact useless to NSW, the impact this relinquishment of territory might have on "the maintenance of faith with the public debt", the dangerous precedent it might set for other areas of NSW like the

³⁵ Ibid.

³⁶ See A Grenfell Price, Ch IV "Prospectus and Flotation 1829-1936" in *The Centenary History of South Australia*, Royal Geographical Society of Australasia, South Australian Branch, 1936, p 47; A Grenfell Price, *The Foundation and Settlement of South Australia 1829-1845*, Facsimile ed 1973 of 1st publication by F W Preece, Adelaide 1924, pp 13,16- 17.

Murrumbidgee region which had closer trading links to Adelaide than Sydney, and the fact that South Australia had not bothered to approach NSW directly!³⁷

After significant efforts on the part of SA's Governor MacDonnell, No Man's Land was eventually annexed to South Australia on 10 October 1861 by Letters Patent made under the *Australian Colonies Act 1861* (Imp) (24 & 25 Vic c 44).

Map 8



Border with Victoria

Originally, the eastern border of South Australia at the 141meridian was entirely the western boundary of New South Wales. In 1850, with the separation from New South Wales of the new colony of Victoria, the lower part of the border up to the River Murray was now the border with Victoria, while the remaining upper part continued as the border with NSW.

From 1839, attempts were made by SA and NSW surveyors to precisely mark out this boundary along the 141 meridian.³⁸ In 1844, SA's Governor Grey suggested that the border with NSW at this meridian be replaced with the Glenelg River. In response, NSW suggested the River Murray further west instead. Despite the preparedness of both colonies to reconsider their border, the Governor of NSW, Sir Charles Fitzroy outlined to Earl Grey in 1848 how neither of these alternatives was acceptable:

³⁷ See the debates of the NSW Legislative Council on 4 November 1858, reported in the *Sydney Morning Herald* 5 November 1858 at p 3.

³⁸ See David Taylor, *The States of a Nation – The Politics and Surveys of the Australian State Borders*, NSW Department of Lands, 2006, at 71ff.

I find that my predecessor [Sir George Gipps], after deliberating the matter with his Executive Council, came to the conclusion that the natural boundaries recommended by Governor Grey were not distinct or perfect enough to justify so large a concession of country on the part of NSW as this adoption would require. The course of the Murray, on the other hand, was not open to any objection on the score of indistinctiveness; but its adoption would deprive South Australia of a large tract of sea board Country, and would leave the capital of that Colony within forty miles of its frontier. Being thus unable to recommend either of the proposed boundaries, the Council advised an adherence to the 141st Degree of East Longitude.³⁹

In 1846, the practical necessity to mark the boundary was highlighted by a SA Land Commissioner to the Colonial Secretary in these terms:

I would beg leave to call His Excellency's attention to the necessity of having the eastern boundary of the Province at least approximately defined as soon as possible. The country through which it passes is now occupied for seventy miles from the east coast, and there are at least twelve or fourteen settlers whose runs lie so near the boundary that I considered my jurisdiction over them uncertain, and therefore refrained from interfering with them. The loss to the revenue is not the only evil resulting from the want of a defined boundary. A number of bad characters resort to this neutral ground, knowing that the police cannot interfere with them until the question of jurisdiction is determined.⁴⁰

By the end of 1846, agreement was reached by correspondence between the NSW Governor Sir Charles Fitzroy and the SA Lieutenant-Governor Frederick Robe that their respective surveyors should use their "best means" to mark the boundary even if this might still be out by a few seconds of longitude.⁴¹ Surveyor Wade marked the 141 meridian border from the western side of the mouth of the Glenelg River north to the 36th parallel, a distance of 123 miles.⁴² Despite an initial view that this line, referred to as the Wade line, was a temporary one, it was adopted by proclamation published in the *South Australian Government Gazette* of 23 December 1847 and subsequently by a proclamation to the same effect in the *New South Wales Government Gazette* of 4 March 1849.

³⁹ Despatch No 7 of 8/1/1848 in HRA Series I vol XXVI p 163.

⁴⁰ Letter from Charles Bonney 15 July 1846: quoted by David Taylor, *The States of a Nation – The Politics and Surveys of the Australian State Borders*, NSW Department of Lands, 2006, at 74-5 fn 20.

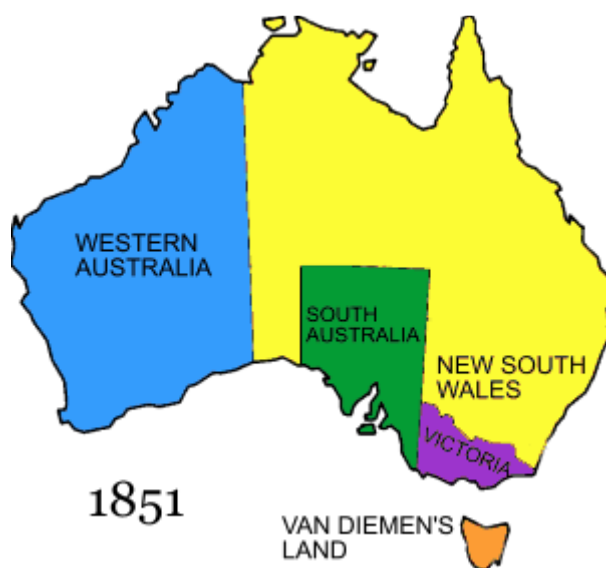
⁴¹ See David Taylor, *The States of a Nation – The Politics and Surveys of the Australian State Borders*, NSW Department of Lands, 2006, at 75; detailed history by Griffith CJ in *South Australia v Victoria* (1911) 12 CLR 667 at 677-693.

⁴² See Despatch No 7 of 8/1/1848 from NSW Governor Fitzroy to Earl Grey in HRA Series I vol XXVI p 163-4.

Surveyor White continued the Wade line to the River Murray in 1850: hence the description of the SA/Vic boundary as the Wade-White Line. This latter part of the line was never proclaimed.⁴³

After the separation of the colony of Victoria from New South Wales in 1850, the Wade-White Line was found by the use of more accurate technology in 1868 to be two miles and 19 chains west of the 141 meridian.

Map 6



South Australia immediately sought correction of the boundary line eastward but had no success. A prolonged campaign for rectification of the boundary achieved nothing. In 1894 the South Australian Governor even purported to issue a proclamation to revoke the 1847 proclamation of the Wade line and sought the intervention of the UK Parliament and Government. These appeals stalled because Victoria refused to accede to the matter being adjudicated by Imperial authority.

Federation led to renewed attempts by South Australia in the High Court and the Privy Council. These were also unsuccessful. Why so?

In *South Australia v Victoria*⁴⁴, the Court accepted first that it had jurisdiction under s 75(iv) of the Commonwealth Constitution as a matter arising between two States which raised a justiciable issue.

⁴³ See Frank J Williams, "Boundaries" in Wilfred Priest (ed) *The Wakefield Companion to South Australian History*, Wakefield Press 2001, at p 82.

⁴⁴ (1911) 12 CLR 667.

A majority of the Court⁴⁵, led by Chief Justice Griffith, then rejected South Australia's claim relying on the doctrine of authority arising from necessity, that is, once the need to mark out the boundary arose as settlers arrived, so the Governors of both NSW and SA had authority to agree on the actual boundary line drawn by their surveyors as the best attempt at that time to give effect to the border at the 141 meridian. And, that this was intended to be a permanent fixing of the boundary.⁴⁶

Justice Higgins dissented, rejecting any statutory conferral of authority on the Governors to fix a boundary other than on the true 141 meridian. His Honour reasoned: "If Parliament says the 141st degree, the Executive cannot make the boundary two miles more to the West."⁴⁷

His view makes no allowance for the apparent impossibility during the 1830s and 1840s of accurately determining the boundary along lines of longitude and latitude. Justice Isaacs, in the majority, highlights in his judgment the extreme inconvenience of such a strict view on the rights and duties of the local inhabitants if the boundary had to be moved each time there was an improvement in technology.

On appeal, the Judicial Committee of the Privy Council⁴⁸, in affirming the High Court's decision, found that the Letters Patent and the 1834 Statute establishing South Australia contemplated that an actual boundary needed to be determined and impliedly empowered the Executives of the two colonies to implement this.⁴⁹ The Privy Council had no difficulty in rejecting South Australia's argument that any boundary line could only ever be provisional until it was finally drawn with complete accuracy. Lord Moulton, in delivering the opinion of the Judicial Committee, relied on the need to fix a boundary with certainty:

It is essential that the given boundary should be such as fixes the rights and duties of the people and their rulers, and this can only be done by its fixing a boundary on the surface of the earth which divides the two.⁵⁰

The Judicial Committee also considered the effect of the *Queensland Government Act 1861* (24&25 Vic c 44) the preamble of which begins:

Whereas the boundaries of certain of Her Majesty's Colonies on the Continent of Australia may be found to have been imperfectly or inconveniently defined, and it may be expedient, from time to time, to determine or alter such boundaries:

⁴⁵ Barton J concurred; same conclusion by O'Connor J and Isaacs J; Higgins J dissented.

⁴⁶ See espec O'Connor J at 711-714 and Isaacs J at 723 and 731.

⁴⁷ At para 19.

⁴⁸ (1914) 18 CLR 115.

⁴⁹ Ibid at 140.

⁵⁰ Ibid at 139.

This Act empowered the Governors, with the advice of their respective Executive Councils, by an instrument under their joint hands and seals, *to determine or alter the common boundary of such Colonies* ...subject to Her Majesty's approval.

This provision was interpreted to authorise an actual change to the lawfully prescribed borders of the Colonies. It did not affect the implied power of the colonial authorities to determine issues arising in the actual marking of those lawfully prescribed borders.⁵¹ This distinction between the prescribed border and its actual survey occupies a central and pivotal role in understanding the legal status of the land boundaries of Australia.

Border with New South Wales

In 1868, the South Australia-New South Wales boundary north from the Murray River to the 26th parallel was surveyed. It was at this time that the inaccuracy of the Wade-White Line was discovered. Known as the Smalley-Todd Line, it is more accurately drawn along the 141 meridian north by commencing two miles and 19 chains east of the point where the Wade-White Line connects with the Murray River. By 1914 even this line was not regarded as entirely accurate, with the Privy Council observing in *South Australia v Victoria* that it was still “probably a hundred yards to the east of the meridian”.⁵²

The difference between the two boundaries which meet the River Murray is accentuated by the river meandering north-west for 13 km from the point where it meets the SA/NSW border until it meets the SA/Vic border – even though the gap between the two borders, as the crow flies, is only 2 miles and 19 chains west. This means that the border with Victoria extends further north thereby creating a narrow strip of South Australia bounded on the west and east by both borders and the River Murray on the south. It also raises difficult issues over the precise boundary line along this 13 km stretch of the Murray. There are competing arguments for the territory of South Australia to extend in three different ways: (i) over the whole of the watercourse of the river; (ii) to the middle of the river; or (iii) only to the northern bank.⁵³

Borders with Queensland

South Australia's eastern border with Queensland exists because the Queensland-New South Wales border at the 29th parallel lies south of South Australia's northern boundary at the 26th parallel. The

⁵¹ Ibid at 135.

⁵² Ibid at 139.

⁵³ See Greg Parker, *Time & Space in South Australia, The curious anomaly in the border of South Australia*, Australian Association of Constitutional Law seminar paper, Adelaide 2009.

point where the borders of New South Wales, Queensland and South Australia meet, is named “Cameron Corner”, after the surveyor who marked the spot in 1879 with a large wooden post.

South Australia’s northern border with Queensland arose in 1862 when Queensland acquired the eastern strip of the Northern Territory to the 138 meridian. This prompted South Australia to seek the remainder of the Northern Territory.

Annexation of the Northern Territory

The Colony of South Australia acquired the Northern Territory from NSW by Letters Patent dated 6 July 1863, issued pursuant to s 2 of the *Australian Colonies Act* 1861.

This may have been motivated initially to thwart any further expansion of Queensland into the Northern Territory, as well as by an abiding desire of the original promoters of South Australia to form “The Great Central State” stretching across the continent from the Southern Ocean north to the Indian Ocean, with all the trading advantages flowing from both coasts.⁵⁴

But it seems that the annexation of the Northern Territory was more in response to John McDouall Stuart’s trek from Adelaide to Darwin in 1861-62, and the need to control the northern grazing lands attracting South Australian settlers.⁵⁵ In time, South Australia regretted its acquisition. Eventually, the South Australian Parliament willingly surrendered, by s 7 of the *Northern Territory Surrender Act* 1907 (SA), the Northern Territory to the Commonwealth of Australia in accordance with s 111 of the Commonwealth Constitution. This territory was accepted by s 6 of the *Northern Territory Acceptance Act* 1910 (Cth) with effect from 1 January 1911.

The northern border with the Northern Territory remains the original border of South Australia at the 26th parallel. This boundary was not surveyed until the 1960s.⁵⁶

Victoria

The District of Port Phillip became separated from NSW as the new colony of Victoria on 1 July 1851 pursuant to the procedure prescribed by the *Australian Constitutions Act (No 2)* 1850 (Imp). Section

⁵⁴ Jack Cross, *Great Central State – The Foundation of the Northern Territory*, Wakefield Press, South Australia 2011 at 1 and

⁵⁵ See A Powell, *Far Country: A Short History of the Northern Territory* (2nd ed Melbourne University Press 1988) at 73-6; Jack Cross, *Great Central State – The Foundation of the Northern Territory*, Wakefield Press, South Australia 2011 at 7ff.

⁵⁶ See Frank J Williams, “Boundaries” in Wilfred Priest (ed) *The Wakefield Companion to South Australian History*, Wakefield Press 2001, at p 82.

1 of the Act defined the border with NSW, while maintaining the South Australia border at the 141meridian.

The land borders of Victoria with New South Wales and South Australia have generated more litigation than any other borders.

Since the border with South Australia has already been covered, let me deal with the NSW border.

The origins of the border between Victoria and NSW seem to lie in the *Australian Constitutions Act (No 1) 1842 (Imp)* (5&6 Vic c 76) which granted New South Wales its first form of representative government. In providing for the election of six representatives from the District of Port Phillip to the NSW Legislative Council, the Act defined the northern boundary of the District as follows:

a straight line drawn from Cape How (sic) to the nearest source of the River Murray and thence the course of that river to the eastern boundary of the province of South Australia.⁵⁷

This description was adopted by s 1 of the *Australian Constitutions Act 1850*⁵⁸ to define the territory of Victoria upon separation from New South Wales.

Clarification of the River Murray as the boundary occurred under s 5 of the *Constitution Statute 1855 (Imp)*, which :

declared and enacted, That the whole watercourse of the said River Murray, from its source therein described to the Eastern Boundary of the Colony of South Australia, is and shall be within the Territory of NSW.

Both colonies were also authorised to redefine this boundary line by enacting concurrent laws.

Why Cape Howe and the River Murray were selected as the key features of the Victorian-New South Wales border is not well documented. But the explanation seems to lie in the fact that they were near the southern boundaries of the two southern-most counties of NSW, namely, St Vincent and Murray, as proclaimed by the NSW Governor on 14 October 1829. Their southern boundaries extended from the coast south of Bateman's Bay and then along the Murrumbidgee River.

So when Lord John Russell, as Secretary of State for the Colonies, proposed in 1840 to the NSW Governor, Sir George Gipps, the creation of the Port Phillip District, he initially suggested the boundary line to be "from the limits of these two Counties by the whole course of the River

⁵⁷ See ACV Melbourne, *Early Constitutional Development in Australia*, edited by RB Joyce, St Lucia University of Queensland Press, 1963, at 269.

⁵⁸ 13 & 14 Vic c 59.

Murrumbidgee and the Murray, until it meets the Eastern Boundary of South Australia.”⁵⁹

Consequently, the Port Phillip District included the area north of the Murray River to the Murrumbidgee River.⁶⁰

Why Cape Howe was selected on the coast remains unexplained. It is fascinating to note that the survey conducted in 1872 in a straight line from Forest Hill, the agreed source of the Murray, across 110 miles of the rugged Australian Alps, arrived at Cape Howe a mere 16.8 inches from the marker at the Cape!⁶¹

The Victoria-New South Wales border has also raised legal issues, although the High Court was not involved until the 1980s. In 1911, an issue arose over what was the “nearest source of the River Murray”. Although never litigated, it was argued by some in the Riverina District⁶² of NSW who were unhappy that they had not been included in Victoria, that the Murray’s nearest source was in fact the source of the Murrumbidgee River. This would mean that all territory between the Murrumbidgee and Murray Rivers was part of Victoria – the same territory as that of the former District of Port Phillip.⁶³ So far the High Court has not had to rule on this issue!

But in the 1980s the High Court had to resolve in two cases - precisely where the boundary line lies in the River Murray itself.

In 1980, the High Court in *Ward v R*⁶⁴ established that the precise boundary line between New South Wales and Victoria along the River Murray is the top of the southern bank of the river. The Court interpreted s 5 of the *Constitution Act 1855 (Imp)*, which deemed the whole watercourse of the River Murray to be in New South Wales, to thereby encompass from the top of one bank to the top of the other. Accordingly, a shot fired from the top of the southern bank of the river by Ward, which killed a man on the southern shore of the river, constituted an offence committed in New South Wales and not in Victoria.

⁵⁹ Despatch No 93 of 31 May 1840: HRA Series I Vol XX at pp 641-642.

⁶⁰ See Note 119 to Despatch No 93 of 31 May 1840: HRA Series I Vol XX at pp 642 and 869.

⁶¹ WD Campbell, “An Account of the Boundaries of the Australasian Colonies” *The Surveyor* Vol VII Part I, at 23.

⁶² Ibid: their petition for separation from NSW in 1865 was unsuccessful: *ibid* 33-34.

⁶³ MH McLelland, “Colonial and State Boundaries in Australia” (1971) 45 ALJ 678 at 678 in fn 55 cites the opinion by NSW Sol-Gen Walter Bevan of 1 March 1912 in NSW Parliamentary Papers 1911-12 Vol 4 at 709; JCH Ogier, *The Riverina* (1913) 29 *Victorian Geographical Journal* p 49.

⁶⁴ (1980) 142 CLR 308, the Court agreed with Stephen J.

The decision of the High Court in 1982 in *Hazlett v Presnell*⁶⁵ dealt with the issue arising from the fact that there are two islands in the middle of the River Murray, for which s 5 of the *Constitution Act* 1855 (Imp) makes no provision. Those islands are: Pental Island and Beveridge Island.

Their status had previously been an issue during the latter half of the 19th century.

In 1872, Pental Island, which is 15 miles long and 2 miles across, was claimed by Victoria, although it was treated as part of NSW. The Judicial Committee of the Privy Council in arbitrating this issue advised, without giving reasons, that it was part of Victoria.⁶⁶

The status of the other island, Beveridge Island, was raised the following year. Both NSW and Victoria avoided litigation in this case by agreeing to ask their respective surveyors to determine whether the main channel of the River Murray flowed to the north or south of the island. In concluding that it flowed to the north of the island, they agreed that the island was part of Victoria. This conclusion was confirmed by a letter of 20 June 1876 from the Colonial Secretary of New South Wales to the Chief Secretary of Victoria. Successive colonial and State Governments of New South Wales and Victoria accepted and acted on this understanding.

It was this understanding which was challenged in 1982 in *Hazlett v Presnell*.⁶⁷ The High Court rejected the challenge, primarily on the ground that the approach of leaving to the surveyors the technical determination of the actual boundary line in accordance with s 1 of the 1855 Imperial Act was within the implied authority of both Governments conferred by that statute. The Court followed the approach adopted by the Privy Council in *South Australia v Victoria*⁶⁸ in deriving a similar implied authority to determine the actual boundary:

In our view, those provisions [of the 1850 and 1855 Acts] contained an implied grant of power and authority to the local administrators of the two Colonies to delineate and determine the actual boundary line on the surface of the earth and to resolve, by accord or agreement reached in good faith for that purpose, any questions of the identification of the River Murray, its course and its whole watercourse which might arise in that delineation and determination.⁶⁹

The Court followed the earlier authority despite acknowledging it is more difficult to define a boundary fixed by a meridian than by a river.⁷⁰

⁶⁵ (1982) 149 CLR 107.

⁶⁶ See W Harrison Moore, "The Case of Pental Island" (1904) 20 LQR 236.

⁶⁷ (1982) 149 CLR 107.

⁶⁸ (1911) 12 CLR at 723-4; (1914) 18 CLR 115 at 140-1.

⁶⁹ (1982) 149 CLR 107 at 122-3.

⁷⁰ *Ibid* at 122.

The Court also indicated that the long period of reliance on the understanding between the two governments since 1873 would bar the claim brought in the 1980s.⁷¹ The Court adopted the position expressed by the US Supreme Court in *Rhode Island v Massachusetts*:

...for the security of rights, whether of states or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be involved with greater justice and propriety than in a case of disputed boundary.⁷²

The Court in obiter offered guidance for a river boundary where the natural course of a river changes. If this change occurs as part of a gradual process of change (“gradual and imperceptible erosion and accretion”⁷³), then the boundary is altered in accordance with ordinary principles of erosion and accretion. If, however, it occurs suddenly as an “avulsion”, then the boundary is unlikely to change.

The final State to consider in this story is, of course, Queensland – the only Australian colony to be created and to be given self-government at the same moment on 10 December 1859!

Queensland

The placement of the border between New South Wales and Queensland in the 1850s aroused more controversy and debate than any other Australian land boundary. This was due to several factors: the widespread settlement which had already occurred in the northern rivers of New South Wales; the pastoral interests at stake in that region; the long gestation period since the establishment of the penal station at Moreton Bay in 1824; and, after all, it was the final border by which the mother colony of New South Wales was to be defined.

The focus of attention for the proposed border was as far south as the 30th parallel and as far north as the 26th parallel. As early as 1840, both these parallels were publicly suggested: the former by Governor Gipps who favoured a border south of the Clarence River to facilitate the pastoral industry in that region; the more northern parallel by an article in the *Sydney Morning Herald* (9 December 1840) which suggested 50 miles north of Moreton Bay.

In 1846, there was an aborted attempt to create a new colony, called “North Australia”, north from the 26th parallel and west to the 129 meridian. The necessary Letters Patent⁷⁴ were issued, an Administrator was appointed, a settlement was established at Port Curtis (now Gladstone) and the

⁷¹ Ibid at 125.

⁷² (1846) 4 How 591 at 639.

⁷³ (1982) 149 CLR 107 at 118.

⁷⁴ Issued 17 February 1846 pursuant to s 51 of the *Australian Constitutions Act 1842* (5&6 Vic c 76).

inaugural *Government Gazette of North Australia* was published on 30 January 1847. However, unbeknown to those concerned, Earl Grey had arranged for the Letters Patent to be revoked the previous December, which led to Port Curtis being abandoned by June 1847.⁷⁵

Meanwhile, the Reverend Dr John Dunmore Lang who was in England from 1847 to 1850 lobbied Earl Grey for a new northern colony from the 30th parallel. Significant support existed on the Darling Downs for this. However, members of the NSW Parliament, some of whom formed the “Select Committee on the *Dismemberment of NSW*”⁷⁶, and landed interests in New England sought the 26th parallel.

During 1855 and 1856, the Principal Secretary of State for the Colonies, Henry Labouchere, grappled with these competing views in despatches with the NSW Governor, Sir William Denison. It appears Governor Denison may well have suggested the compromise of the McPherson Range at the 28th parallel near the coast. It was the following description, which he suggested in a despatch to Labouchere, which was adopted by the Letters Patent of 6 June 1859 establishing the new colony of Queensland:

Starting at Cape Danger and following the range of hills which now separate the district of Clarence River from that of Moreton Bay, it should continue along that ridge forming the boundary of the basins of the Richmond and Clarence until it reaches the Parallel of 29 degrees of south latitude, along which it should continue westward till it reaches the meridian of 141 degrees east...⁷⁷

Map 7

⁷⁵ MH McLelland, “Colonial and State Boundaries in Australia” (1971) 45 ALJ 678 at 674.

⁷⁶ WD Campbell, “An Account of the Boundaries of the Australasian Colonies” *The Surveyor* Vol VII Part I, at 25.

⁷⁷ Despatch of 2 January 1858 from Governor Denison to Labouchere. This despatch included the final boundary with a map by Augustus Gregory (later first Qld Surveyor-General). See also: UR Ellis, *New Australian States*, Sydney, The Endeavour Press 1933, at 59.



A joint survey by the NSW and Qld surveyors, Isaiah Rowland and Francis Roberts, was undertaken of the eastern section of the NSW/Qld border between 1863 and 1866, commencing from Point Danger and ending at the junction of the Tenterfield and Dumaresq Rivers, a total of 215 miles (346 km). A complication of this border not found in any other Australian border is the need to determine the water-shed of the McPherson Range, since the border must run along the Range *between* the named rivers.⁷⁸

It seems that the Queensland and New South Wales Governments have tacitly accepted since the 1860s that the more accurate plans produced by the Qld surveyor, Mr Roberts, define that part of the border, rather than those produced by the NSW surveyor, Mr Rowland. Minor errors in the border, since revealed, have not been the cause of dispute, given the reliance both Governments have placed on the Qld survey plans. For instance, when the survey line was found in 1934, during construction of a tick gate and fence, not to follow strictly the top of the range near Terranora in NSW, the NSW Crown Solicitor advised Premier Bertram Stevens that “Mr Robert’s definition had always been adopted as the common boundary, and he advised against any redetermination of the boundary by method of litigation against Queensland”.⁷⁹

⁷⁸ See the instructions from Qld Surveyor-General Augustus Gregory to Roberts 17 April 1863, quoted in David Taylor, *The States of a Nation – The Politics and Surveys of the Australian State Borders*, NSW Department of Lands, 2006, at 150.

⁷⁹ *Ibid* at 152-3.

Unlike the position with the River Murray where Imperial statute conferred the whole watercourse to NSW, it is accepted that the actual boundary runs along the middle thread of the rivers which form the NSW –Queensland border.⁸⁰

The Letters Patent of 1859 made no reference to the western boundary of Queensland above the 26th parallel. Consequently, some argued Queensland extended all the way to the Western Australian border at the 129 meridian. One explanation is that this was a deliberate omission from the Letters Patent to allow for future determination of the western boundary as the interior country was explored.⁸¹ An opinion of the Imperial Law Officers of the Crown dated September 1859 rejected the view that the western boundary was at the 129 meridian, asserting that it was at the 141 meridian. They relied on the reference in the Letters Patent to the southern border ending at the eastern boundary of South Australia at the 141 meridian, to infer that this meridian formed the western boundary of the new colony.⁸²

Northern Territory Border

Although not a persuasive interpretation, the issue was soon resolved when Queensland succeeded in persuading the Imperial authorities to transfer to it, by Letters Patent dated 13 March 1862, that part of the Northern Territory between the 141 and 138 meridians, above the 26th parallel: **Map 9**



Queensland sought this annexation to gain control of the plains around the Albert River, referred to as the “Plains of Promise”, which were attracting squatters from Queensland, as well as to establish

⁸⁰ Ibid at 149 who cites at fn 62 the Report of Graeme Stewart, *Boundary definition of a Section of the New South Wales/Queensland Border located along the Dumaresq River between Tenterfield and Bonshaw*.

⁸¹ Qld Surveyor-General Gregory Memo of 28 Sept 1860 in *Votes and Proceedings of the Queensland Parliament* 1861 at pp 1012-3.

⁸² Opinion dated 28 Sept 1859, *ibid* at p 1015.

a deep water port in the Gulf of Carpentaria. Queensland gained enormously from this additional territory which includes the Barkly Tableland and the Mt Isa mineral field, as well as significant uranium deposits.

Suggestions from the Colonial Office later in 1862 to divide the remainder of the Northern Territory so that the top half above the Tropic of Capricorn was annexed to Queensland and the bottom half to South Australia were firmly rejected by Queensland which had no desire to increase its territory beyond the 138 meridian.⁸³ Instead, as noted earlier, South Australia eagerly accepted the annexation of the entire Northern Territory.

Map 10



It should come as no surprise that when surveyed between 1884 and 1886, the Qld/NT border along the 138 meridian was not drawn precisely north. So by the time it reaches the Gulf of Carpentaria, it is out by 600m in Queensland's favour!⁸⁴

An attempt has been made in Queensland to avoid any uncertainty over its land boundaries by enacting the *Queensland Boundaries Declaratory Act 1982* (Qld), s 3 of which purports to fix the land boundaries of Queensland according to the surveys conducted before 1900. The efficacy of this legislation seems doubtful in the absence of complementary legislation of the other States or Territory with which the Queensland boundaries are contiguous.

⁸³ See *Votes and Proceedings of the Queensland Parliament 1863* at pp 539-545 for Despatch No 5 from Governor Bowen to the Secretary of State for the Colonies dated 18 January 1863 with two enclosures: Minutes of the Executive Council of Queensland dated 14 January 1863; and Memo from Surveyor-General Gregory dated 25 November 1862.

⁸⁴ Bill Kitson and Judith McKay, *Surveying Queensland 1839-1945 A Pictorial History*, 2006 Qld Department of Natural Resources & Water and the Queensland Museum, at 61.

Power to alter State Borders

There remains to consider whether it is possible for the State borders to be altered in the future.

Before federation, the colonial boundaries could be altered by the Queen in Council under the *Colonial Boundaries Act 1895 (Imp)* with the consent of the affected Colonial Parliaments. Since federation, s 123 of the Commonwealth Constitution provides the *only* constitutional avenue for an alteration in State borders. It provides as follows:

The Parliament of the Commonwealth may, with the consent of the Parliament of a State, and the approval of the majority of the electors of the State voting upon the question, increase, diminish, or otherwise alter the limits of the State, upon such terms and conditions as may be agreed on, and may, with the like consent, make provision respecting the effect and operation of any increase or diminution or alteration of territory in relation to any State affected.

Accordingly, it is possible for the borders of a State to be altered by Commonwealth legislation enacted under s 123 which has been approved by both that State's Parliament and by a referendum of that State's electorate. Where the alteration affects the borders of more than one State, then the requisite approvals will be required from all affected States.

Writing in 1900, Quick & Garran considered the requirement of electoral approval as an "extraordinary limitation" on the power of State Parliaments.⁸⁵ This additional approval had been inserted into clause 123 subsequent to the Convention Debates, in response to the failure of the Convention Bill to be approved by the requisite majority in NSW. Today, referendum approval for any alteration in the State borders seems entirely appropriate and justified.

However the late inclusion of State electoral approval in the drafting of s 123, creates difficulty with ss 111, 121 and 124 of the Constitution. Section 111 enables a State Parliament to surrender part of its territory to the Commonwealth. Section 121 enables the Commonwealth Parliament to establish new States, which by s 124, can occur by an existing State giving up part of its territory to form a new State, or by the union of two or more States or parts thereof. In each of these circumstances, State borders are likely to change, but only the consent of the relevant State Parliament is expressly required.

Hence the issue: whether s 123 applies in each of these circumstances to require referendum approval? Not surprisingly, Quick & Garran⁸⁶ argue against this on the basis that each of the specific

⁸⁵ J Quick & RR Garran, *The Annotated Constitution of the Australian Commonwealth*, 1901, at 975.

⁸⁶ *Ibid.*

powers in ss 111⁸⁷, 121 and 124 should not be read down by s 123. While constitutional arguments can be mounted each way on this issue, I suggest that each of the State electorates in the 21st century would expect their approval to be sought before the borders of their State were altered in any respect.

Conclusion

It is evident from what I have covered tonight that the story of Australia's land boundaries is intimately connected with the foundations of this nation and its development. It is a story which has yet to be fully revealed.

What is clear is that several boundaries, which were marked by our surveyors in the 19th century, are in fact not exactly true to their celestial descriptions. Yet the High Court, since federation, has sensibly responded to this situation by refusing to disrupt the rights of those who might be affected by any correction.

As for the future, I imagine that our State land boundaries will remain unchanged this century – although the politics they limit will continue to evolve markedly!

⁸⁷ The NT was surrendered by SA to the Cth under s 111 (approved in *Paterson v O'Brien* (1977) 138 CLR 276) without any SA or NT referendum.