

Commonwealth Fisheries Management Review.

My submission is as follows.

I believe The Offshore Constitutional Settlement Agreement is illegal because it contravenes section 123 of the Australian Constitution.

This has had a serious effect on the fishing industry in Bass Strait & surrounding waters of the State of Tasmania.

I think you should look at this problem with the intention of rectifying it.

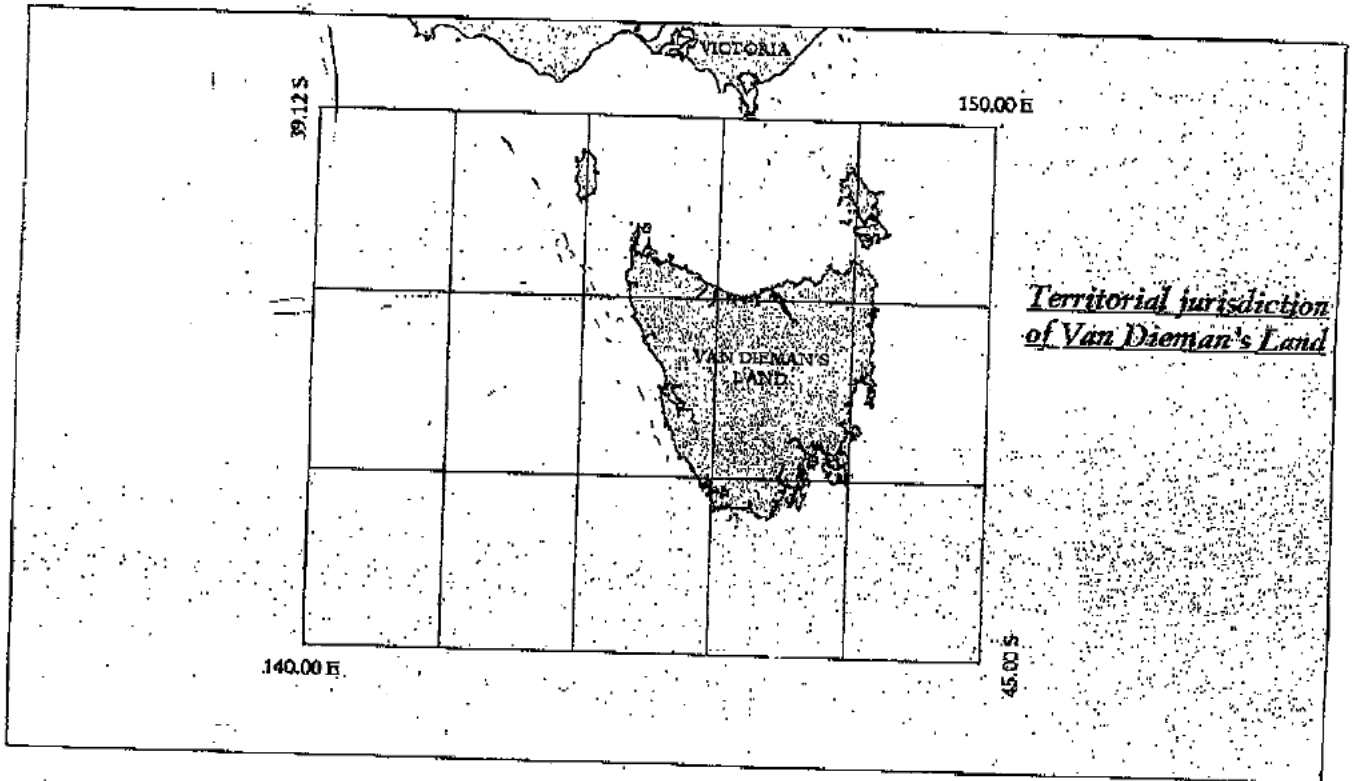
H. Miller

Haydn John Miller.

2. Map showing the boundaries

3

Figure 1 Map showing boundaries of Tasmania as described in the Commission of Lieutenant General Ralph Darling.



3. The process for changing State boundaries.

Section 123 of the Constitution provides a process for the alteration of the limits of States;

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.

Clearly, this provision governs the alteration of existing boundaries. However, there is a question as to whether it governs the determination of new boundaries. The question was discussed in one of the first text books dealing with the Australian Constitution. Section 123 exclusively governs the *alteration* of boundaries and this was said to be consistent with the idea that '[t]he territorial limits of the States are no longer the sole concern of the States whose limits are in question'

The States are units of territory for many purposes of federal government, and any alteration of their limits not only disturbs electoral and jurisdictional arrangements within the Commonwealth, but might entirely alter the balance of political power in the Commonwealth.¹⁴

However, 'the case is less clear' as to whether section 123 governs the making of new boundaries, for example where the boundary is 'uncertain or imperfectly defined'.¹⁵ If section 123 does not apply, it may be covered by powers conferred under Imperial Act 24 & 25 Vict c 44.

(4)

Chapter VI – New States

121 New States may be admitted or established

The Parliament may admit to the Commonwealth or establish new States, and may upon such admission or establishment make or impose such terms and conditions, including the extent of representation in either House of the Parliament, as it thinks fit.

122 Government of territories

The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.

123 Alteration of limits of States

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.

123

124 Formation of new States

A new State may be formed by separation of territory from a State, but only with the consent of the Parliament thereof, and a new State may be formed by the union of two or more States or parts of States, but only with the consent of the Parliaments of the States affected.

to the south-eastern corner of portion 177, parish Keewong, county of Murray; by the southern boundaries of that portion and portions 218, 211, 36, and 38 generally westerly to the Murrumbidgee River; by that river downwards to a point east of the south-east corner of portion 68, parish of Cuppacumbalong, county of Cowley; by a line partly forming the southern boundary of that portion west to the eastern watershed of Gudgenby River; by that watershed and the eastern and southern watersheds of Naas Creek; by part of the western watershed of Gudgenby River generally southerly, westerly, and northerly to the southern watershed of Coffey River; by that watershed and the western watershed of that river, passing through Mount Murray and through Bimberi Trigonometrical Station, generally northerly to Coree Trigonometrical Station; thence by a line bearing north-easterly to One-tree Trigonometrical Station; thence by the watershed of Molonglo River north-easterly and generally south-easterly to the Goulburn-Cooma Railway aforesaid; and thence by that railway generally south-westerly, to the point of commencement." The said Act came into force on 15th December, 1909.

By a proclamation²² dated 5th December, 1910, issued pursuant to s. 5 of the *Seat of Government Acceptance Act 1909* (Oth) (No. 23 of 1909) the Commonwealth accepted the said surrender on and from 1st January, 1911.

(r) *Surrender of Coastal A.C.T. to the Commonwealth*

By s. 6 of the *Seat of Government Surrender Act 1915* (N.S.W.) (No. 9, 1915) the New South Wales parliament, in pursuance of s. 111 of the Commonwealth Constitution, surrendered to the Commonwealth part of New South Wales, described as follows: "All that piece and parcel of land and water situate at Jervis Bay, in the parish of Bharwerre, county of St. Vincent, State of New South Wales, Commonwealth of Australia, area about 18,000 acres: Commencing at a point on the high-water mark on the left bank of Sussex Inlet at its intersection with the western boundary of portion 12 of 40 acres; and bounded thence westerly and north-westerly by that high-water mark to the high-water mark of St. George's Basin; thence in a general easterly and north-easterly direction by that high-water mark to its intersection with the production westerly of the southern boundary of portion 18; thence easterly by a straight line formed by the western production of the southern boundary of portion 18, the

boundary itself, and its production easterly to the high-water mark of Jervis Bay; thence by a line across the southern part of Jervis Bay bearing north-easterly to a point in the high-water mark of Jervis Bay at the northernmost extremity of Bowen Island; thence by the high-water mark of Jervis Bay and of the South Pacific Ocean along the eastern boundary of Bowen Island to the southernmost point thereof; thence by a line bearing south-westerly across the passage between Bowen Island and Governor Head to the high-water mark of the South Pacific Ocean on the foreshore of the mainland at the northernmost point of Governor Head; and thence by that high-water mark in a general southerly and south-westerly direction to St. George's Head; thence in a general northerly, westerly, and south-westerly direction by the high-water mark of Wreck Bay to the high-water mark on the left bank of Sussex Inlet before mentioned; and thence in a general northerly direction by that high-water mark to the commencing point." The said Act came into force on 21st April, 1915.

By s. 4 of the *Jervis Bay Territory Acceptance Act 1915* (Oth) (No. 19 of 1915) the territory so surrendered was accepted by the Commonwealth on and from 4th September, 1915, the date of commencement of the said Act.

2. TASMANIA (FORMERLY VAN DIEMEN'S LAND).²³

(a) *Original Boundaries*

By an Order-in-Council²⁴ dated 14th June, 1825, made pursuant to s. 44 of the Act 4 Geo. IV c. 96, Queen Victoria erected as a separate colony to be known as the Colony of Van Diemen's Land, certain territory described by reference to the draft commission to be issued to the Governor thereof (Darling),²⁵ read in the Council on the same day. This commission²⁶ was issued by letters patent dated 16th July, 1825 and described the Governor's territorial jurisdiction as follows: "Our Island of Van Diemen's Land, and all islands and territories lying to the southward of Wilson Promontory in 39° and 12' of south latitude, and to the northward of the 45th degree of south latitude, and between the 140th and 150th degree of longitude east from Greenwich, and also

²² The change of name from Van Diemen's Land to Tasmania was effected by proclamation of 1st January 1856 made pursuant to an Order-in-Council dated 21st July 1855.

²⁴ H.R.A. III, 4, 304; *Tasmanian Statutes 1826-1959*, Vol. 6, p. 868.

²⁵ Darling was also appointed Governor of New South Wales—see *supra* n. 3.

²⁶ *Tasmanian Statutes 1826-1959*, Vol. 6, p. 271; H.R.A. III, 5, 1.

²³ *Commonwealth Gazette*, 8th December, 1910, p. 1851.

by a straight line formed by the western production of the southern boundary of portion 18, the

²² *Commonwealth Gazette*, 8th December, 1910, p. 1851.

Vol. 6, p. 868.

²⁵ Darling was also appointed Governor of New South Wales—*supra* n. 9.

²⁶ *Tasmanian Statutes 1826-1959*, Vol. 6, p. 871; H.R.A. III, 6, 1.

Macquarrie Island lying to the southward of the said Island of Van Diemen's Land . . . " The said Order-in-Council took effect from 3rd December, 1825, the date of the proclamation²⁷ thereof at Hobart.

(b) *Inclusion of Norfolk Island*

By letters patent²⁸ dated 24th October, 1843, issued pursuant to s. 1 of the Act 6 & 7 *Vict. c. 35*, Norfolk Island was severed from New South Wales and annexed to the Colony of Van Diemen's Land, from and after 29th September, 1844.

(c) *Exclusion of Norfolk Island*

By an Order-in-Council²⁹ dated 24th June 1856 made pursuant to s. 5 of the *Australian Waste Lands Act, 1855* (18 & 19 *Vict. c. 56*), Norfolk Island was separated from the Colony of Tasmania and constituted a distinct and separate settlement, from and after the date of the proclamation of the said Order-in-Council in New South Wales, namely 31st October, 1856.⁴⁰

3. WESTERN AUSTRALIA

(a) *Original Boundaries*

The first British settlement in what became the Colony of Western Australia was founded at King George's Sound in December 1826. This settlement was under the control of the Governor of New South Wales, although outside the limits of that Colony.

In June 1829 a separate settlement, independent of the government of New South Wales, was established at Swan River by James Stirling who had been instructed to form and superintend the new settlement under the title of Lt.-Governor.⁴¹

In the preamble to the Act 10 *Geo. IV c. 22*,⁴² it was recited that "divers of His Majesty's subjects have, by the licence and consent of His Majesty, effected a settlement upon certain wild and unoccupied lands on the western coast of New Holland and the islands adjacent, which settlements have received and are known by the name of Western Australia." The said Act authorised the constitution of a legislature in Western Australia, but did not state the limits of its jurisdiction except negatively "that no part of the Colonies of New South Wales and Van Diemen's

Land, as at present established, shall be comprised within the . . . new Colony or settlements of Western Australia."

The establishment of the settlement at the Swan River was preceded by a voyage to the west coast by Captain Charles Howe Fremantle, Commander of H.M.S. "Challenger", who in a despatch⁴³ to the Secretary to the Admiralty reported that on 2nd May, 1829 he landed at the Swan River and that "formal possession was taken of the whole of the West Coast of New Holland in the name of His Britannic Majesty and the Union Jack was hoisted on the South Head of the River."

The territorial limits of the Colony of Western Australia were first formally defined in the commission⁴⁴ by letters patent dated 4th March, 1831 issued to Governor Stirling. It described his territorial jurisdiction as follows: "Our territory called Western Australia extending from Cape Londonderry in latitude 13° 44' south to West Cape Howe in latitude 35° 8' south and from the Hartog's Island on the western coast in longitude 112° 52' to 129° of east longitude . . . including all the islands adjacent in the Indian and Southern Oceans within the latitudes aforesaid of 13° 44' south and 35° 8' south and within the longitude aforesaid of 112° 52' and 129° east . . ." The said commission was received by Stirling in the Colony on 13th December, 1831.⁴⁵

(b) *Extension of Northern Limits*

In a supplementary commission⁴⁶ to Governor Weld, by letters patent dated 10th July, 1873, Queen Victoria declared Her pleasure to be that Her Colony of Western Australia was for the future to be considered and taken as "extending from the parallel of 13° 30' south latitude, to West Cape Howe in the parallel of 35° 8' south latitude, and from the Hartogs Island, on the

⁴³ Fremantle to Croker, 8th October, 1829—Cottesloe (ed.) *Diary and Letters of Admiral Sir C. H. Fremantle, G.O.B.*, p. 23.

⁴⁴ *Western Australian Year Book*, 1965, p. 452; P.R.O., C.O. 397/2 fol. 35.

⁴⁵ Despatch, Stirling to Goderich, 7th January, 1832; P.R.O., C.O., 18/10, fol. 5.

⁴⁶ P.R.O., C.O. 380/120, fol. 139. It is not clear when, or whether, the making of these letters patent was "signified" in Western Australia "by proclamation or other notice." Governor Weld's successor, Governor Robinson, was appointed by letters patent dated 6th November, 1874, which repeated the new territorial limits (P.R.O., C.O. 380/121 fol. 59). Governor Robinson's assumption of the administration of the government of the Colony was publicly notified on 11th January, 1875 (*Western Australian Govt. Gazette*, 12th January, 1875, p. 5.).

²⁷ *Tasmanian Statutes 1826-1959*, Vol. 6, p. 878; *The Hobart Town Gazette*, 4th December, 1826, p. 1.

²⁸ *N.S.W. Govt. Gazette*, 17th September, 1844, p. 1142.

²⁹ *The Statutory Rules and Orders Revised*, (1st ed.), Vol. 5, p. 129.

⁴⁰ *N.S.W. Govt. Gazette*, 1st November, 1856.

⁴¹ Murray to Stirling, 30th December, 1828—H.R.A. III, 6, 600.

⁴² Assented to on 14th May, 1829.

fixed,³ but it was provided that no part of New South Wales or of Van Diemen's Land as then established should be comprised within the new colony or settlements of Western Australia.

In 1825 Tasmania, which until 1853 was known as Van Diemen's Land, was separated from New South Wales. Its boundaries were defined in the Commission issued to Lieutenant-General Ralph Darling as Captain General and Governor in Chief, as "Our Island of Van Diemen's Land, and all Islands and territories lying to the southward of Wilson's Promontory in 39°12' of south latitude, and to the northward of the 45th degree of south latitude, and between the 140th and 150th degrees of east longitude, and also Macquarie Island."⁴

The Imperial Act 4 and 5 William IV. C. 95, passed in 1834, made provision for the creation of a new province or provinces within the territory of New South Wales as far east as the 141st degree of east longitude.

Letters patent dated 18th February, 1836, were thereupon issued by which the Province of South Australia was established, the boundaries of which were fixed as—on the north the 26th degree of south latitude; on the south the Southern Ocean; on the west, the 132nd degree of east longitude; and on the east, the 141st degree of east longitude, including Kangaroo Island and all other adjacent islands.

By the "Australian Constitutions Act, 1850" (13 and 14 Vict. c. 59), sec. 1, the Colony of Victoria was established. The land boundary was declared to be a line from Cape Howe to the nearest source of the River Murray and by the course of that river to the eastern boundary of the province of South Australia.⁵

By the "New South Wales Constitution Act, 1855," sec. 5, the whole watercourse of the River Murray from its source to the eastern boundary of South Australia was declared to be within the Territory of New South Wales,⁶ and by sec. 46 of the Schedule to that Act, the territory of New South Wales was defined as all the territory lying between the 129th and 154th meridians of east longitude and north of the 40th parallel of south latitude, including all adjacent islands in the Pacific and Lord Howe Island, except the Territories comprised within the boundaries of the province of South Australia and the colony of Victoria as at present established.⁷

3. [In 1831, when the Commission to Governor Stirling was issued, the boundaries were defined. They comprise the territory lying between 13° 30' and 35° 8' s. lat. and west of the 129th meridian including the adjacent islands in the Indian and Southern Oceans.]

4. Historical Records of Australia, 3rd series, vol. 5, p. 1.

5. Halsbury: Statutes (2nd Ed.), vol. 6, p. 229.

6. *Ibid.*, p. 236.

7. [See now New South Wales Constitution Act (1902) S. 4].

e Royal
missions
thorised
were all
*k place
on 22nd
Endeav-

upy the
l of 6th
uthority
w South
Arthur
of New
hed for
vernor's

of the
to the
latitude
ie west-
rom the
t in the

n, were
of the
ape was
bound-
d to the
s to the
ontinued
mission
General
eridian.

west of
d to the
George
ame of
ouncil to
es were

on 12th
Australia,