

THE MABO JUDGMENT IN THE LIGHT OF IMPERIAL LAND POLICY

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I. INTRODUCTION

In the *Mabo*¹ case the High Court recognised the native title of the Murray and Darnley Islanders and in so doing overthrew the doctrine of *terra nullius*. The full implications of that decision are still being examined but already a number of things are clear. The long tradition of native title jurisprudence in the United States, Canada and New Zealand has become directly relevant to Australian courts. The judgment has implications for the interpretation of Australian history and lends strength to the attempt to reassess the policies of the Imperial Government officials in the 1830s and 1840s as they grappled with the explosive expansion of Australian settlement ignited by the squatting rush. It becomes

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1 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

increasingly apparent that prior to the granting of responsible government to the Australian colonies in 1856, the Colonial Office attempted to provide compensation and protection for the Aborigines and that these policies continued to have relevance throughout the colonial period and beyond. This was particularly true in relation to the Aboriginal interest in the sprawling pastoral lands held under various forms of lease or licence. The *Mabo* decision, then, is far more securely rooted in the Australian experience than many observers appreciate, despite the counter thrust of both national historiography and jurisprudence during much of the twentieth century.

II. EARLY COLONIAL ACCEPTANCE OF ABORIGINAL PROPRIETORSHIP

Land has been of central concern in Australian history. The saga of pioneering looms large in national consciousness celebrated alike in history, novels and stories, drama, painting and film. The emphasis has been on the struggle against distance, drought and flood, against a hard, unforgiving land, even against nature itself. The Aborigines have frequently been ignored or treated merely as one of the many vexations endured by hardy pioneers. The fact that the Aborigines owned the land and were engaged in a defence of their property has only recently emerged in the more popular accounts of colonisation. The contrary view that the Aborigines didn't own anything, that Australia was in fact a *terra nullius*, received powerful support from both historians and judges.

The creation of a history of land settlement that ignored the Aborigines reached its high point in the work of SH Roberts, in particular *A History of Australian Land Settlement, 1788-1920*, and *The Squatting Age in Australia, 1835-47*.² Roberts detailed the struggle with the land and the conflict between colonists and Imperial authorities, and then between the settlers themselves as to who would own it and how it would be used. The traditional owners were scarcely mentioned at all. Their legal interest in the land was disregarded. They had disappeared from the story of land settlement. It was an intellectual and moral conjuring trick of considerable dexterity. But it was one which the legal profession had already perfected in the previous century. In 1889 the Privy Council declared that at the time of settlement Australia was "practically unoccupied without settled inhabitants".³ Forty years earlier the Supreme Court of New South Wales

2 SH Roberts *A History of Australian Land Settlement, 1788-1920* (1927), SH Roberts *The Squatting Age in Australia, 1835-47* (1933).

3 *Cooper v Stuart* [1889] AC 14 286 at 291.

determined that there could be no chance of any legal interest surviving from before the act of sovereignty, that there was no native title in the colony. The Court was:

...of the opinion that the waste lands of this colony are, and ever have been from the time of its settlement in 1788, in the Crown; that they are and ever have been, from that date...in the Sovereign's possession; and that, as his or her property, they have been and may now be effectually granted, to subjects of the Crown.⁴

But despite this emphatic statement from the Court, legal opinion in Britain was far more accommodating towards native title and strenuous official efforts were made to provide some justice towards the traditional land owners buffeted on all sides by the burgeoning colonial population.

It is necessary at this point to discuss both contemporary opinion and the evolution of British policy in respect of Aboriginal native title.

From the earliest years of settlement the colonists faced the inescapable fact that the Aborigines were in possession of the land. They quickly came to appreciate that the various tribal groupings lived in clearly defined territories and that they had a firm sense of possession. "Strange as it may appear", David Collins noted in 1791, "they also have their real estates". He appreciated that Aboriginal hostility related to the expropriation of their land, explaining that:

While they entertained the idea of our having dispossessed them of their residences they must always consider us as enemies; and upon this principal they made a point of attacking the white people whenever opportunity and safety concurred.⁵

In a confidential memo written to his successor William Bligh, Governor King confessed that he had "ever considered them [the Aborigines] the real proprietors of the soil".⁶

The belief that the Aborigines were in possession of the land - in the strict legal sense of the word - was expressed by many leading figures in colonial society. Opinion in Britain moved in much the same direction as in the colonies. Concern about the rights of the Empire's indigenous people grew rapidly in the 1830s as the powerful humanitarian movement looked for further crusades after the abolition of slavery in 1833. The parliamentary leader of the crusade, TF Buxton, who hated "shooting innocent savages worse than slavery itself"⁷ was principally concerned with the dispossession of native people. In 1834 he successfully moved in the Commons a unanimously supported address to the King urging the

...duty of acting upon the principles of justice and humanity in the intercourse and relations of this country with the native inhabitants of its Colonial Settlements, of affording them protection in the enjoyment of their civil rights.⁸

4 *Attorney General (NSW) v Brown* (1847) 1 Legge 312 at 316.

5 D Collins *An Account of the English Colony in New South Wales* (2nd ed, 1975). See vol 1 pp 122, 497.

6 H Reynolds *The Law of the Land* (2nd ed, 1992) p 60.

7 *Ibid* p 87.

8 *Ibid* p 84.

Buxton was overwhelmingly concerned with affirming the principle that "the natives have a right to their land".⁹ With the growing importance of humanitarian sentiment these ideas came to exert a powerful influence on British colonial policy. The famous 1837 Commons Select Committee on the Aboriginal people of the Empire reported that it should be obvious,

...that the native inhabitants of any land have an incontrovertible right to their own soil; a plain and sacred right, however, which seems not to have been understood.¹⁰

These comments were made with the Australian colonies particularly in mind.

British legal opinion of the time also favoured Aboriginal native title. At the request of the British agent of the Port Phillip Association - still fighting to overturn the New South Wales Government's rejection of Batman's treaty with the Port Phillip clans - four of the leading legal figures of the time provided opinions which found against the Company on the one hand and in favour of native title on the other. Significantly they applied the general principles of native title to the legal situation in the Australian colonies. There was no suggestion that Australia was different from other parts of the Empire or that Australia could in any sense be considered as a *terra nullius*. In the major opinion Burge, Pemberton and Follet argued that the title gained by colonial powers was "that of ultimate dominion in and sovereignty over the soil, even whilst it continued in the possession of the Aborigines". This principle was "reconciled with humanity and justice towards the Aborigines" because the dominion was qualified by allowing them to retain "not only the rights of occupancy, but also a restricted power of alienating those parts of the territory which they occupied".¹¹ The degree to which the colonial courts diverged from this view was a fair indication of the extent to which they had become isolated from the mainstream of British legal opinion on the common law of the Empire. The opinion, written by Burge, the leading contemporary authority on colonial law, was studied in the Colonial office and accepted as a statement of the current status of the law.

III. PROBLEMS CAUSED BY THE EXPANSION OF THE COLONY

Anyone seeking to trace the development of British policy towards Aboriginal land rights is seriously disadvantaged by the lack of specific references in the instructions given to the early governors. It was a problem referred to by Deane and Gaudron JJ in their joint opinion in *Mabo*. They concluded that the absence of

9 *Ibid* p 85.

10 *Id.*

11 *Colonial Office* (CO) 1/255.

any clear instructions does not suggest that Australia was considered to be a *terra nullius*. On the contrary the lack of discussion indicates that the established Empire policy of respect for native title was carried into Australia. A departure from that policy can not be assumed on the basis of silence on the issue which hints more at continuity than discontinuity.

Even if the act of State establishing the Colony [they argue,] be so extended to include all the documents read and all those activities, there is nothing which could properly be seen as effecting a general confiscation or extinguishment of any native interest which may have existed in the Colony under native law or custom or as negating or revising the strong assumption of the common law that any such pre-existing native interests were respected and protected under the law of the Colony once established.¹²

Given the slow progress of New South Wales and Van Diemen's Land until after the Napoleonic Wars the question of competing and irreconcilable claims to land did not reach a crisis point until the 1820s. Even then the Imperial authorities sought to concentrate settlement within a few hundred kilometres of the major towns and the expectation was that the colonists would engage in farming conducted somewhat after the English manner with small fields and fixed boundaries. Settlement would edge forward at the pace of the ploughman. In colonies so arranged the Aborigines would be compensated by the granting of reserves which would, it was hoped, provide food sufficient to replace what had been lost with the curtailing of the chase and the foraging range. In Van Diemen's Land Governor Arthur sought to keep the Aborigines out of the 'settled' districts but intended to leave them undisturbed in the rugged hinterland. When that plan failed he created a reserve on Flinders Island. While discussing their common 'native problem' Governor Bourke wrote to Arthur:

The management of those people has I fear become a matter of great difficulty and is likely to increase as more of the land is granted to settlers from foreign parts, unless some regular allotments can be made to the Tribes with which they would be satisfied.¹³

The policy of creating reserves was more vigorously pursued in Port Phillip and South Australia in the 1840s. The justification for the policy was clearly enunciated by South Australia's Governor Gawler and his Land Commissioner Charles Sturt. The local tribes, they believed, had "exercised from time immemorial...distinct, defined and absolute rights of proprietary and hereditary possession". They had "well understood and distinctly defined proprietary rights over the whole of the available land". Indeed their sense of property was "equally positive and well defined" as was that of the settlers themselves. The "invasion of those ancient rights" was justifiable, they believed,

12 Note 1 *supra* at 96.

13 *Arthur Papers Mitchell Library A 2168*.

...only on the ground that they should, at the same time, reserve for the natives an ample sufficiency for their present and future use and comfort, under the new state of things into which they are thrown - a state in which we hope they will be led to live in greater comfort on a small space than they enjoyed before it occurred on their extensive original possessions.¹⁴

But by the end of the 1830s it was apparent that Australia was to be “not an agricultural but a pastoral country”, that dispersed settlement was “essential to its prosperity”.¹⁵ We are so familiar with this development that it is hard for us to appreciate its uniqueness. There was little in British or European experience to guide the development of appropriate policy. Even the far flung Empire provided little help and the rapid occupation of the North American prairies was still some time in the future. Internal Colonial Office memos capture the sense of dealing with a unique situation. The Under Secretary of State, James Stephen, wrote that the Office had to

...deal with the problem admitting of none but a very imperfect solution, and which at no remote period will set all legislation at defiance. That problem is how to provide for the Government of persons hanging on the frontiers of a vast pastoral country to which there is no known or assignable limits. The backwoodsmen of the United States have a great Nation in their vicinity and from the nature of their agricultural pursuits are to some extent stationary in their habits. The Shepherds and Herdsmen of New South Wales must bear a greater resemblance to the Nomadic Tribes of Russia and Tartary, and must I apprehend ultimately become almost as lawless and migratory a Race. To coerce them by Statute of any kind would I should conceive prove in the result a vain undertaking.¹⁶

The squatting rush swept all else before it. “The squatters”, Gipps explained, “are now the most numerous class of our colonists, the squatting interest is becoming the prevailing interest in the country, squatting is superseding settling”.¹⁷ The policy of concentrated settlement was brushed aside. Bourke explained to his superiors in London that while the policy was fine in theory he could not

...avoid perceiving the peculiarities which, in this Colony, render it impolite, and even impossible to restrain dispersion within limits that would be expedient elsewhere. The wool of New South Wales forms, at present, and is likely long to continue, its chief wealth. It is only by a free range over the wide expanse of native Herbage which this Colony affords that the production of this staple article can be upheld at its present rate of increase in quantity or standard of value in quality.¹⁸

The Government decided that it would regulate by the granting of grazing licences the surge of settlement which it could not control. The principal motive was to “preserve the rights of the Crown to the lands” against any prescriptive title

14 Note 6 *supra* pp 133-34

15 Gipps to Russell *Historical Records of Australia* (19 December 1840) series 1 vol 21 p 132.

16 Comment by J Stephen in: Gipps to Glenelg (6 April 1839) CO 201/285.

17 Gipps to Stanley (18 April 1843) CO 201/248.

18 Bourke to Glenelg (10 October 1835) CO 201/248.

to them "being obtained against the Crown by virtue of the occupation of them under licence", or even by squatting on the land far beyond the limits of settlement.¹⁹ This was essentially the problem faced by the New South Wales and Imperial authorities as a result of the claim to land at Port Phillip by John Batman on the basis of his treaty with the local Aborigines.

The rejection of that treaty has been interpreted, by both historians and jurists, as a clear indication that the authorities regarded Australia as a *terra nullius*. If the Aborigines were unable to sell their land to Batman, the argument runs, it shows that they had nothing to sell. This was the view adopted by Blackburn J in *Milirrpum v Nabalco*²⁰ in 1971 (and also by Dawson J in *Mabo*) who argued that the official rejection of the treaty was "a cogent demonstration of the total absence from official policy of any idea that Aborigines had any proprietary interest in the land".²¹ However a close examination of the relevant Colonial Office files indicates that the principal reason for the failure of the Batman venture was the Crown's pre-emptive right to extinguish native title - a central feature of the doctrine since the eighteenth century and reaffirmed in many cases in North America and New Zealand. This was the basis of the Crown's case against Batman - no subject could acquire land from indigenous landowners. It had nothing to do with *terra nullius*. In fact the hand of the Crown was strengthened by the acceptance of native title. The vast lands of Australia weren't empty territory in danger of prescriptive claim by squatters. They remained in the possession of the Aborigines by right of prior occupation up until the time that the Crown chose to exercise its exclusive right to extinguish the native title.²²

The Colonial Office files also make it clear that the officials were deeply concerned about the fate of the Aborigines on the vast pastoral frontiers - far more concerned than they indicated in their dispatches to Australia. James Stephen noted on a letter received from New South Wales:

English Acts of Parliament seem rather flimsy contrivances for the government of nomadic natives as these [ie the squatters] are becoming... over squatters of bad character the law can have little power.[sic]²³

19 Gipps to Stanley (18 April 1843) CO 201/332.

20 (1971) 17 FLR 141.

21 *Ibid* at 257.

22 Note 6 *supra* pp 125-31.

23 Gipps to Glenelg (6 April 1839) CO 201/285.

IV. PROVISION FOR ABORIGINAL LAND RIGHTS

Intermittent unease about the Aborigines was heightened in 1847 when a report from GA Robinson, Chief Protector of Aborigines at Port Phillip, reached the Colonial Office. "The claim of Aborigines", he wrote,

...to a reasonable share in the soil of their fatherland has not, I regret to say, been recognised, in any of the discussions which for so great a length of time, have agitated the public mind on the question of rights of the Squatters, to the occupancy of the lands of the Crown... the duty devolves on me to bring this Claim under the notice of Her Majesty's Government for a reasonable share in the soil of their fatherland.²⁴

One of the Colonial Office officials who read the report stressed the importance of the subject matter, underlining in pencil and placing asterisks in the margin beside the twice repeated phrase about Aboriginal claims to a "reasonable share in the soil of their fatherland". The intra-office memos were equally revealing. Herman Merival noted that Governor Fitzroy's attention "must be drawn" to the question: "It would, of course be most unjust that the Natives should be extruded in the manner described ... from the soil of which till recently, they were the sole occupants".²⁵ Secretary of State Earl Grey commented that the Governor "must be instructed to take care that they are not driven off all that country which is divided into grazing [stations] and let under the recent regulations".²⁶ Grey considered the matter one of the greatest importance. In a brief memo he explained why Aboriginal rights must be affirmed. It was a matter of life and death. Action must be taken "with a view to their preservation from being exterminated".²⁷

The resulting dispatch, sent to Sydney in February 1848, outlined a well developed proposal which sought to meet the situation outlined in Robinson's report. Grey referred to the suggested creation of large reserves by way of compensation for the impairment of native title. He argued that whereas such a scheme was appropriate elsewhere in the world the nature of Australian geography and settlement patterns demanded a different answer. The dryness of the continent and the need for extensive grazing rights called for a peculiarly Australian solution. In fact:

...the very difficulty of thus locating the Aboriginal Tribes absolutely apart from the Settlers renders it more incumbent on Government to prevent them from being altogether excluded from the land under pastoral occupation. I think it essential that it should be generally understood that leases granted for this purpose give the grantees only an exclusive right of pasturage for their cattle, and of cultivating such land as they may require within the large limits thus assigned to them; but that

24 CO 201/382.

25 *Id.*

26 *Id.*

27 *Id.*

leases are not intended to deprive the natives of their former right to hunt over these Districts, or to wander over them in search of subsistence, in the manner to which they have been heretofore accustomed, from the spontaneous produce of the soil.²⁸

The Colonial Office had been forced to examine some of the same issues which exercised the mind of the High Court in the *Mabo* case. They considered whether pastoral occupation was “wholly or partially inconsistent with a continuing right to enjoy native title” and concluded that it certainly was not. They were adamant that pastoral leases did not confer a “right of exclusive possession”. The pastoralists' exclusive right of pasturage coexisted with the Aboriginal right of use and occupancy. They were “mutual rights”.²⁹ One was not superior to the other. On the other hand, the Colonial office accepted that when the land was enclosed and cultivated the usage was inconsistent with a continuing Aboriginal interest although whether that interest revived if the land went out of cultivation is not clear.

Earl Grey was even more emphatic on these points in another intra-office memo written in March 1849 when he noted that it has to be assumed that the Imperial Government “did not intend...to exclude the natives”³⁰ from land held under lease. What is more he believed that the Australian *Waste Land Act* had provided the government “no power”³¹ to extinguish customary rights.

What then was to be done to protect the Aboriginal interest? Colonial Office officials were clear about what they wanted to achieve - “the reservation in leases of Pastoral Land of the rights of the Natives”. It was not a case of creating new rights but the recognition of existing ones, the shaping of an instrument to ensure the “continuance of their rights”.³² They clearly interpreted a reservation in the precise legal sense of retaining or holding back some right, power or privilege. Equally, when they wrote of ‘rights’ they referred, not to moral, but to ‘legal’ rights. And the term ‘right’ was employed over and over again in official correspondence of the time.

How was the matter finally resolved? The New South Wales Law Officers, on receiving the initial instruction to provide for a ‘continuance’ of Aboriginal rights, argued that the matter could not be pursued without additional authority provided by an Order in Council. The Colonial Office accepted the advice and referred the correspondence on to the Colonial Land and Emigration Office. The officials there were acutely aware of the political sensitivities so soon after the colonial agitation of 1844-46 and suggested a form of words which disguised the specific purpose of

28 *Historical Records of Australia* series 1 vol 26 p 226.

29 *Id.*

30 See Fitzroy to Grey (11 October 1848) CO 201/400.

31 *Id.*

32 *Id.*

the Order in Council, which eventually was signed by the Queen on 18 July 1849 to "have the force and effect of law" in all the Australian colonies. It read in part:

And where as it is expedient that all such pastoral leases should contain such conditions, clauses of forfeiture, exceptions, and reservations, as may be necessary for securing the peaceable and effectual occupation of the land comprised in such leases, and for preventing the abuses and inconveniences incident thereto...³³

The failure of the Order in Council to be more specific about Aboriginal rights has misled later commentators. It was indeed an issue which concerned the Colonial Office's Australian specialist Gordon Gairdner. In a minute to Earl Grey on the draft Order in Council received from the Land and Emigration Commission he scrawled: "The entire extent of the access of the natives must surely be defined."³⁴ With an eye to the politics of the situation Grey replied that the Order would "be sufficient" as long as it was accompanied by an "explanatory dispatch".³⁵ So the true meaning of the measure was to be found less in the Order in Council, which was a public document published in the New South Wales Government Gazette, and more in the dispatch, which was only for official eyes. In that correspondence, Grey re-emphasised the substance of his original dispatch of 11 February 1848 and reiterated that there could be "little doubt that the intention of the Government was ... to give only the exclusive right of pasturage in runs, not the exclusive occupation of the land, as against the natives using it for ordinary purposes".³⁶ To underline his commitment to the issue, the Secretary of State told the Governor that if necessary he was to use discretionary powers under the Act to force squatters who had received leases prior to the publication of the Order in Council to accept the new conditions if they were "disposed to insist on an unreasonable construction of their right of occupation".³⁷

Colonial Office policy and intentions were expressed much more clearly in correspondence with the West Australian Government in 1850. Dispatches from the colony were received in May enclosing three detailed alternative schemes for regulating the occupation of waste land. None of the schemes mentioned the Aborigines, an omission immediately noticed by Earl Grey. While reading the dispatch he minuted: "one point I think has been overlooked". He explained:

If I am not mistaken a question arose in New South Wales as to the right of leaseholders to exclude the natives from their runs and it was found necessary to give some additional instructions upon that point. It is material that this will be attended to in the present case.³⁸

33 *Sydney Gazette* (29 April 1850) p 686.

34 Memo on letter of Colonial Law and Emigration Office (17 April 1849) CO 201/422.

35 *Id.*

36 Grey to Fitzroy (6 August 1849) *Dispatches to the Governor* Mitchell Library MS A 1308.

37 *Id.*

38 See Fitzgerald to Grey (24 July 1849) CO 18/51; Grey to Fitzgerald (22 May 1850) CO 397/9.

At Grey's insistence, an extra sentence was added to the draft dispatch which was then returned to him for approval. The sentence read:

You will observe that it is expressly provided by the [accompanying] Order-in-Council that no pastoral lease shall exclude natives from seeking their subsistence on the run in their accustomed manner.³⁹

The Order in Council embodied the official direction in chapter V, cl 7, which read:

Nothing contained in any pastoral lease shall prevent Aboriginal natives of this colony from entering upon the lands comprised therein, and seeking their subsistence therefrom in their accustomed manner.⁴⁰

The clause was duly incorporated in the colonial pastoral regulations and gazetted on 17 December 1850. It was made quite clear to Governor Fitzgerald that he was to enforce the regulations, Grey noting that other clauses in the Order in Council gave him the "fullest power to insert in all leases such conditions and clauses of forfeiture as may be necessary for the protection of the public interests in these or any other respect".⁴¹

The reaction of Earl Grey to the West Australian plans for pastoral occupation of the sprawling frontier territories provides us with the clearest possible picture of Imperial policy as interpreted at the highest level. We can trace with certainty the evolution of that policy from the ministerial minute scribbled on a dispatch in May to the gazettal of the regulations in Perth at the end of the year.⁴² We could not wish for a more complete endorsement of the policy of protecting Aboriginal occupancy rights on all land leased for pastoral purposes anywhere in the Australian colonies. Grey had underlined the practical consequences of this policy early in 1850 in a dispatch to New South Wales responding to further reports of frontier violence. While expressing his grave concern about bloodshed he firmly pointed out to Fitzroy, "that the practice of driving the natives from the cattle runs is illegal and that they have every right to the protection of the law from such aggression".⁴³

After considerable delay, the New South Wales Government proclaimed in March 1851 that all leases over Crown Lands beyond the settled districts would embody the terms, conditions, reservations and provisions outlined in the two Orders in Council of March 1847 and July 1849. The South Australian Government had been kept informed of developments in the other colonies. The Governor was sent a copy of Grey's dispatch to New South Wales of February

39 *Id.*

40 *Id.*

41 *Id.*

42 *Id.*

43 Grey to Fitzroy (10 February 1850) CO 202/58.

1848, which had for the first time enunciated the policy of defending the Aboriginal interest on all pastoral lands, and he was told that the proposals should be applied in South Australia. An Order in Council of June 1850 brought the colony under the sway of the *Waste Land Act* 1846 and its attendant orders and regulations. From that time on, local pastoral leases contained a provision reserving,

...for and on account of the present Aboriginal inhabitants of the Province and their descendants...full and free rights of ingress egress and regress into upon and over the said Waste Lands of the Crown...and in and to the Springs and surface water thereon and to make an erect such wurlies and other dwellings as the said Aboriginal Natives have been heretofore accustomed to make and erect and to take and use for food birds and animals - in such manner as they would have been entitled to if this demise had not been made.⁴⁴

V. ATTEMPTS BY THE IMPERIAL GOVERNMENT TO PROTECT ABORIGINAL INTERESTS UNDER RESPONSIBLE GOVERNMENT

After the 1850s as the colonies began to prepare for responsible government the Colonial Office officials assessed their use of Orders in Council under the *Waste Land Act* 1846 to protect the Aboriginal interest on the pastoral lands. They had to consider whether their chosen instrument was legally effective and what would happen when power over Crown land passed into the hands of colonists. As they looked at the various aspects of Aboriginal policy they re-emphasised the importance of "securing to the Natives the use of the unimproved lands for the purposes of hunting and of otherwise securing their subsistence". It was confidently assumed at the end of 1850 that this issue had "been already disposed of by the provisions made for that purpose". The right had "already been provided for".⁴⁵ There was no doubt in their minds that the relevant Orders in Council had provided secure legal protection for the Aborigines.

The attitude of the Colonial Office to the continued recognition of the legal rights after the transfer of power was that no group or individual (leaseholders, traditional owners, Imperial pensioners) should be "placed in a less secure position than at present"; no existing interest "should be sacrificed" or be "left open to invasion by the local legislature".⁴⁶ The Secretary of State for the Colonies, Earl Grey, was gravely concerned about the fate of the Aborigines under settler-controlled governments. He believed that "in assuming their territory the Settlers in Australia [had] incurred a moral obligation of the most sacred kind". The

44 Quoted by Blackburn J in *Milirrpum v Nabalco* note 20 *supra* at 260.

45 Memo on Fitzroy to Grey (23 March 1850) CO 201/427.

46 Memo from Colonial Land and Emigration Office CO 309/7. Draft reply of Grey to Fitzroy CO 201/516.

honour of both Imperial and Colonial governments was "deeply concerned in proving that no effort [had] been wanting on their part to avert the destruction of the Native Races as a consequence of occupation of their territories by British Subjects".⁴⁷

The future control of Crown Lands was almost the last business dealt with by the Imperial Government and Parliament before the formal transfer of power to the colonies. The *Imperial Repeal of Colonial Waste Land Act* 18 and 19 Vict c 53 of 1855 transferred the control of the sprawling Crown Lands of Australia to the colonial administrations allowing New South Wales, South Australia, Tasmania and Victoria to repeal, alter or amend an Order in Council made under the *Waste Land Act* 1846 provided they allowed for "the preservation and enabled the fulfilment of contracts, promises and engagements made by or on behalf of Her Majesty with respect to land".⁴⁸ Similar restrictions were placed on Queensland and Western Australia when they received their grant of responsible government in 1859 and 1890 respectively as a consequence of s 5 of Queensland's Letters Patent of 1859 and s 30 of the Queensland *Constitution Act* 31 Vict c 38 of 1867 and s 4 of the West Australian *Constitution Act* 53 and 54 Vict c 26 of 1890 which specified that nothing in the Act should "effect any contract or prevent the fulfilment of any promise or engagement made before the time at which this Act takes effect in the Colony".

It is significant that the Aboriginal rights of use and occupancy had been re-confirmed in the West Australian *Land Regulations* of 1887 gazetted just prior to the adoption of responsible government. Section 113 referred to:

...the full right [of] the aboriginal natives of the said Colony at all times to enter upon any unenclosed or enclosed but otherwise unimproved part of the said demised premises for the purpose of seeking their subsistence therefrom in their accustomed manner.⁴⁹

The Government took the rights seriously. In August 1888 the Colonial Secretary informed the Government Resident at Derby that these conditions "must be upheld or an injustice will be done the natives". Governor Broome was equally clear that the spirit of s 113 must be upheld even if the Aborigines "seeking their subsistence in their accustomed manner" engaged in burning of the rangelands.⁵⁰

In 1907 the High Court considered the relevant provisions of the Western Australian *Constitution Act* 1890 (WA) in *Moore & Scroope v Western Australia* and determined that:

47 Grey to Fitzroy (10 February 1850) CO 202/58.

48 Sections 4, 5.

49 Land Regulation issued under 18 and 19 Vict c 56; Correspondence re the proposed Introduction of Responsible Government in Western Australia (1889) 55 *British Parliamentary Papers* 113 c 5743.

50 *Western Australia Colonial Secretary Office* (CSO) 2315/88.

...the right to dispose of Crown lands and to make regulations was transferred to the autonomous government then established, but all contracts made by the Crown and all vested rights already accrued relating to Crown lands prior to that Act were expressly saved from interference.⁵¹

If the West Australian Constitution Act saved all vested rights from interference it is reasonable to assume the Queensland Constitution Act 1867 did likewise.

The effectiveness of the *Waste Land Act* 1855 had earlier been tested in the New South Wales Supreme Court in *Rusden v Weekes*. Stephen CJ concluded that the control of waste lands had not been “transferred to the legislature absolutely” but was given “only on conditions which operate as limitations on its power”. He explained:

I think it impossible for any man to doubt, that the clear intention of this proviso and of these provisions was, to preserve in the fullest manner to those lessees and licensed occupants, and others, whatever rights of any kind they had or were entitled to, respectively under the Order-in-Council. The words used, moreover, I conceive sufficient to effectuate that intention. As little do I see reason to doubt that the Colonial Legislature - by force of these provisions - acquired in respect of the leased lands, and lands permissively occupied, powers qualified and restricted only.⁵²

The judgments in the Supreme Court of New South Wales in *Rusden v Weekes* and the High Court in *Moore & Scroope v Western Australia* suggest that the *Imperial Waste Land Act* 1855 did limit the powers of Australian governments - colonial and state - in the critical area of land policy either directly by its specific application to the four colonies - New South Wales, Victoria, South Australia and Tasmania which received responsible government in 1856 - and to Western Australia and Queensland by implication and by specific references in their Constitutions Acts. Because the Imperial legislation was directly related to the Australian colonies it applied with paramount force in Australia as a result of long established legal traditions which were embodied in the *Colonial Laws Validity Act* 28 and 29 Vic C 63, s 2 of which read:

Any colonial law which is or shall be in any respect repugnant to the provisions of any act of parliament extending to the colony to which such law may relate, or repugnant to the provisions of any act of parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such act of parliament, or having in the colony the force and effect of such act, shall be read subject to such act, order, or regulation, and shall, to the extent of such repugnancy...be and remain absolutely void and inoperative.

Until the passage of the *Australia Act* 1986 the various Australian governments were unable to circumvent the *Colonial Laws Validity Act*.

51 *Moore & Scroope v West Australia* (1907) 5 CLR 326 at 327.

52 *Rusden v Weekes* (1861) 2 Legge 1406 at 1410.

In the late 1840s and early 1850s the Colonial Office officials set out to defend the right of Aborigines to continue to live on and take their living from the pastoral lands of Australia held under lease or licence. They believed that the rights of the two groups of land users - indigenous and European - were mutual. Faced with the approach of colonial self-government and the attendant loss of Imperial control over Crown land they sought to protect the Aboriginal interest from "invasion by the local legislators". It appears now they may have been successful, an achievement, however, which has been completely overlooked by Australian historians and jurists.

VI. RELUCTANCE TO ACKNOWLEDGE THE HISTORICAL RECOGNITION OF ABORIGINAL INTERESTS

Why were Imperial intentions and policies so hidden away from succeeding generations? There is no ready answer beyond the fact that it was overwhelmingly in the interests of the colonists to disregard any Colonial Office concern for Aboriginal rights. This was true of everyone from Lands Ministers and Attorneys-General in the parliaments down to the individual pastoralists who held leases which, at least in theory, provided for concurrent Aboriginal rights of use and occupancy. Historians and judges didn't help either. In his *History of Australia* GW Rusden assumed that the obscure wording of the 1848 Order in Council meant that Earl Grey "refused to declare that the native rights deserved respect",⁵³ an interpretation followed by Dawson J in his *Mabo* judgment.⁵⁴ But the case of Chief Justice Stephen of New South Wales is even more perplexing. In his judgment in *Rusden v Weekes* he strongly affirmed the power of the *Waste Land Act* 1855 to protect "in the fullest manner...whatever rights of any kind" accrued under the various Orders in Council. This protection, he determined, extended to lessees and licensed occupants "and others".⁵⁵ Was Stephen CJ unaware that the Colonial Office had by this legislation "provided for" Aboriginal rights of use and occupancy alongside those of the pastoralists? This may have been the case. An alternative explanation is that he was aware of the Imperial Government's intentions but deliberately obscured this by referring enigmatically to 'others' in such a way that those rights would remain in obscurity and as a consequence never be enforced by the law or defended in the courts. Was it indeed an attempt to ensure that his view of the situation as embodied in *Attorney-General v Brown*?⁵⁶

53 GW Rusden *History of Australia* (1883) vol 2 p 513.

54 Note 1 *supra* at 142.

55 Note 52 *supra* at 1410.

56 Note 4 *supra*.

prevailed over the contrary policies espoused contemporaneously in the Colonial Office?

The question of pastoral leases was discussed both by Blackburn J in *Milirrpum v Nabalco* and by Dawson J in his *Mabo* judgment. Blackburn dismissed the significance of provisions in South Australian and Northern Territory leases providing for Aboriginal use and occupancy rights. Such leases, he argued, did not have "any particular relevance" except that they were "consistent with the whole pattern of non-recognition of communal native title by Australian law".⁵⁷ Covering the same ground Dawson J argued that nothing was said by the authorities which could be "construed in any way as a recognition or acceptance by the Crown of any native rights to land". As settlement expanded, land was dealt with in a way that was intended to be "comprehensive and complete and was simply inconsistent with the existence of any native interest in land". Dawson J referred to clauses in Queensland nineteenth century pastoral leases recognising Aboriginal rights but noted that the squatters ignored their provisions and "continued to drive the Aboriginal inhabitants from their runs".⁵⁸ That was clearly the case. But the real point of the matter was that such behaviour was illegal and was conducted in direct contravention of Imperial law which had paramount force in the colonies. As shown above, when in 1850 Earl Grey was informed of such action on the Australian frontier, he was quite clear about the matter, telling Governor Fitzroy that it was illegal to drive the Aborigines from the cattle runs.⁵⁹

VII. EXTINGUISHMENT OF HISTORICALLY RECOGNISED ABORIGINAL INTERESTS

A further issue of great consequence is the question of the extinguishment of native title. The consensus in *Mabo* was that the Crown could extinguish the Aboriginal interest but that such an exercise of power must reveal a clear and plain intention to do so whether the action was taken by the legislature or the executive. Brennan J explained that:

...where the Crown has validly alienated land by granting an interest that is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency. Thus native title has been extinguished by grants of estates of freehold or of leases but not necessarily by the grant of lesser interests (eg authority to prospect for minerals).⁶⁰

57 Note 20 *supra* at 261.

58 Note 1 *supra* at 142.

59 Note 43 *supra*.

60 Note 1 *supra* at 69.

What then of pastoral leases? Did they extinguish native title? It was a question which closely concerned Colonial Office officials. When they were informed that pastoralists were driving Aborigines off their traditional lands they were adamant that the sort of lease envisaged for Australia under the *Waste Land Acts* 1842, 1846 and 1844 did not give the settler an interest that was wholly or even partially inconsistent with native title. As indicated above Grey explained that the intention of the Imperial Government was to give “only the exclusive right of pasturage in runs” and not the “exclusive occupation of the land, as against the Natives using it for ordinary purposes”. The squatter and the local Aboriginal group had concurrent, or ‘mutual’ rights over the same land.

The problem can perhaps best be approached by reconsidering what pastoral leases actually were. In a forthcoming article *Mabo: Australian Aboriginal Native Title in Two Syllables*⁶¹ Amankwah and Poynton argue that while a grant of freehold clearly does extinguish native title the question of leaseholds is “not free from doubt”. They tackle the question by looking at the essential character of a lease. They explain that in the High Court case *Radaich v Smith*⁶² Windeyer J concluded that the fundamental right possessed by a tenant which distinguishes his position from that of a licensee was the legal right of exclusive possession for a particular term. Critically, they argue that a licence does not become a lease because the document creating it employs language and terminology appropriate to a lease. They observe:

If a grant or demise of an interest is subject to other people's right to enter the land and put the land to their own particular kind of usage - foraging, fishing, hunting, etc - then it is submitted that the grantee does not have exclusive possession and *a fortiori* the demise is not a lease notwithstanding the employment of terminology consistent with the creation of a lease. Viewed from this angle so-called pastoral leases were actually mere licences for pasturage purposes... We submit that pastoral leases fall within the ambit of ‘lesser interests’ which could not therefore extinguish native title.⁶³

VIII. CONCLUSION

Detailed consideration of Imperial policy based on an examination of dispatches to and from the colonies and more critically the internal memos exchanged by Colonial Office officials establishes beyond doubt that the British Government recognised native title and considered that the Aborigines should be compensated when it was extinguished. A central feature of this recognition was the determination to protect and preserve the right of Aborigines to continue to use

61 HA Amankwah and P Poynton *South African International and Comparative Law Journal* forthcoming.

62 (1959) 101 CLR 209

63 Note 61 *supra* pp 48-49 (pages refer to those in the manuscript).

their lands even while they were used by settlers for pastoral purposes. Given the enormous areas occupied by the squatters such a measure was essential to save the tribes from 'being exterminated'. There is no doubt either that the Colonial Office intended to provide on-going protection against the 'invasion' of those rights by colonial parliaments. This policy developed slowly in answer to the unique problems created by Australian settlement. Its long term legal effectiveness has not been fully determined. But it may yet shake the Australian legal system and have profound political consequences as well. As Australia moves with growing momentum towards a republican constitution the Empire may strike back in quite unexpected ways.