

## ABORIGINES AND PASTORAL LEASES- IMPERIAL AND COLONIAL POLICY 1826-1855

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Imperial and colonial government policies in relation to the occupation and use of the pastoral lands of New South Wales evolved during the 1830s and 1840s, as understanding of colonial conditions increased and governments struggled to find answers to new and complex social, economic and political problems. There was a need to balance the interests of the squatters with the public interest. By the end of the 1850s, colonial land policy had been shaped by several influences, including the emergence of policies with respect to the Aborigines. These policies aimed to extend to Aborigines the 'benefits of civilisation', while at the same time, ensuring that they would not be prevented from having continued access to the pastoral lands of the colony as long as those lands were used for pastoral purposes.

The squatters' early demands for 'fixity of tenure' were ignored. Granting leases over the large areas of land required for pastoral activities would be incompatible with the rights and interests of the Crown and the wider public interest. The Crown would lose its control over, and the revenue from, extensive areas of land and occupation that was intended to be temporary might evolve into a 'permanent right'. There was also concern that a secure title for an extended term might give the squatters 'so much right of tenure' that some might believe their claim to the land 'so permanent that they would not allow an Aboriginal to stay upon or even cross the stations'.

Imperial legislation enacted in 1846 permitted lands in the Australian Colonies to be leased and in the following year, an Order in Council authorised the New South Wales

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Governor to grant leases for pastoral purposes. It was not intended that lessees should have the right to exclude Aboriginal people from their runs. A further Order in Council (of July 1849) authorised the Governor to insert in all future leases such conditions as would prevent the injury to the public that would result from the absolute exclusion of Aboriginal people from lands held under pastoral lease.

In 1855 the Imperial Parliament enacted *The New South Wales Constitution Act* which transferred to the Colonial Legislature the entire management and control over the waste lands of the Crown in New South Wales. The *Imperial Land Acts* 1842 and 1846 were repealed, and the Local Parliament had the power to enact its own laws with respect to the alienation and occupation of land in the colony.

## I. INTRODUCTION

The dignity and independence based on landed wealth, are ever the chief allurements of the emigrant. Whatever his rank, he dreams of the day when he shall dwell in a mansion planned by himself; survey a wide and verdant landscape called after his name; and sit beneath the vineyard his own hands planted.<sup>1</sup>

My country all you gone. The White Men have stolen it.<sup>2</sup>

Conversation reported by missionary Francis Tuckfield

Land has been a central preoccupation of Australian history since 1788. There has been incessant debate and much contention over who should control it, under what tenure it should be held and how it should be used. From the beginning of settlement until 1856, the Colonial Office determined land policy in New South Wales, Tasmania, Victoria and South Australia. Western Australia remained under Colonial Office control until 1890. Between 1835 and 1856 British politicians and officials grappled with the vast and unprecedented problems thrown up by the squatting movement which saw settlers with their flocks and herds, fan out across south-eastern Australia to occupy an area as large as western Europe. For the first time the Imperial Government was forced to confront the inescapable realities of the Australian environment and the emerging shape of a pastoral based economy. Hope of concentrating settlement had to be abandoned, Governor Bourke explaining in a despatch to London in October 1835:

I cannot avoid perceiving the peculiarities which, in this Colony, render it impolitic 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 the Colony affords that the production of this staple article can be upheld at its present rate of increase in quantity or ... quality.<sup>3</sup>

1 John West, *The History of Tasmania*, The Examiner (1852).

2 Conversation reported by missionary Francis Tuckfield, Western Victoria, 1840

3 Sir Richard Bourke to Lord Glenelg, Despatch No 99, 10 October 1835, CO201/248.

It was a problem which Colonial Office officials concluded was “admitting of none but a very imperfect solution”.<sup>4</sup> They were perplexed as to how they could control “persons hanging on the Frontiers of a vast pastoral country to which there is no known or assignable limits”. The permanent head of the Colonial Office, James Stephen believed that the “[S]hepherds and Herdsmen of New South Wales” would become like the “[N]omadic Tribes of Russia and Tartary” and ultimately prove to be “almost as lawless and migratory a Race”.<sup>5</sup>

Officials in both Sydney and London decided they would have to control a movement they had no power to stop, to “turn to best advantage a state of things which [the government] cannot wholly interdict”. The dispersion, Governor Bourke observed, would continue, but the worst evils might be prevented “by the guidance and control of authority opportunely introduced”.<sup>6</sup>

One pressing concern of officials was the fear that the squatters would eventually gain freehold title to the land and lock it up forever, in defiance of Imperial Government intentions and policies. Governor Gipps warned the Colonial Office of the need “to guard against any prescriptive title” being obtained against the Crown, but also against a “general clamour” which would be used to extort freehold title from “the weakness of Government”.<sup>7</sup>

Of equal importance was officials’ desire to protect the Aborigines. Officials in the Colonial Office, reading the despatches from all the Australian Colonies, were inescapably aware of the violence and bloodshed which accompanied the settlers as they moved into new country. Every month or so they read of new atrocities. In their internal memorandums, they frankly expressed their disgust at the attitudes and behaviour of the colonists, views which rarely found their way into despatches sent out to Australia. While commenting on a despatch from Sydney which contained references by a settler named Docker to frontier attitudes, James Stephen wrote:

Mr Docker touches on the real truth when he observes on the hatred with which the white man regards the Black. That feeling results from fear – from the strong physical contrasts which interrupt the sympathy which subsists between men of the same Race – from the proud sense of superiority – from the consciousness of having done them great wrongs and from the desire to escape this pain of self-reproach by laying the blame on the injured party.<sup>8</sup>

James Stephen and his fellow officials believed that the settlers would ultimately annihilate the Aborigines who would “ere long cease to be numbered amongst the Races of the Earth”.<sup>9</sup> It was a “calamity”, an “approaching catastrophe”,<sup>10</sup> an “impending catastrophe”<sup>11</sup> which the British authorities seemed

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4 James Stephen, memorandum on: Governor Gipps to Lord Glenelg, Despatch No 65, 6 April 1839, CO201/285.

5 *Ibid.*

6 See note 3 *supra*.

7 Governor Gipps to Lord Stanley, Despatch No 54, 18 April 1843, Historical Records of Australia (HRA) Series I, vol xxii, 666-7.

8 Governor Gipps to Lord John Russell, Annotation, 9 April 1841, CO201/309.

9 Governor Gipps to Lord Glenelg, Marginal note, 22 July 1839, CO201/286.

10 Governor Gipps to Lord John Russell, Marginal note, 19 July 1841, CO201/310.

11 Governor Gipps to Lord Glenelg, Marginal note, 25 April 1838, CO201/272.

unable to prevent. They were sentiments shared by Governor Gipps, who wrote in 1838 that “all we can do now is to raise, in the name of Justice and humanity a voice in favour of our poor savage fellow creatures”.<sup>12</sup>

But the Colonial Office did not desist in its desire to provide protection for Aborigines from the violent dispossession which accompanied the squatting rush. In 1839 Gipps announced in the *Government Gazette*, that:

...each succeeding despatch from the Secretary of State, marks in an increasing degree the importance which Her Majesty’s Government, and no less the Parliament and the people of Great Britain, attach to the just and humane treatment of the Aborigines of this country; and to declare most earnestly, and solemnly, his deep conviction that there is no subject or matter whatsoever in which the interest as well as the honour of the Colonists are more essentially concerned.<sup>13</sup>

This public announcement underlines the fact that the squatting movement coincided with the upsurge of humanitarian sentiment in Britain. The reformer’s great victory - the abolition of slavery in 1833 - was consummated just as the Australian sheep and cattlemen were pushing out beyond ‘the limits of location’.

### A. Native Title and Pastoral Leases

Since the March 1996 Federal election, State Premiers and backbench members of the coalition parties have called for amendments to the *Native Title Act 1993* (Cth) which would expressly extinguish native title over lands held under pastoral lease. However, the Prime Minister has indicated that the Government will not legislate to extinguish native title over pastoral leases. It will uphold the principles of the *Racial Discrimination Act 1975* (Cth) and leave the question to be determined by the courts.

In the *Wik* and *Waanyi* cases the courts have considered whether the grant of a Queensland pastoral lease confers exclusive possession and if so, whether such a lease extinguishes native title. Justice French (*Re Waanyi Peoples’ Application*),<sup>14</sup> Jenkinson and Hill JJ (*North Galanjanja Aboriginal Corporation and Another v State of Queensland and Another*)<sup>15</sup> and Drummond J (*Wik Peoples v The State of Queensland & Ors*)<sup>16</sup> have all held that pastoral leases, like leases under the general law, do confer exclusive possession and, consistently with the views of the

12 Governor Gipps to Lord Glenelg, 21 July 1838, HRA, Series I, vol xix, 509-10.

13 Governor Gipps, “Notice: Aborigines”, no 418, New South Wales *Government Gazette*, 22 May 1839 at 606.

14 *Re Waanyi Peoples’ Application* (1994) 129 ALR 118 (*Re Waanyi*); see also, “Extinguishment by Pastoral Lease” (1995) 1 *Native Title News* 54; “Extinguishment by Pastoral Lease: The Waanyi Claim” (1995) 1 *Native Title News* 79; “The Waanyi Peoples’ Claim” (1995) 1 *Native Title News* 112; G Nettheim, “Moral Shortcoming’: Waanyi Peoples and Native Title” (1995) 3(73) *Aboriginal Law Bulletin* 10.

15 *North Galanjanja Aboriginal Corporation and Another v State of Queensland and Another* (1995) 132 ALR 565 (*North Galanjanja*); L Kennedy, “Lawn Hill’s Pastoral Leases: North Galanjanja and Bidanggu Aboriginal Corporations for the *Waanyi People v Queensland and CRA*” (1995) 3(77) *Aboriginal Law Bulletin* 17; L Kennedy, “Pastoral lease issues before the High Court: North Galanjanja and Bidanggu Aboriginal Corporation for the *Waanyi People v Queensland and CRA*” (1996) 3(79) *Aboriginal Law Bulletin* 15.

16 *Wik Peoples v The State of Queensland & Ors* (1996) 134 ALR 637 (*Wik*).

majority of the High Court in *Mabo v Queensland (No 2)*,<sup>17</sup> do extinguish native title.<sup>18</sup> Justice Lee (*North Galanjanja*) however, thought that it was arguable that pastoral leases “were intended to be used, or enjoyed, in co-existence with indigenous title and that the granting of pastoral leases of such areas did not carry with it an intent by the Crown to extinguish native title”.<sup>19</sup> In a statement which we believe is consistent with the history of the evolution of the lease for pastoral purposes in colonial Australia, Lee J expressed the view that:

[I]t may be submitted that a pastoral lease granted by the Crown is a qualified grant of an interest in land being a statutory interest in Crown land created to meet the requirements of Australian conditions.<sup>20</sup>

The Waanyi People were granted special leave to appeal to the High Court.<sup>21</sup> Although the appeal was determined on procedural grounds relating to the operation of s 63 of the *Native Title Act 1993* (Cth) the majority concluded that the proposition that native title was extinguished by the grant of a pastoral lease raised a question of law which was not settled and was “fairly” or “plainly” arguable.<sup>22</sup>

Relying on the binding authority of the majority decision in *North Galanjanja*, Drummond J held that a Queensland pastoral lease which confers on the lessee exclusive possession and which does not contain a reservation, extinguishes native title.<sup>23</sup> The Wik Peoples gave notice of their intention to appeal to the Full Court.<sup>24</sup> In April 1996 the State of Queensland successfully applied under s 40 of the *Judiciary Act 1903* for the removal of the appeal to the High Court. The appeal was heard on 11-13 June 1996. The court reserved its judgment.

## B. Aborigines and Pastoral Leases

In what way is the evolution of the lease for pastoral purposes in colonial New South Wales relevant to the question whether pastoral leases granted in

17 (1992) 175 CLR 1 (*Mabo (No 2)*). Justice French, in *Re Waanyi*, at 137-9, and Hill and Jenkinson JJ, in *North Galanjanja*, at 617, placed particular reliance on the statement of Deane and Gaudron JJ at 110 that:

The personal rights conferred by common law native title do not constitute an estate or interest in the land itself. They are extinguished by an unqualified grant of an inconsistent estate in the land by the Crown, such as a grant in fee or a lease conferring the right to exclusive possession.

18 In the cases of *Re Waanyi* and *North Galanjanja*, the legislation under consideration was the *Land Act 1902*, and the *Land Act 1910*. In the *Wik* case, the Act under consideration was the *Land Act 1962*. Justice French also held that the grant of a lease without a reservation under *The Pastoral Leases Act 1869* extinguished native title. On appeal Hill J in *North Galanjanja* at 607 concluded that because of the “possible inferences and open facts” in relation to whether this lease had issued and if so, whether it would have contained a reservation, French J was in error in deciding that the applicants could not make out a prima facie claim with respect to the lease under the 1869 Act. Justice Jenkinson, at 577 reached the same conclusion.

19 *North Galanjanja*, note 15 *supra* at 586.

20 *Ibid* at 590.

21 *Re North Galanjanja Aboriginal Corporation; Ex parte Queensland* (1996) 70 ALJR 344.

22 *Ibid* at 357-9. Justice McHugh reached the same conclusion at 367.

23 Ironically, 15 months after the hearing in *Wik*, Justice Drummond’s judgment preceded only by days the hearing of the *North Galanjanja* appeal in which the High Court ordered that the Orders of the Full Court of Federal Court and the decision of the President of National Native Title Tribunal be set aside: *Re North Galanjanja Aboriginal Corporation; Ex parte Queensland*, note 21 *supra*.

24 The appeal was not limited to the pastoral lease question. Other questions determined by Drummond J were also the subject of appeal.

Queensland in 1915, 1919 and 1975 respectively, extinguish the native title rights and interests of the Wik and Thayorre Peoples in land on Cape York Peninsula?

Justice Drummond<sup>25</sup> and Hill J<sup>26</sup> for example, both suggested that events and actions occurring in the mid-19th century were of little utility as an aid to the construction of statutes enacted during this century. It is implicit in his judgment that Hill J<sup>27</sup> thought that, without more, a statutory lease would possess all the incidents of a lease under the general law, including a right of exclusive possession. He pointed out that statutes providing for the grant of pastoral leases must be construed according to their terms and noted that the *Land Act* 1902 used "expressions well known in land law such as 'lease', 'demise', 'term', 'surrender', 'rent'".<sup>28</sup> On the other hand, Lee J thought that some assistance could be gained from a consideration of the history of the use of the waste lands of the Crown for pastoral purposes and that: "the historical records suggest at the outset an absence of Crown intention to exclude customary rights of access of Aborigines to that land, or to extinguish native title."<sup>29</sup>

Justice Lee further noted that the legislation it expressly contemplated the concurrent exercise of rights by third parties over lands leased for pastoral purposes. He pointed out that:

[S]uch statutory provisions imposed limitations upon the possessory interest granted by a pastoral lease and, it may be argued, spoke fairly forcefully of the absence of an intention of the Crown to extinguish any form of native title which burdened the Crown title at the time the pastoral lease was granted.<sup>30</sup>

In summary then, Lee J concluded that in considering whether certain Queensland legislation disclosed a clear and plain intention to extinguish native title, it was relevant to have regard to the history of the occupation and use of Crown lands. This history revealed that from the outset the Crown had no intention to prevent Aboriginal access to lands held under pastoral lease. An analysis of the legislation in the light of the evolution of the pastoral lease in New South Wales suggested that a pastoral lease was a qualified grant and that:

...the Crown intended that a leasehold estate qualified in its grant, such as a grant of a lease for pastoral purposes, was capable of being enjoyed to the extent of the estate intended to be granted by the Crown concurrently with indigenous title.<sup>31</sup>

25 *Wik Peoples v State of Queensland*, note 16 *supra* at 671.

26 *North Galanjanja*, note 15 *supra*, per Lee J at 613.

27 With whom Jenkinson J agreed, at 577. Justice Drummond, at 666-9 considered himself bound by the majority decision in *North Galanjanja*, note 15 *supra*.

28 *North Galanjanja*, *ibid* at 613. It is tempting to ask why a whole new lexicon has to be developed to describe a statutory leasehold before it can be inferred that the rights arising under it are different from those under the general law. Compare with B Edgeworth, "Tenure, Allodialism and Indigenous Rights at Common Law: English, United States and Australian Land Law Compared after *Mabo v Queensland*" (1994) 23 *Anglo-American Law Review* 397 at 422-4, 433.

29 *North Galanjanja*, note 15 *supra* at 586. Justice Lee also suggested that:

It is arguable that the interests created by the Crown as pastoral leases ... were intended to be used, or enjoyed, in coexistence with indigenous title and that the granting of pastoral leases over such areas did not carry with it an intent by the Crown to extinguish native title.

30 *Ibid* at 585-6, 590-1.

31 *Ibid* at 591.

In other words, there is a relevant connection between the history of the occupation and leasing of Crown lands and later Colonial and State land laws as showing that in its development the pastoral lease was never intended to confer on lessees the right to exclude Aboriginal people.

This article examines the origins of the "lease for pastoral purposes"<sup>32</sup> in the years between 1826 and 1850. It is suggested that this history illustrates the difficulty of trying to assimilate these leases to leases under the general law and supports the view that the statutory leasehold evolved as and constitutes a distinct tenure. Furthermore, in so far as it parallels the emergence of a coherent Imperial and Colonial policy with respect to the Aborigines, it reveals not just an ill-defined concern for the "protection" and "civilisation" of Aboriginal people<sup>33</sup> but an intention that the grant of a pastoral lease would not give lessees the right to exclude Aboriginal people from their runs. On the contrary, it was intended that Aboriginal people should continue to have access to lands held under lease. The location and size of pastoral runs and the reluctance of Aboriginal people to abandon their 'wandering habits' called for a different approach to that taken in the closely settled parts of the colony and with respect to enclosed or cultivated lands. It is also suggested that in considering these questions it is wrong to impute to governments and interpret as official policy, the practical consequences of the granting of leases and the conduct of settlers towards the Aborigines.

The pastoral lease had its origins in *The Sale of Waste Lands Act Amendment Act 1846 (Imp)*<sup>34</sup> and an Imperial Order in Council of 9 March 1847.<sup>35</sup> Before this, pastoral lands were held permissively under an annually renewable occupation licence. When Queensland became a separate colony in June 1859, the laws then in force in New South Wales applied in the new colony.<sup>36</sup> By then *The Sale of Waste Lands Amendment Act 1846 (Imp)* had been repealed<sup>37</sup> but the Orders in Council authorising the grant of leases for pastoral purposes and providing for a condition to be included in leases which would reserve to the Aborigines free access to leased lands<sup>38</sup> remained in force and would not be repealed for some years. From the start, Queensland legislation<sup>39</sup> dealing with leases for pastoral

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32 The Order in Council, 9 March 1847 distinguishes between lands in the unsettled and settled districts (c 1). Although clause IV, s 1 provided for "leases exclusively for pastoral purposes" of lands in the settled districts (one year) we are concerned here with leases for pastoral purposes of lands in the unsettled districts under clause II s 1 (14 years).

33 Compare with, *Mabo (No 2)*, note 17 *supra*, per Dawson J at 142. See also, Deane and Gaudron JJ at 105-9. *Wik Peoples v State of Queensland*, note 16 *supra* at 648, 662 per Drummond J.

34 See *North Ganalanja*, note 15 *supra*, per Hill J at 610-11.

35 Compare with, *Western Australia v The Commonwealth* (1995) 69 ALJR 309 at 319-20. The comparable Order in Council (22 March 1850) under *The Sale of Waste Lands Amendment Act 1846 (Imp)* did not take effect in the colony of Western Australia until after December 1850 (see, *Western Australian Government Gazette*, 17 December 1850). Before the Order in Council came into force in the colony no lands were held under 'pastoral lease'.

36 Order in Council, s 20, 6 June 1859. Proclamation published in the *Queensland Government Gazette*, 24 December 1859.

37 *The Australian Waste Lands Act 1855 (Imp)*, s 1.

38 Order in Council, 18 July 1849.

39 And also administrative practice, for example, the inclusion of a reservation in pastoral leases.

purposes was founded on the principles developed during the 1830s and 40s in New South Wales.

It is not our purpose to consider what the legal effect of leases granted under Chapter Two of the 1847 Order in Council might have been. However, it is nonetheless important in the general context of understanding the contemporary relevance of the history of the pastoral lease, to inquire whether any conclusion that these first leases in fact conferred exclusive possession (unqualified by any limitation in relation to continuing access by Aboriginal people) would be consistent with history and the actual intentions of the Imperial and colonial governments. If it was intended from the outset that pastoral leases should be a qualified form of leasehold tenure, it is suggested that it cannot simply be assumed that when expressions normally associated with a lease under the general law are used in legislation from a later period in relation to such leases, that (without more) this legislation comprehends all the incidents of a lease at common law, including the right of exclusive possession.<sup>40</sup> More importantly, it would also seem to invite an inquiry whether the legislation concerned disclosed an intention (other than by the use of terms like 'demise' and 'lease') that the grant of a pastoral lease should not be qualified by any limitation on the rights of possession

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40 *Attorney-General of Victoria v Ettershank* (1875) 6 LRPC 354 at 370; *American Dairy Queen (Qld) Pty Ltd v Blue Rio Pty Ltd* (1981) 147 CLR 677, per Mason J at 682-5, per Brennan J at 686; *Minister for Lands and Forests v McPherson* (1990) 22 NSWLR 687 (the *McPherson* case). In *American Dairy Queen*, the Court was concerned with the rights of sublessees under Part XI of the *Land Act* 1962-1981 (Qld) which relevantly dealt with lands reserved and set apart by the Governor in Council and placed under the control of trustees. A sublease of land set apart as a reserve and under the control of a trustee is of course a lease between private parties and not the grant of a lease by the Crown in which the lease defines the rights and obligations of the Crown and its lessee with respect to the leased land. Justice Mason, at 684-5, commented that:

In that part of the Act which relates to leases of Crown land generally, as opposed to the provisions in Pt XI relating to dealings with grants, reserves and reservations for public purposes, there are specific provisions permitting subletting and sub-letting with the written approval of the Minister s 274(2)(a) and s (6)(a). However, as these provisions form part of a far more detailed scheme regulating the creation and disposition of interests in Crown leases not for public purposes, they do not provide a sound basis for making an implication Pt XI (sic), which deals with a quite distinct subject.

The Court sought to identify what rights a sublessee had by reference to the common law in circumstances where those rights were not exhaustively defined in the Act. It was not considering what rights a lessee from the Crown would have had at common law or under the Act (compare with the *McPherson* case, *ibid*). In that case different issues might be relevant in considering whether the statutory scheme 'assumes the existence' of the rights, powers and obligations 'arising under the general law' and 'proceeds to modify them to the extent considered necessary', per Mason J at 683. Justice Mason for example, observed at 683, that:

The general rule is that the courts will construe a statute in conformity with the common law and will not attribute to it an intention to alter common law principles unless such an intention is manifested according to the true construction of the statute... [t]his rule certainly applies to the principles of the common law governing the creation and disposition of rights of property.

Although native title is not a creation of the common law it is recognised by the common law and accordingly, legislation must disclose a clear and plain intention to extinguish native title. How do you reconcile the recognition of native title by the common law with giving effect to the principles of the common law relating to the creation and disposition of rights of property? In relation to leases held from the Crown under statute, is it enough to attract all the incidents of a lease at common law, that a statute uses the terminology of leasehold interests or would some further evidence be needed if the result would be that other rights and interests recognised by the common law would be extinguished?



of lessees. This in turn would demand some consideration of the legislative history of pastoral leases to determine whether, and if so at what point in that history, the legislature had indicated a clear and plain intention that Aboriginal people should no longer be entitled to have any access to leased lands.

## II. IMPERIAL AND COLONIAL POLICIES IN RELATION TO THE ABORIGINES

We have seen that humanitarian influences on colonial policy were paramount after 1835 when a change of government saw Lord Glenelg, a leading humanitarian reformer, become Secretary of State for the Colonies. This occurred at a time when the squatting movement was gathering momentum in Australia. In the House of Commons, Thomas Buxton moved an address to the King in July 1834. The motion, seconded by the Secretary of State and passed unanimously, read:

[T]hat an humble Address be presented to His Majesty, humbly to represent to His Majesty that His Majesty's faithful Commons in Parliament assembled, deeply impressed with 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 the protection in the enjoyment of their civil rights, and of imparting to them that degree of civilisation and that religion with which Providence has blessed this Nation, and humbly to pray that His Majesty will take such measures, and give such directions to the Governors and officers of His Majesty's Colonies, Settlements and Plantations, as shall secure to the natives the due observance of justice, and the protection of their rights, promote the spread of civilisation amongst them, and lead them to the peaceful and voluntary reception of the Christian religion.<sup>41</sup>

The Address was circulated to colonial Governors.<sup>42</sup> In the despatch which accompanied it, the Secretary of State noted that "these principles are not now laid down for the first time" and he entertained the "fullest confidence that ... the most earnest and anxious attention will be given to the subject".

The following year Buxton moved for the establishment of a Select Committee on the native inhabitants of the Empire. The Committee reported in 1836 and 1837. In its final report the importance of property rights was strongly affirmed. "It might be presumed", the argument ran:

...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. Europeans have entered their borders, uninvited, and when there, have not only acted as if they were undoubted lords of the soil but have punished the natives as aggressors if they have evinced a disposition to live in their own country.<sup>43</sup>

Underpinning the humanitarian's attitudes were a number of legal principles which were summed up by the leading contemporary jurists, Burge, Pemberton

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41 T Buxton, Address to His Majesty the King, House of Commons, CO 323/218.

42 Right Honourable TS Rice (Secretary of State) to Governor Bourke, Circular Despatch, 1 August 1834, HRA, Series I, vol. 16, 80-3.

43 Select Committee on Aborigines (British Settlements), *Report*, House of Commons, Sessional Papers, 1837, vol 7, no 425 at 85.

and Follett<sup>44</sup> in an opinion drafted for the Port Philip Association in 1836. The opinion addressed the question whether grants obtained by the Port Phillip Association under a ‘treaty’ between John Batman and the local Aboriginal tribe were valid and whether the right of soil is or is not vested in the Crown. William Burge, with whom Pemberton and Follett agreed, wrote:

I am of opinion, that, as against the Crown, the grants obtained by the Association are not valid, and that, as between Great Britain and her own Subjects, as well as the Subjects of foreign States, the right to the soil is vested in the Crown. It has been a principle adopted by Great Britain as well as by the European States, in relation to their settlements on the continent of America, that the title which discovery confers on the Government, by whose authority or by whose subjects the discovery was made, was that of the ultimate dominion in and sovereignty over the soil, even while it continues in the possession of the Aborigines. Vattel, B2C18. The 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. It was essential that the power of alienating should be restricted. To have allowed them to sell their lands to the subjects of a foreign state would have been inconsistent with the rights of the State, by the title of discovery to exclude all other States from the discovered Country. To have allowed them to sell to her own subjects would have been inconsistent with their relation *of subjects*.

The restriction imposed on their power of alienation consisted in the right of *pre-emption* of the lands by that State, and in not permitting its own subjects or foreigners to acquire a title by purchase from them without its consent. Therein consists the sovereignty of a dominion or right to the Soil asserted, and exercised by the European Government against the Aborigines, even whilst it continued in their possession. The Commission granted by England to Cabot, the Charter to Sir Humphrey Gilbert in 1578, and which was afterwards renewed to Sir Walter Raleigh, the Charter to Sir Thomas Gates and others in 1606, and to the Duke of Lennox and others in 1620, the grants to Lord Clarendon in 1663, and to the Duke of York in 1664, recognise the right to take possession on the part of the Crown, and to hold in absolute property, notwithstanding the occupancy of the Natives.<sup>45</sup>

The opinion was read with approval by senior Colonial Office officials as an authoritative statement of the colonial common law. A copy of the opinion was given to both Governor Arthur, who had just returned from Tasmania and to Governor Gipps who was about to depart for New South Wales. It was referred to by Gipps in a speech to the New South Wales Legislative Council in 1840.<sup>46</sup>

44 William Burge was the leading authority on colonial law at the time, a former Attorney-General of Jamaica and the author of *Commentaries on Colonial and Foreign Law* (1838) which was republished many times and was still in print in the twentieth century. Thomas Pemberton was the leader of the Chancery Bar and was subsequently a member of the Judicial Committee of the Privy Council for twenty years. William Follett had been Solicitor-General in Peel’s Ministry between 1834 and 1835 and was Attorney-General from 1844 to 1845. See generally, H Reynolds, *The Law of the Land*, Penguin (1987) pp 125-31; H Reynolds, “Mabo and Pastoral Leases” (1992) 2(59) *Aboriginal Law Bulletin* 8; H Reynolds, “Native Title and Pastoral Leases”, in MA Stephenson and S Ratnapala, *Mabo: A Judicial Revolution* (1993) 119 at 121-2; H Reynolds, “The Mabo Judgment in the Light of Imperial Land Policy” (1993) 16 *UNSWLJ* 27 at 30.

45 W Burge, *Case for Opinion*, prepared by William Burge and signed by him on 16 January 1836. Signed by T Pemberton and WW Follett on 21 January 1836. True copy certified by Geo Mercer, CO 201/255.

46 Governor Gipps to Lord John Russell, Despatch No 29, 16 August 1840, United Kingdom PP, Copies of extracts of Correspondence relative to New Zealand, (311) *Accounts and Papers*, 1841, vol xvii, 63-78 [559-74]:

The Bill (*New Zealand Claims to Land Bill*) is founded upon two or three general principles, which ... I thought were fully admitted, and indeed received as political axioms. The first is, that the uncivilised

Gipps argued that the principles outlined in the opinion were “the Law of England, and founded both on the law and practice of nations”. They were “fully admitted” and “received as political axioms”.<sup>47</sup>

From at least the time of Governor Darling and certainly by the late 1830s, Imperial and colonial governments alike recognised that Aboriginal people were entitled:

- to protection from violence;<sup>48</sup>
- to receive education, religious instruction and other benefits of civilisation; and
- to continue to occupy and use their traditional lands as they had at the time of settlement, subject to the rights of the Crown.<sup>49</sup>

These general principles would not only shape government policy in relation to the Aborigines throughout the period between 1838 and 1850 but would also influence the administration of Crown land in the vast pastoral region of eastern Australia.

The Instructions issued to colonial Governors after Brisbane, commanded them to promote religion and education among the Aborigines, to take measures for their civilisation and to “protect them in their persons, and in the free enjoyment of their possessions”.<sup>50</sup> In the 19th century “possessions” referred to a territory subject to a sovereign ruler or state.<sup>51</sup> In 1840 Charles Sturt, the Assistant Commissioner of

inhabitants of any country have but a qualified dominion over it, or a right of occupancy only; and that, until they establish amongst themselves a settled form of government, and subjugate the ground to their own uses, by the cultivation of it, they cannot grant to individuals, not of their own tribe, any portion of it, for the simple reason, that they have not themselves any individual property in it.

Secondly, that if a settlement be made in any such country by a civilised power, the right of pre-emption of the soil, or in other words, the right of extinguishing the native title, is exclusively in the government of that power ...

See also, Governor Gipps to Lord Glenelg, Despatch No 177, 31 October 1838 (HRA, Series I, vol 19, 638-42) where Governor Gipps points out the Aborigines were “the first possessors of the soil from which the wealth of the Colony has been derived”. See generally, H Reynolds (1987), note 44 *supra* at 131-2. At the time New Zealand was part of New South Wales: Proclamation of Letters Patent dated 15 June 1839 extending the Governor Gipps to Lord John Russell, Despatch No 13, 9 February 1840, United Kingdom PP, Copies of extracts of Correspondence relative to New Zealand, (311) *Accounts and Papers*, 1841, vol xvii, 1-2 [497-98].

47 Governor Gipps to Russell, 16 August 1840, see note 46 *supra*.

48 Lord Glenelg to Sir Richard Bourke, Despatch No 353, 26 July 1837 (HRA, Series I, vol 19, 47-50); Lord Glenelg to Governor Gipps, Despatch No 72, 31 January 1838 (HRA, Series I, vol 19, 252-5).

49 Governor Gipps to Russell, 16 August 1840, note 46 *supra*; *contra*, *Attorney-General (NSW) v Brown* (1847) 1 Legge 312 at 316-18 and *Cooper v Stuart* (1889) 14 App Cas 286 at 291; *Williams v Attorney-General (NSW)* (1913) 16 CLR 404 at 439; *Randwick Corporation v Rutledge* (1959) 102 CLR 54 at 71. As to the power of the Crown to extinguish native title, see K McNeil, “Racial Discrimination and Unilateral Extinguishment of Native Title” (1996) 1 *AILR* 181. McNeil argues that native title was no more liable to be extinguished by the Crown than any other title.

50 See for example, Royal Instructions to Ralph Darling General and Governor in Chief over the Territory called New South Wales, 17 July 1825, HRA, Series I, vol 12, 107-125; Royal Instructions from Her Majesty the Queen under the Royal Sign Manual and Signet to Governor Gipps, Captain General and Governor in Chief of New South Wales, 10 October 1837, CO 381/55; Instructions of 31 December 1850 to Sir FitzRoy, CO 381/55; Instructions dated 8 September 1850 to Governor Denison, CO 381/55; Warrant for Letters Patent and Instructions dated 6 June 1859. Commission appointing Sir George Ferguson Bowen Captain General and Governor in Chief of Queensland, CO 381/55.

51 *The New Shorter Oxford English Dictionary*, Oxford University Press (1993) 2 vols.

Crown Lands in South Australia, wrote in a letter headed "Native Rights in the South Australia", that the Governor "desired him to say":

...it is ... a matter of deep surprise that persons of intelligence like yourselves, who also as preliminary purchasers are well acquainted with the history of the establishment of the Colony should consider any rights which any Europeans possess to the Lands of the Province as preliminary to those of the Aboriginal Inhabitants.

The Natural, indefeasible rights, which, as His Excellency conceives are vested in them as their birthright have been confirmed to them by Royal Instructions to the Governor and the Commissioners' instructions to the Resident Commissioner.

The Royal Instructions command that they shall be protected in the free enjoyment of their possessions, that injustice and violence towards them shall be prevented, that all measures which may appear to be necessary shall be taken for their advancement in Civilisation and the Commissioners' Instructions direct that they shall not be disturbed in the enjoyment of Lands over which they may possess proprietary rights and of which they are not disposed to make a voluntary transfer.<sup>52</sup>

Sir George Gipps had recognised these principles in his Address to the Legislative Council on the New Zealand Claims to Land Bill 1840. However, he was not content simply to talk about the legal rights of the Aborigines. Gipps' willingness to take practical steps in an effort to protect the Aborigines and their rights in relation to lands being occupied for pasturage, angered the squatters in New South Wales. Crown Lands Commissioners, who had to be constantly within their districts (except with the permission of the Governor), were charged with keeping the peace and enforcing the squatting laws and in doing so had to visit the stations established by the squatters.<sup>53</sup> When a squatter sought the renewal of his license, the Commissioner had to certify that it may with safety and propriety be renewed for the ensuing year. While the squatters resented these powers they knew that it was the Governor who ultimately determined what Crown lands could be occupied and who actually approved license renewals. When given the opportunity, Gipps was prepared to use his powers to prevent lands from being

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52 Appendix L in: Governor Gipps to Lord Stanley, Despatch No 75, 1 April 1846, CO 201/366: Letter from Charles Sturt, Assistant Commissioner to certain preliminary purchasers, entitled "Native Rights in South Australia", Land Office, July 11th 1840; another colonial view of the meaning of the words used in the Instructions was provided by the Reverend James Campbell in a lecture introduced by the Governor of Queensland in October 1864:

There was no doubt some difficulty experienced in carrying out these instructions, on account of the necessity beforehand of defining properly what the rights and possessions of the Aborigines really were. There could be no doubt that, as the original occupiers of the vast territorial possessions, they should be paid for every acre taken up by white men unless they forfeited possessions by bad conduct. It was also true that, although no one could defend the proposition that the extensive and valuable land of Australasia should be made perpetual hunting grounds, but they should become the property of those who would make use of them for the purposes of pasture, agriculture and other uses, still the rights of the original occupiers must be recognised. They should be allowed to hunt on their grounds, in order to obtain the means of sustentation; and they should also be protected in the enjoyment of the hunting grounds.

Reported in the *Brisbane Courier*, 6 October 1864 enclosed in Bowen to Cardwell, Despatch No 56, 10 October 1864, QSA, GOV/24. Also quoted in JCH Gill, "Governor Bowen and the Aborigines" (1972) 2(7) *Queensland Heritage* 3 at 28.

53 An Act further to restrain the unauthorised Occupation of Crown Lands and to provide the means of defraying the Expense of a Border Police (1839) 2 Vic No 27 (NSW), s 10. (*The Crown Lands Unauthorised Occupation Act 1839*).

taken up in areas where Aborigines were reported to be present in large numbers. This was despite the difficulties of regulating conduct on a pastoral frontier hundreds of miles from Sydney, and when he was often only armed with information from Commissioners who had little or no regard for the interests of Aborigines. In at least one instance, Gipps rigorously defended a decision by the Commissioner for the Wellington District that a license not be renewed because employees of the squatter concerned had been involved in a reprisal attack on Aborigines after they had been “driven from their waterholes”.<sup>54</sup>

Therefore, while colonial land administration certainly proceeded on the basis that the Crown could alienate and otherwise regulate the occupation and use of any land in New South Wales, the Government did not simply ignore the rights and interests of the Aborigines in the pastoral districts of the colony nor did it lack the will to confront the squatters over their treatment of Aboriginal people. The problem faced by the Government was that the means available for implementing its policies – squatting regulations, Crown Lands Commissioners, Border Police, the criminal law – were all imperfectly suited to colonial conditions. If the Government struggled to prevent the illegal occupation of Crown lands outside the settled parts of the colony, it could hardly be expected to be able to ensure that the rights of Aborigines were respected when, in addition to the difficulties of distance and appropriate personnel, many squatters, their managers and employees and often those charged with enforcing the law and protecting both settlers and Aborigines in these remote areas thought that it was necessary that Aboriginal people “be driven, by force if necessary, from their traditional homelands”.<sup>55</sup>

Faced with these difficulties the Imperial and colonial governments nevertheless accepted that Aboriginal people would continue to occupy the pastoral lands of the colony. No action was taken to prevent them from obtaining their subsistence from these lands or to separate them from the settlers and their stock, although in 1839 a Border Police Force was established to, among other things, supervise relations between the settlers and Aborigines. On the other hand, the rapid advance of settlement was recognised as inevitable. Squatting interests were a powerful political force in a colonial society which demanded a reduction in the influence of the Governor and more representative institutions and where increasingly, the pastoral industry underpinned the local economy.

It was against this background, that a number of specific policies with respect to the Aborigines emerged towards the end of the 1830s and during the 1840s. These policies included:

- the appointment of Protectors;<sup>56</sup>

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54 See generally, RHW Reece, *Aborigines and Colonists*, Sydney University Press (1974), particularly see chapter five, “Gipps and the Aborigines”.

55 *Mabo (No 2)*, note 17 *supra* at 105, per Deane and Gaudron JJ.

56 Also described as the Port Phillip Protectorate. There were continuing doubts about the efficacy of the Protectorate and it was eventually abandoned in 1849. See for example, Lord Stanley to Governor Gipps, Despatch No 225, 20 December 1842, United Kingdom, PP, Aborigines (Australian Colonies), (627) *Accounts and Papers*, 1844, vol xxxiv, 221-3 [547-549]; see also for example, A McGrath (ed), *Contested Ground*, Allen & Unwin (1995) pp 130-2.

- the appointment of Border Police,<sup>57</sup> “or the mutual protection and security of all persons lawfully occupying or being upon the Crown lands beyond the limits allotted for location”,<sup>58</sup>
- education, training and religious instruction;
- reserves, including mission reserves;<sup>59</sup>
- application of fifteen per cent of the Land Fund for the benefit, civilisation and protection of the Aborigines;<sup>60</sup>
- legal recognition - for example, the admissibility of Aboriginal evidence.

After 1846, when it was decided that squatters should be granted leases of their runs, the Imperial and colonial governments finally realised, prompted by the concerns expressed by Aboriginal Protectors and Commissioners for Crown Lands, that although it was not intended that leases would give squatters the right to exclude Aboriginal people from their runs it might nevertheless be necessary to declare the extent of their “mutual rights” and as eventually happened, to give formal recognition to the continuing rights of the Aborigines.<sup>61</sup> It will be seen therefore, that the principle that Aboriginal people were not to be denied access to their traditional homelands or prevented from obtaining their subsistence from land also used for pastoral purposes had, by the late 1840s, become a formal policy of the Imperial and colonial governments.

### A. Protection and Civilisation

The policies of protection and civilisation have been misunderstood. It has been argued that government policy amounted to no more than a general concern for the welfare of Aboriginal people and that other policies, like the creation of reserves, are quite inconsistent with the idea that Aboriginal people were entitled to remain on their traditional lands.<sup>62</sup> Other theorists have been prepared to concede that from time to time the government seemed prepared to accept that Aboriginal people should continue to have undisturbed access to lands used for pastoral purposes, but except for the years when Earl Grey was Secretary of State for the Colonies, there was no consistent government policy to this effect.<sup>63</sup>

There is no doubt that it was realised and expected that Aboriginal occupation and use of land in the pastoral districts of the colony could not continue once the

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57 *The Crown Lands Unauthorised Occupation Act 1839* (NSW), s 25.

58 These words read with Gipps despatch to the Secretary of State, Governor Gipps to Lord Glenelg, Despatch No 65, 6 April 1839, CO 201/285 clearly suggest that the colonial government not only admitted but accepted continuing Aboriginal presence on lands used for depasturing stock.

59 Lord John Russell to Governor Gipps, Despatch No 132, 25 August 1840, United Kingdom, PP, Aborigines (Australian Colonies), (627) *Accounts and Papers*, 1844, vol xxxiv, 73-74 [399-400].

60 *Ibid.*

61 The need to take the practical step of securing these rights was prompted by the Imperial Order in Council of 9 March 1847 and the anticipated imminent grant of leases. Before 1848 it was not considered necessary, these rights were simply accepted.

62 See for example, *Mabo (No 2)*, note 17 *supra* at 141-2, per Dawson J.

63 See for example, *Wik Peoples v The State of Queensland*, note 16 *supra* at 648, 662.

land was required for closer settlement.<sup>64</sup> This had already happened in many areas. Policies with respect to the education of children, the provision of medical services and setting land aside for reserves anticipated the needs of those Aboriginal groups who were no longer able to live as they had in the past. Others might choose to abandon their wandering habits for a more settled way of life.

On the other hand, the use of land for pastoral purposes was not regarded as so incompatible with continuing Aboriginal occupation and use as to justify their exclusion *while it was used for pastoral purposes*. There is no evidence of the government sanctioning the removal or exclusion of Aboriginal people from pastoral lands, although after 1846 it was believed that the granting of leases might have this effect. In fact there are clear and repeated statements at a political and official level<sup>65</sup> that this was not to happen, while measures taken by Governor Gipps as early as 1839 providing for “the mutual protection of all persons lawfully occupying or *being upon*” Crown lands<sup>66</sup> were intended to prevent violence upon and by the Aborigines in the pastoral districts and obviously contemplated the continuing presence of Aboriginal people on the squatters’ runs.

The policies we have referred to were not undifferentiated. In fact, the policies recognised that the circumstances of Aboriginal groups in different parts of the colony were not the same and that how they were to be treated would depend on where they were living, what contact they had already had with settlers and what use was being made of the land they occupied. The evidence is that no less than today, governments struggled to find solutions to the problems posed by the colony’s Aboriginal population, particularly those who had been displaced by settlement. Different plans were attempted, but none with any long-term success. Commissioners of Crown Lands lamented that Aborigines showed no signs of social improvement or any willingness to cease their ‘wandering habits’ and adopt a more settled way of life. Others however, reported an end to the conflict in their districts and that Aboriginal camps had formed ‘in the vicinity of some station’.<sup>67</sup> Some Aboriginal people were assisting with station chores and in time Aboriginal people would become an important source of labour in some areas.<sup>68</sup> Government policies were piecemeal, they had no answers to improving the social condition of the Aborigines and no way of encouraging them to settle down, away from their traditional lands. In these circumstances, it is not difficult to understand why governments, consistent with the principle that underpinned the squatting regulations, would not want to have large numbers of Aboriginal people removed from their traditional lands as the squatters opened up new runs for their stock.

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64 Compare with the discussion of the intention of the British Crown to extinguish native title generally when it acquired the territory of Western Australia in *Western Australia v The Commonwealth*, note 35 *supra* at 320-1.

65 Including Commissioners of Crown Lands in the early 1840s.

66 *The Crown Lands Unauthorised Occupation Act 1839* (NSW) was continued for a further five years by *An Act to amend and continue for five years an Act intituled “An Act further to restrain the unauthorised occupation of Crown Lands and to provide the means of defraying the expense of a Border Police”* (1841) 5 Vic No 1 (NSW) (*The Crown Lands Unauthorised Occupation Act 1841*).

67 See for example, Governor Gipps to Lord Stanley, Enclosures in Despatch No 75, 1 April 1846, CO 201/366.

68 See discussion in A McGrath (ed), note 56 *supra* at 68-70.

It was believed that much of the land that was presently used for pastoral purposes would eventually become more closely settled, towns established and that the predominant land use would change from pastoralism to agriculture. As we will see, both the Imperial and colonial governments wanted to ensure that large areas of land in the pastoral districts were not permanently removed from the power of the Crown. In fact, the 1847 Order in Council which authorised the grant of leases for pastoral purposes enabled the Crown to retain control over land in these districts, even though it was held under lease. The Governor could make grants or sales for public purposes of any lands within the limits of a run or comprised in a lease or could otherwise dispose of such lands in the public interest for a wide range of purposes including “facilitating the improvement and settlement of the colony”.<sup>69</sup>

It was not intended that the policies which sought to extend the ‘benefits of civilisation’ to the Aborigines would apply throughout the colony to all Aboriginal groups. In the sparsely occupied areas where the depasturing of stock was the predominant land use, the policy (later given explicit recognition by the insertion of a reservation in pastoral leases) was to allow Aboriginal people to continue to occupy and use leased and licensed land for subsistence purposes. This is not to say that there was no expectation or hope that the social condition of Aboriginal groups living in these areas would improve and that people would eventually choose a more ‘civilised’ way of life. However, for those Aboriginal groups who chose to stay on their land (even though it was also used for pastoral purposes), the policy was clear, they were not to be forced from the land and their right to continue to occupy and use the land and its resources was recognised. The decision to include a reservation in favour of Aboriginal people in pastoral leases was not a change in government policy; it was a formal acknowledgment that circumstances in the unsettled districts of the colony were different. However, when development demanded that pastoral land should be turned to other uses, Aboriginal occupation and use of the land would also have to yield to the changes. Land would be needed for townships, pastoral activities would be succeeded by small farms and agriculture and land sales would replace leasing. Traditional Aboriginal life would no longer be compatible with competing social and economic uses of the land and governments would have to devise new policies to deal with Aboriginal groups living on the fringes of new settlements.

## B. Aboriginal Reserves

While land had been set aside for Aboriginal use from time to time,<sup>70</sup> it was not until 1842 that the creation of such reserves received statutory recognition. Section 3 of *The Sale of Waste Lands Act 1842 (Imp)*<sup>71</sup> provided that land could be excepted from sale and reserved “for the use or benefit of the aboriginal

69 Order in Council, 9 March 1847, Chapter II, s 9. The classification of land and the term of leases to be granted under the Order in Council of 9 March 1847 reflect the relative potentiality of land being required for purposes other than depasturing stock – Unsettled Districts: 14 years; Intermediate Districts: eight years and Settled Districts: one year.

70 See for example, RHW Reece, note 54 *supra*, pp 9, 110, 201.

71 See generally, *Randwick Corporation v Rutledge*, note 49 *supra*, per Windeyer J.



inhabitants".<sup>72</sup> A similar clause appeared in the Order in Council which authorised the granting of leases for pastoral purposes.<sup>73</sup>

Where Aboriginal people had been displaced by European settlement, in the towns and farming districts,<sup>74</sup> reserves were one way of providing them with a place to live. The setting aside of suitable areas of land for small reserves was also favoured in the unsettled districts, although experience suggested that Aboriginal people would not stay permanently, if at all, at these places. However, they would be needed one day, when, as the government envisaged, pastoralism was replaced by closer settlement, in the shape of small townships and farming communities.<sup>75</sup>

The Commissioner of Crown Lands in the Murrumbidgee District, believed that reserves were needed, not "to confine the black within that Reserve but a Reserve that would secure to them undisturbed fishing and Hunting Grounds". He remarked that some "[S]ettlers will not permit the Natives to come on their Runs if they can deter them by violence and threats privately administered" leaving them to seek food on "[L]ands other than those they were accustomed to hunt and fish over".<sup>76</sup>

Later, after reserves had been established for some time, their failure was attributed to the fact that food was so easily obtained elsewhere, presumably from the lands on which the squatters had their stock. Conditions were not the same in every district. In newly settled areas where there was conflict between the Aborigines and settlers, the attitude and conduct of stock owners was quite different from that of settlers in areas which had been occupied for a number of years.<sup>77</sup> In the same year as the Commissioner for the Murrumbidgee District reported Aboriginal people being driven away from their accustomed hunting grounds, the Commissioner in the Lachlan District was able to say:

[T]he Blacks have no fixed place of residence although each tribe have their own particular portion of a River and Country which they seldom leave for any long period...

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72 Lands dedicated and set apart for some public use were not "Waste Lands of the Crown", s 23. See *Williams v The Attorney-General for New South Wales*, note 49 *supra*; see also *Randwick Corporation v Rutledge*, *ibid*.

73 Order in Council, 9 March 1847, Chapter II, s 9. A provision of this kind has also appeared in Queensland Crown lands legislation from 1860 through to the present day.

74 H Reynolds (1987), note 44 *supra* at 134-42, 150; see also H Reynolds (1993), note 44 *supra* at 124.

75 In giving effect to the provisions of the Order in Council of 9 March 1847 with respect to the issuing of leases in the unsettled districts, the Surveyor-General's Office was instructed to make provision for reserves for town sites and suburban and cultivation allotments along every public thoroughfare in the unsettled districts, the Crown Law Officers recommending that it was preferable for areas to be identified and the land reserved from lease prior to the issue of leases under the Order in Council: Sir FitzRoy to Earl Grey, Despatch No 239, 6 December 1847 (enclosures), United Kingdom, PP, Papers Relative to the Occupation of Crown Lands, New South Wales, (994) *Accounts and Papers*, 1847/48, vol xlii, 24-49 [574-599].

76 Gipps to Lord Stanley, 1 April 1846 (Enclosure No 10, Report on the Condition of the Aboriginal Natives of the Murrumbidgee District, January 1st 1846), note 67 *supra*. The Chief Protector of Aborigines in the Port Phillip District shared this view believing that reserves were needed because under the land regulations the Aborigines 'are said to have no right in the property of the soil and were liable to be driven away from their own lands' (Enclosure No 12).

77 See generally, RHW Reece, note 54 *supra*, p 21 *et seq*.

They wander from place to place in their own District generally forming their Camps in the vicinity of some station.<sup>78</sup>

Only twelve months earlier, the Commissioner had reported to the Colonial Secretary that if leases were to replace the annual depasturing license some squatters “would consider their claim to the Run so permanent that they would not allow an Aboriginal to stay upon, or even cross the stations”.<sup>79</sup>

By the late 1840s reserves in the unsettled districts were viewed as places which could initially be used as depots and then later, become refuges where Aboriginal people could return as settlement encroached on their hunting and fishing grounds, during those months of the year when it was difficult to obtain food or should they decide to cease their ‘wandering life’.<sup>80</sup> Officials in the colonial government nevertheless believed that their “natural rights”,<sup>81</sup> “their right to wander over the pastoral districts in search of food, or for recreation as formerly”<sup>82</sup> should continue and should be secured by a condition in all future pastoral leases.<sup>83</sup>

Although many officials disapproved of the Aborigines’ way of life, it was accepted. Observers in the United Kingdom and New South Wales believed that the persistent failure of reserves<sup>84</sup> was attributable in no small part to the fact that they were not needed for subsistence<sup>85</sup> and that Aboriginal people led a life that was incompatible with confinement to one place. As early as 1840, the Secretary of State, Lord John Russell remarked upon the “great difficulty in making reserves of land for the natives” and the Colonial Land and Emigration Commissioners noted:

[I]n so extensive a colony as New South Wales, where the native inhabitants are thinly scattered over every part of it, we think that these reserves would probably require to be made in several different places...

When all these precautions, and others which greater foresight might suggest, have been taken it is still impossible, judging from experience, to feel sanguine as to the result. By reference to the evidence taken before the House of Commons’ Committee on Aborigines, it appears that in many cases, where the attempt to fix the wild native upon particular spots has been carried into effect, the consequences have been far from satisfactory...

As regards the natives of New South Wales, great difficulty appears to be found in inducing them to settle in any fixed spot.<sup>86</sup>

78 Enclosure No 9 in: Gipps to Lord Stanley, 1 April 1846, note 67 *supra*.

79 Letter to the Colonial Secretary from Edgar Beckham, Commissioner of Crown Lands, Lachlan District, 20th January 1844 enclosure in Despatch No 169, Governor Gipps to Lord Stanley, 11 August 1844, CO 201/347. See generally, A McGrath, note 56 *supra*.

80 Sir FitzRoy to Earl Grey, Despatch No 231, 12 November 1849, CO201/416; memoranda, Sir FitzRoy to Earl Grey, Despatch No 63, 23 March 1850, CO 201/427; Earl Grey to Sir FitzRoy, Despatch No 163, 5 November 1850, CO 201/427.

81 Sir FitzRoy to Earl Grey, 12 November 1849, *ibid*.

82 *Ibid*.

83 *Ibid*; see Despatch No 221. Sir FitzRoy to Earl Grey, 11 October 1848 (enclosures), CO 201/400.

84 Russell to Gipps, 25 August 1840, note 59 *supra*.

85 Sir FitzRoy to Earl Grey, Executive Council Minute No 49/51, 12 November 1849, note 80 *supra*.

86 Lord John Russell to Governor Gipps, Despatch No 128, 5 August 1840, United Kingdom PP, Aborigines (Australian Colonies), (627) *Accounts and Papers*, 1844, vol xxxiv, 57-64 [383-90]; see also, Russell to Gipps, 25 August 1840, note 59 *supra*.

In the pastoral districts it was not intended that reserves would be a substitute for continued access to the land taken up by the squatters. In fact the United Kingdom Government rejected the idea of setting aside large tracts of land for reserves, as “inapplicable to the circumstances of Australia” and insisted that the “mutual rights” of Aboriginal people and settlers in relation to lands leased for pastoral purposes be “fully recognised”.<sup>87</sup>

In the late 1840s a series of reports by the Chief Protector and a number of Commissioners of Crown Lands led the British and colonial governments to re-examine the nature and purpose of reserves for Aboriginal use. In June 1848 Commissioner Mayne wrote to Governor FitzRoy requesting “the making of a reserve for the Aborigines of one square mile at that part of the River, and of access to such Reserve”. In a second letter of the same date, he suggested that it was necessary to introduce into pastoral leases “some general Clause that will reserve to the Aborigines, such free access to land, trees and Water, as will enable them to procure the animals birds and fishes etc, on which they subsist”.<sup>88</sup> FitzRoy tabled the letters in the Executive Council and forwarded copies to the Secretary of State. Earl Grey had already read the report from the Chief Protector proposing that land be set aside as reserves and in December 1847 addressed a memorandum to Herman Merivale, the Assistant Under Secretary of the Colonial Office in which he pointed out that the question of reserves was an important one:

[L]and should be reserved (to be held by some officers of the Government as trustees) sufficient to allow of the natives being maintained upon it, and to make up for the deficiency of game for their subsistence rations should be granted to them as is done in South Australia (where the system of management seems to me in every way better) this is very important with a view to their preservation from being exterminated.<sup>89</sup>

Earl Grey was careful to note however, that the Governor must be instructed “to take care that they are not (as it appears to be apprehended they may be) driven off all the country which is divided into grazing stations and let under the recent regulations”. In the despatch to FitzRoy which followed,<sup>90</sup> Grey commented that he “could not authorise or recommend the adoption on an extensive scale, of measures setting apart of large tracts of land for the Aborigines”. On the other hand, he thought that “small tracks [sic] of land” could be set aside as reserves “where they do not exist; particularly in districts recently brought within the range of occupation”.<sup>91</sup> Again he was careful to qualify his remarks on reserves by pointing out that settlers and Aborigines possessed “mutual rights” in relation to lands leased for pastoral purposes and that it was not intended to give lessees the right to exclude Aboriginal people from their runs.

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87 Earl Grey to Sir FitzRoy, Despatch No 24, 11 February 1848, HRA, Series I, vol 26, (CO201/382).

88 Letters from William Mayne, Commissioner of Crown Lands, Wellington to Sir FitzRoy, 1 June 1848 enclosure in Sir FitzRoy to Earl Grey, 11 October 1848, note 83 *supra*.

89 Sir FitzRoy to Earl Grey, Memorandum, Earl Grey to Herman Merivale (then Assistant Under Secretary of State at the Colonial Office), Despatch No 107, 17 May 1847, CO201/382. This despatch enclosed the report of the Chief Protector of Aborigines in which he suggested the setting aside of land as reserves for the Aborigines.

90 Earl Grey to Sir FitzRoy, 11 February 1848, note 87 *supra*.

91 Sir FitzRoy to Earl Grey, 11 October 1848, note 83 *supra*.

In October, FitzRoy replied with a despatch setting out the steps which had already been taken to give effect to the Secretary of State's instructions. He enclosed the Minutes of the Executive Council meeting at which Grey's despatch had been tabled. The Council had forwarded an extract to the Crown Law Officers drawing their attention to an earlier instruction to include in the form of Crown leases a provision which secured:

... to the Aborigines the free use of unimproved Crown lands for the purposes of hunting and in other ways seeking their subsistence as heretofore notwithstanding the occupancy of those lands under leasehold tenure.<sup>92</sup>

In November 1849 FitzRoy reported that:<sup>93</sup>

The Council after a most careful consideration of the subject are unable at present to propose any general plan by which Reserves for the Aborigines could be made productive of benefit as regards their moral and intellectual improvement. Nor are they wanted to secure for the Aborigines the means of subsistence, except in cases such as fisheries in which particular spots yield a large proportion of their ordinary or favourite food. At the present time, however, when the Crown is about to demise the whole of the lands over which the flocks and herds of the British settlers have spread; the Council fully recognise the justice and expediency not only of securing for the aboriginal inhabitants, the right of wandering as heretofore, in quest of food, over all lands which the Crown tenants may leave in an unimproved state, but also of reserving small tracts in suitable situations, with a view to their being applied hereafter to the purposes specified in Earl Grey's Despatch of the 11th February, 1848, or in such other manner as future experience may suggest. The Council therefore advise, that throughout the country lying beyond the settled districts, a suitable number of reserves of moderate extent should be made for the use of the Aborigines ... (emphasis added).<sup>94</sup>

The Secretary of State, officials in the Colonial Office, the Governor and the New South Wales Executive Council all understood that reserves would co-exist with continuing Aboriginal occupation and use of the pastoral lands of the colony.

### III. THE EVOLUTION OF THE PASTORAL LEASE

Prior to the enactment of *The Sale of Waste Lands Act 1842 (Imp)* and *The Australian Constitutions Act 1842 (Imp)*<sup>95</sup> the Prerogative was the source of Crown's power to make grants or to appropriate land for its own purposes<sup>96</sup> - radical title to all land in New South Wales having been acquired by the Crown on the acquisition of sovereignty.<sup>97</sup> The Governor was granted the power to dispose of the waste lands<sup>98</sup> by his Commission.<sup>99</sup> 'Regulations' were set out in the

92 Extract from Minute No 48/28 dated 22 August 1848.

93 Sir FitzRoy to Earl Grey, 12 November 1849, note 80 *supra*.

94 Extract from a Minute No 49/51 dated October 15, 1849.

95 5 and 6 Vic c 76 (Imp), hereafter *The Australian Constitutions Act 1842 (Imp)*.

96 See, Law Book Company, *The Laws of Australia*, vol 19, s 19.3 [58].

97 In *Mabo (No 2)*, note 17 *supra*, Brennan J refers to the "sovereign power", see for example at 48, 63, 68. Justice Brennan points out that the "sovereign power" to grant interests in land became an exclusively statutory power.

98 "Waste lands" or "waste lands of the Crown" were defined in s 23 of *The Sale of Waste Lands Act 1842 (Imp)*. In *Williams v Attorney-General for New South Wales*, note 49 *supra* at 428 Barton ACJ suggested that:

Instructions<sup>100</sup> to colonial Governors and in despatches from the Secretary of State which prescribed the manner in which the power to dispose of lands was to be exercised. The colonial government issued Proclamations, Orders and Notices and after 1823, legislated by local Acts of Council.<sup>101</sup> Legislation was generally limited to administrative matters and regulating the occupation of Crown lands within the authority conferred on the Governor and later, subject to Imperial laws applying in the colony. Until the enactment of *The New South Wales Constitution Act 1855 (Imp)* the colonial legislature did not have the power to make laws which “interfere in any manner” with the sale or appropriation of land.<sup>102</sup>

On taking office, colonial Governors were issued with Instructions under the Royal Sign Manual and Signet. Additional or amended Instructions were issued when for example, major changes in policy were introduced. This occurred when the policy of disposing of land by grant was replaced in 1831 with a system of sale by auction.<sup>103</sup> Most frequently however, instructions, usually of an administrative nature, were contained in despatches from the Secretary of State for the Colonies to colonial Governors. It was expected that a Governor would act in accordance with instructions from the Secretary of State, but what legal (as opposed to political) consequences flowed from a failure to comply with them is not clear and would appear to depend on the circumstances, including whether the instructions had been made public.<sup>104</sup>

Government Orders defined the boundaries, the limits of location,<sup>105</sup> within which land could be granted or sold in the colony. The boundaries were extended from time to time as settlement expanded beyond the original “Nineteen Counties”, but land which was granted or sold to settlers within these limits had to

Waste lands of the Crown, where not otherwise defined, are simply, I think, such of the lands of which the Crown became the absolute owner on taking possession of this country as the Crown had not made the subject of proprietary right on the part of any citizen.

- 99 See for example, Commission of Governor Darling, HRA, Series I, vol 12, 99-107. As to the Commission and Instructions issued to colonial governors, see generally, Enid Campbell, “Crown Land Grants: Form and Validity” (1966) 40 *ALJ* 35 at 36-8; *Mabo (No 2)*, note 17 *supra* at 139-40, 142-3, per Dawson J.
- 100 Instructions to Governor Darling, note 50 *supra*; Earl Bathurst to Sir Thomas Brisbane, Despatch No 1, 1 January 1825, HRA, Series I, vol 11, 434-4; Marquess of Normanby to Governor Gipps, Despatch No 83, 29 June 1839, HRA, Series I, vol 20, 209.
- 101 As to the validity of the exercise of legislative power by the Governor, see *Mabo (No 2)*, note 17 *supra* at 37, per Brennan J. After the establishment of the Legislative Council in New South Wales in 1823 successive Imperial Acts dealing with constitutional arrangements for the colony reserved to the Sovereign the power to approve or disallow colonial laws and ordinances. They were transmitted for approval through the Secretary of State for the Colonies and in fact were subject to the ‘supervision’ of the Secretary of State. See *The New South Wales Act (1823)* 4 Geo IV c 96, s 30; *The Australian Courts Act (1828)* 9 Geo IV c 83, ss 6, 12. For discussion of these Acts see generally, P Parkinson, *Tradition and Change in Australian Law*, (1994) pp 133-42.
- 102 *The Australian Constitutions Act 1842 (Imp)*, s 29; *The Australian Constitutions Act (1850)*, *ibid*, s 14; compare with *The New South Wales Constitution Act 1855 (Imp)*, schedule 1, s 43.
- 103 Viscount Goderich to Governor Darling, Despatch No 21, 14 February 1831, HRA, Series I, vol 16, 80-83.
- 104 K Roberts-Wray, *Commonwealth and Colonial Law*, Stevens & Co (1966) pp 146-52, 237, 339; ACV Melbourne, *Early Constitutional Development in Australia: New South Wales 1788-1856 and Queensland 1859-1922*, Oxford University Press (1963, R B Joyce ed 152, 164-9; E Campbell, 1966, note 99 *supra*, 36-8.
- 105 The Order in Council of 9 March 1847 introduced the terms “settled” and “unsettled districts”.

be cultivated and improved.<sup>106</sup> In 1831 the Secretary of State issued Instructions concerning the disposal of the waste lands of the Crown in New South Wales within the limits of location. The regulations terminated the system of land grants and instituted a system of:

- sale by public auction at a minimum upset price of 5 shillings per acre; and
- for persons engaged in rearing cattle, annual leases terminable at the pleasure of the Crown on one month's notice.

In the despatch announcing the new system, the Secretary of State instructed the Governor to "suspend all further grants of land" except to those people to whom positive promises had been made.<sup>107</sup> It was intended that the system of grants and promises of grants<sup>108</sup> by the Governor should come to an end.

### A. Occupation of Crown Lands

The object of the 1831 regulations was to limit the alienation of land to people who had the capital to cultivate and improve it and also to check the rapid expansion of settlement that had occurred under the system of grants.<sup>109</sup> However, the changes did not address the occupation of grazing lands beyond the limits of location. The colonial government knew that large areas of land were needed for grazing and that the existing land regulations were inadequate. Although measures were introduced to prevent the unauthorised occupation of lands beyond the limits of location temporary occupation was permitted, for the purposes of grazing.<sup>110</sup> When it was realised that the existing regulations were having little impact, it was decided that the better approach would be to regulate the occupation of Crown land by making it unlawful to occupy land beyond the "limits allotted for location" without a valid license for depasturing cattle and other animals.<sup>111</sup>

106 Governor Darling to Earl Bathurst, Despatch No 43, 22 July 1826, HRA, Series I, vol 12, 374-424; Governor Darling to Earl Bathurst, Despatch No 60, 2 April 1827, HRA, Series No 1, vol 12, 536-542; Government Order No 35, *Sydney Gazette and New South Wales Advertiser*, vol xxiv, no 1240, 9 September 1826; Government Order No 50, *Sydney Gazette and New South Wales Advertiser*, vol xxvi, no 1570, 17 October 1828.

107 Viscount Goderich to Governor Darling, Despatch No 13, 9 January 1831, HRA, Series I, vol 16, 19-22.

108 E Campbell, "Promises of Land from the Crown: Some Questions of Equity in Colonial Australia" (1994) 13 *UTLR* 1; *North Galanjanja*, note 15 *supra*, per Hill J at 609; *Re Waanyi*, note 14 *supra*, per French J 141-2.

109 Goderich to Darling, 9 January 1831, note 107 *supra*; Viscount Goderich to Governor Darling, Despatch No 21, 14 February 1831, HRA, Series I, vol 16, 80-83; Regulations for the Land Alienation System in New South Wales and Van Diemen's Land, 1 August 1831, Government Order No 22, *Sydney Gazette and New South Wales Advertiser* [1], cols a-c, 2 August 1831.

110 Darling to Bathurst, 22 July 1826, note 106 *supra*; Government Notice, 29 August 1826, *Sydney Gazette and New South Wales Advertiser*, vol xxiv, 30 August 1826; Darling to Bathurst, 2 April 1827, note 106 *supra*; *An Act to authorise the Erection of Pounds, and for regulating the Impounding of Cattle* (1828) 9 Geo IV No 11 (NSW); Government Notice, 16 October 1828, *Sydney Gazette and New South Wales Advertiser*, vol xxvi, no 1570, 17 October 1828; *An Act for the more effectual resumption of Lands permitted to be occupied under the Crown as well as under the Corporation for Church and School Lands* (1829) 10 Geo IV No 6 (NSW).

111 Sir Richard Bourke to Lord Glenelg, Despatch No 99, 10 October 1835, HRA, Series I, vol 18, 153-158; Lord Glenelg to Sir Richard Bourke, Despatch No 142, 13 April 1836, HRA, Series I, vol 18, 379-81; *An Act to restrain the unauthorised occupation of Crown Lands* (1836) 7 Will IV No 4 (NSW); Government Notice, 1 October 1836, *New South Wales Government Gazette*, 5 October 1836, 745-6, *An Act to continue*

The Government believed that the unauthorised occupation of Crown land was “derogatory to the rights of the Crown” and was even concerned that the rights of licensees might mature into “permanent rights”<sup>112</sup> in the land, that would be good against the Crown as well as other settlers. Although licenses were renewable annually it was thought that further clarification was needed and therefore s 26 of *The Crown Unauthorised Occupation Act 1839* provided that the possession or occupation of land under a license did not give the holder any title against the Crown or alter, in relation to the land, the rights of the Crown.

## B. Demands for Fixity of Tenure

By 1835 squatting had become a serious problem for the colonial government and officials in the Colonial Office<sup>113</sup> with responsibility for developing policies with respect to the management of Australian waste lands.<sup>114</sup> Although there was little precedent for what was happening in Australia,<sup>115</sup> the development of colonial land policy between 1831 and 1845 was influenced by a number of clear principles:

- colonial waste lands were held in trust by the Crown for the benefit of the people of the whole British Empire;<sup>116</sup>
- as a general rule the waste lands of the Crown were to be sold at or above the set minimum price;
- revenue generated by land sales was to be used to fund emigration and after the enactment of *The Sale of Waste Lands Act 1842* (Imp), fifteen per cent of

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*and amend an Act intituled “An Act to restrain the unauthorised occupation of Crown Lands” (1838) 2 Vic No 19 (NSW); The Crown Lands Unauthorised Occupation Act 1839 (NSW), note 57 supra; Governor Gipps to Lord Stanley, 75 Government Notice in Despatch, 21 May 1839, 3 April 1844, United Kingdom, PP, Copies of Correspondence relative to the Occupation of Crown Lands and Emigration in New South Wales, Part III, Licensed Occupation of Crown Lands (265) Accounts and Papers, 1845, vol xxxii, 3-17 [79-95]; Governor Gipps to Lord John Russell, Despatch No 139, 28 September 1840, CO 201/299; Governor Gipps to Lord John Russell, Despatch No 192, 19 December 1840, CO 201/300; The Crown Lands Unauthorised Occupation Act 1841 (NSW).*

112 Governor Gipps to Lord Glenelg, Despatch No 65, 6 April 1839, CO 201/285; Governor Gipps to Lord Stanley, Despatch No 54, 24 February 1841, United Kingdom, PP, (180) *Accounts and Returns*, 1844, vol xxxv, 3-6; Governor Gipps to Lord Stanley, Despatch No 54, 18 April 1843, CO 201/332.

113 Through its Australian Department the Colonial Office advised the Secretary of State and through him, colonial Governors, on how best to regulate the disposal and occupation of land in the colonies. The Department received and processed inwards and outwards despatches passing between the Governor and Secretary of State. The Under Secretary was responsible to the Secretary of State for the formulation of policy, although as appears from memoranda and administrative minutes on or appended to despatches others contributed to this process including the Parliamentary Under Secretary of State, the Assistant Under Secretary, the Senior Clerk in the Australian Department and the Colonial Land and Emigration Commission (or Office). It also appears however, that the Secretary of State personally contributed to the formulation of policy and drafting of despatches sent under his signature. When necessary policies would be submitted to Cabinet and Parliament.

114 Prior to the enactment of *The New South Wales Constitution Act 1855* the Imperial Government had responsibility for the management of colonial waste lands.

115 Compare with North America and South Africa, see for example, H Merivale, *Lectures on Colonisation and Colonies* (1861) Lecture IV, 103-28.

116 Gipps to Lord Stanley, 24 February 1841, note 112 *supra*; Earl Grey to Sir FitzRoy, Despatch No 7, 23 January 1852, New South Wales, *Votes and Proceedings*, Legislative Council, 13 July 1852, vol 1, 445-50.

the Land Fund was to be expended for the benefit, civilisation and protection of the Aborigines;<sup>117</sup>

- land beyond the limits of location that was not immediately required for settlement could be permissively occupied for depasturing stock;<sup>118</sup>
- it was necessary to regulate the occupation of unsold lands to ensure that occupiers were not able to secure a prescriptive title against the Crown;<sup>119</sup>
- unsold land should not be put out of the power of the Crown for long periods;<sup>120</sup>
- the occupation of pastoral lands should be restricted where Aboriginal people were numerous<sup>121</sup> but where these lands were held under licence Aboriginal people were entitled to occupy and obtain their subsistence from them;
- the occupiers of land that was not saleable or required for settlement should not be granted an interest<sup>122</sup> in the land as this would derogate from the right of the Crown at any time, to sell or use it for public purposes.

This last point was one of the main reasons why Gipps preferred annual licenses to leases. He opposed granting a pre-emptive right of purchase to licensees because he thought it would also be necessary to grant them a right to “undisturbed possession up to the time when the right of pre-emption commenced”. He insisted, “these lands”:

...are the unquestionable property of the Crown, and they are held in trust by the Government for the benefit of the people of the whole British empire. The Crown has not simply the right of a landlord over them, but it exercises that right under the

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117 Russell to Gipps, 25 August 1840, note 59 *supra*; Lord Stanley to Governor Gipps Despatch No 191, 15 September 1842, HRA, Series I, vol 22, 279-86.

118 Lands beyond the limits of location were only occupied under an annual licence. The Governor did not have the authority to grant leases until the Order in Council of 9 March 1847 was proclaimed in the colony in October 1847.

119 Gipps to Lord Stanley, 18 April 1843, note 112 *supra*; see also, a memorandum by James Stephen (Permanent Under Secretary, Colonial Office) to Mr Hope (Parliamentary Under Secretary), 22 July 1842 on a letter from the Colonial Land and Emigration Office to Stephen, 21 July 1842, CO 384/71:

If I might hazard a prediction founded on my experience in analogous cases it would be that which for [want] of a more appropriate term may be called the Squatting interest will prove too strong for the Government and the Legislature, and that licenses of occupation will slowly but surely ripen into proprietary titles especially now that Parliament has fixed a minimum price at which a large portion of this vast Territory must for many years to come be unsaleable. Thus the Squatters or licensed occupiers will e're long have to plead a possession of so many years continuance, and will be so powerful a Body as to neutralise the effect of any positive Law for disturbing them... [T]hese Licenses of occupation have all the immediate effect of conveyance in perpetuity, and must have that ultimate effect if the Licenses be annually renewed for many years together.

It had been held by the New South Wales Supreme Court in the case of *Scott v Dight* (unreported, 1839) that a right of occupancy under a license was good against everybody except the Crown: Gipps to Glenelg, 6 April 1839, note 112 *supra*; SH Roberts, *History of Australian Land Settlement 1788-1920*, Melbourne University Press (1st published 1924, reissued 1968) p 179 and footnote 11.

120 Gipps to Lord Stanley, 17 January 1844, note 123 *infra*.

121 See for example, RHW Reece, note 54 *supra*, pp 183-4.

122 A “permanent right”: Governor Gipps to Glenelg, 6 April 1839, note 112 *supra*.



obligation of a trustee, and I have accordingly insisted on my power to withhold or to withdraw a license.<sup>123</sup>

By the early 1840s it had become clear to Gipps that in terms of climate, geography and the fertility of the land, Australia was different from other British colonies;<sup>124</sup> that the development of the pastoral industry was critical to the colony's future economic prosperity; and that attempting to prevent the dispersion of population beyond the limits of location would be futile and ultimately counter-productive.<sup>125</sup> Gipps realised that much of the land in the colony was unsuitable for agriculture, that large areas were required for grazing and that no one could afford to purchase all the land contained in their runs at the minimum price. Furthermore, if landholders were to make improvements on these lands they would require greater security of tenure.<sup>126</sup> A number of what would become persistent themes, were therefore emerging:

- pastoral lands beyond the limits of location would not be required for sale in the immediate future and much of this land was only suitable for grazing;
- because large areas of land were required for grazing, occupiers would never be able afford to purchase their runs at the minimum price;
- in the public interest squatters should be encouraged to make permanent improvements on their runs;
- if these lands were not to be sold, but used for grazing, the Crown was entitled to a revenue from their use.<sup>127</sup>

Gipps felt that the answer was to find a balance between the private interests of the land holder and the immediate and long-term public interest.<sup>128</sup> The Colonial Office shared this view and it ultimately influenced the approach that was taken to the question of pastoral leases.

Both the Imperial and colonial governments thought that concessions should be made to squatter demands for 'fixity of tenure'. At first the squatters sought a reduction in the minimum price of land so that they could purchase their runs, later however, they would demand 'long leases'. Both Governments believed that it was not in the public interest to sell these large areas of land, which constituted a substantial part of the colony's most valuable economic resource, to a small number of wealthy individuals. Furthermore, it was unnecessary that they own the

123 Governor Gipps to Lord Stanley, 18 April 1843, *ibid*; Governor Gipps to Lord Stanley, Despatch No 17, 17 January 1844, CO 201/342.

124 Governor Gipps to Russell, 28 September 1840, note 111 *supra*; see generally, New South Wales, Report of the Select Committee of the Legislative Council appointed on the 12th June 1849 to inquire into the management of the waste lands of the Crown, the appropriation of the revenue derived therefrom and the influence of such management and appropriation upon the colonisation of the territory, United Kingdom, PP, (1220) *Accounts and Returns*, 1850, vol xxxvii, 18 pages [487-504].

125 See for example, Gipps to Lord Stanley, 18 April 1843, note 112 *supra*.

126 Gipps to Lord Stanley, 17 January 1844, note 123 *supra*.

127 Gipps to Lord Stanley, 18 April 1843, note 112 *supra*; Report of the Colonial Land and Emigration Office, 30 September 1844, enclosure in: Lord Stanley to Governor Gipps Despatch No 11, 29 January 1845, CO 201/342.

128 Gipps to Lord Stanley, 17 January 1844, note 123 *supra*. As to the attitude of the Colonial Office see, Report of Lord Stanley to Governor Gipps, Despatch No 12, 30 January 1845, United Kingdom, PP, Copies of Correspondence relative to Crown Lands and Emigration in New South Wales, Part VI, Licensed Occupation of Crown Lands, (189) 1846, vol ix, 51-53 [647-649].

land in order to carry on the business of grazing cattle and sheep.<sup>129</sup> It was felt that the squatters should be given no greater tenure than was needed to enable them to carry out their pastoral activities, to encourage investment in the industry and the land, and to promote more permanent settlement in the pastoral districts. It was therefore proposed that the squatters should be able to purchase the land on which their homestead and permanent improvements were located and obtain some form of security<sup>130</sup> over the remainder of their run. The 'homestead area', the enclosed or improved parts of a run, were treated differently from the areas used for grazing, which at the time<sup>131</sup> were not surveyed and did not need to be accurately described for the purpose of obtaining a depasturing licence. While the need for a more secure tenure over the grazing lands was accepted, the occupation of these lands was nevertheless regarded as temporary and subject to the rights of the Crown acting in the public interest. However, differences emerged between the Governor and certain members of the Executive Council as to the form of security that should be afforded the squatter over the grazing areas of his run.

As we have seen, it was realised that it would not be possible to stop the occupation of pastoral lands by the squatters. From the outset, both Imperial and colonial authorities were unwilling to introduce leases to regulate the occupation of lands beyond the limits of location. Among the reasons advanced for this opposition, were:<sup>132</sup>

- disposal other than by sale would reduce Crown revenues from land and have an adverse impact on the Land Fund and emigration to the colonies;
- lessees would acquire an interest in land<sup>133</sup> which (at least for the term of the lease) would limit the Crown's capacity to sell the land or otherwise apply it to a public purpose;<sup>134</sup>
- the difficulty of collecting rent;<sup>135</sup>

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129 Lord Stanley to Gipps, 29 January 1845, note 127 *supra*; Governor Gipps to Lord Stanley, Despatch No 178, 22 August 1844, CO 201/349; Report from the Select Committee of the New South Wales Legislative Council on Land Grievances, New South Wales, *Votes and Proceedings*, Legislative Council, 20 August 1844, 121-38.

130 'Security' from sale ('undisturbed possession') and the loss of the value of improvements.

131 Since 1860 successive Queensland legislation dealing with pastoral leases have provided in the same or similar terms to s 13 (1) of the *Land Act* 1962:

In any pastoral lease it shall be sufficient if the land comprised therein is defined according to the best description of such land and of the boundaries thereof which is procurable, notwithstanding that such description has not been prepared after actual survey. No such lease shall be liable to be set aside by reason only of the imperfection of any such description if the land is defined in the lease with reasonable certainty.

132 See generally, Gipps to Lord Stanley, 11 August 1844, note 79 *supra*.

133 See for example, Governor Gipps to Lord Stanley, Despatch No 94, 1 May 1844 (enclosures), CO 201/358.

134 This was ultimately dealt with in chapter II, s 9 of the Order in Council of 9 March 1847 by providing that nothing in any lease 'shall prevent the Governor ... from making grants or sales of any lands within the limits of the run or comprised within such lease, for public purposes, or disposing of in such other manner as for the public interest may seem best, such lands as may be required for' certain enumerated purposes.

135 Governor Gipps to Lord Stanley, Despatch No 216, 30 September 1844, United Kingdom, PP, Copies of Correspondence relative to the Occupation of Crown Lands and Emigration in New South Wales, Part IV, Licensed Occupation of Crown Lands (189) *Accounts and Papers*, 1846, vol ix, 26-37 [622-633]; Governor Gipps to Lord Stanley, Despatch No 4, 10 January 1846, United Kingdom, PP, Copies of Correspondence relative to the Occupation of Crown Lands and Emigration in New South Wales, Part IV, Licensed Occupation of Crown Lands (189) *Accounts and Papers*, 1846, vol ix, 51-3 [647-649].

- leases would have the potential to adversely affect the rights of Aboriginal people;<sup>136</sup>
- the difficulty of surveying or describing the boundaries of runs beyond the limits of location with sufficient accuracy to enable a lease to issue;<sup>137</sup>
- while it might not be possible to stop the occupation of lands beyond the limits of location, granting leases to occupiers would go further than was necessary to regulate the occupation of these lands, give official sanction to the (often “unlawful”) conduct of people occupying lands in these areas<sup>138</sup> and afford them “permanent rights” inconsistent with the wider public interest.<sup>139</sup>

Gipps thought the squatters should have undisturbed possession during a period of years under an annually renewable licence. By this he meant a title that would not be susceptible to sale by or at the instance of the Crown. He was not referring to the rights of possession conferred by a license. On the other hand, the Colonial Land and Emigration Commissioners who advised the Secretary of State on matters of colonial land policy, acknowledged the difficulties but favoured leases, noting that “in New South Wales for sheep farming, it is necessary that each flock-master should have an exclusive right of depasturing a particular tract of country”.<sup>140</sup> However, in a second report they were careful to note:

The position of the colonies which have so rapidly flourished in Australia is new, and we must expect that the prevalent view concerning them should be required to be modified by experience.<sup>141</sup>

During the 1840s, official policy with respect to squatting evolved, as understanding of colonial conditions increased<sup>142</sup> from an environmental, economic, political, social and cultural perspective. What emerged was a policy in relation to the occupation of pastoral lands that owed its final form to several influences. Significant among these, was the impact of land settlement on the rights and interests of Aboriginal people.

### C. A Secure Title

Before turning our attention to the measures taken by government during this period it must be pointed out that what the squatters sought in the form of a lease of their runs, was not more extensive rights of possession. Although for a limited

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136 Report of the Colonial Land and Emigration Office, dated 4 August 1845, enclosure in: Lord Stanley to Governor Gipps Despatch No 100, 8 August 1845, CO 201/358; (Private and Confidential) Extract of a Despatch from Lord Stanley to Governor Gipps, 31 August 1845, CO 201/358; Gipps to Lord Stanley, 11 August 1844, note 79 *supra*.

137 Governor Gipps to Secretary of State, Despatch No 180, 7 November 1838 (enclosures), CO 201/277; see also, a letter to the Colonial Secretary from Oliver Fry, Commissioner of Crown Lands, Clarence River, 8th January 1844 in: Gipps to Lord Stanley, 11 August 1844, *ibid*.

138 Gipps to Glenelg, 6 April 1839, note 112 *supra*.

139 Gipps to Lord Stanley, 17 January 1844, note 123 *supra*.

140 Report of the Colonial Land and Emigration Office, dated 4 August 1845, note 136 *supra*.

141 Report of the Colonial Land and Emigration Office, 30 September 1844, in Lord Stanley to Gipps, 29 January 1845, note 127 *supra*.

142 *Ibid*.

period, these rights were already adequately protected under existing laws.<sup>143</sup> The squatters instead sought a secure title against the Crown for a fixed term. The principal complaints directed at the annual licence were the shortness of its term and the fact that a run could be sold by the Crown at any time, to a person other than the licensee and without any compensation for improvements.<sup>144</sup> At no time during this long and sometimes bitter debate concerning the nature and scope of the rights to be afforded to the squatters were there demands for more secure rights of possession against third parties, including the Aborigines. Certainly stock owners wanted better protection from attacks by the Aborigines and complained about the effectiveness of the Border Police but they were not seeking a title to their runs which would give them a legal right to treat the Aborigines as trespassers. For its part, the colonial government as early as 1839 had made it plain that the Aborigines were entitled to be present upon the pastoral lands of the colony and to be protected from violence, as the “black inhabitants of this country are no less the subjects of Her Majesty than the white”.<sup>145</sup>

In some ways then the lease was just a step along the same evolutionary path as the licence for depasturing cattle. It was not a complete departure from the principles on which the licence was founded. As we shall see, although the lease ultimately delivered the security demanded by the squatters, it remained a tenure for a limited and specific purpose - the Crown retained substantial rights in relation to leased lands and in so far as Aboriginal interests were concerned it was intended that they would continue to have access to lands held under lease for as long as it was used for pastoral purposes.

#### D. *Sale of Waste Lands Act 1842*

As we have seen, between 1836 and 1841 a series of local Acts<sup>146</sup> had been passed by the New South Wales Legislative Council. These Acts made it unlawful to occupy Crown lands beyond the limits of location without a valid annual license for “depasturing cattle and other animals”. In 1842 the United Kingdom Government enacted “An Act for regulating the Sale of Waste Land belonging to the Crown in the Australian Colonies”.<sup>147</sup> The principal object of the Act was to ensure that land in the colonies was only alienated by way of sale, although s 17

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143 *The Crown Lands Unauthorised Occupation Act 1839* protected licensees from encroachment and penalties were imposed on persons who unlawfully occupied Crown lands: ss 2, 10. See also, *The Crown Land Unauthorised Occupation Act 1841*, s 2.

144 For example, clause 6 of the Crown Lands Regulations of 1836 provided that:

Any improvement effected upon Crown Land depastured under the authority of a license, will be at the risk of the party holding the same, as such land whenever it may be deemed expedient to extend the boundaries of location, will be liable to be up to competition at public auction, in the same manner as other unalienated Crown Lands.

The same provision is to be found in the regulations under *The Crown Lands Unauthorised Occupation Act 1839* (NSW).

145 Instructions to Commissioners of Crown Lands (30 September 1843), enclosure in Governor Gipps to Lord Stanley Despatch No 75, 3 April 1844, United Kingdom, PP, Copies of Correspondence relative to the Occupation of Crown Lands and Emigration in New South Wales, Part III, Licensed Occupation of Crown Lands (265) *Accounts and Papers*, 1845, vol xxxii, 15-17 [93-94].

146 Note 111 *supra*.

147 *The Sale of Waste Lands Act 1842*.

provided that the Governor could grant annual occupation licenses. Land subject to a license could not be sold until the licence had expired. Licensed land remained part of the waste lands of the Crown.<sup>148</sup> The Act confirmed the principles of the 1831 regulations but being legislation of the Imperial Parliament abridged the prerogatives of the Crown in relation to the waste lands of the Crown in the Australian colonies.<sup>149</sup> In the same year, 1842, the Imperial Parliament passed "An Act for the Government of New South Wales and Van Diemen's Land".<sup>150</sup> It authorised the Governor and Legislative Council to make laws for the peace, welfare and good government of the colony, but provided that no law should "interfere in any Manner with the Sale or other Appropriation of the Lands belonging to the Crown ... or with the Revenue thence arising".<sup>151</sup>

The Imperial Government had ignored the demands of the squatting interests in New South Wales and also intended to maintain its control over the administration of land in Australia. It retained complete legislative and executive responsibility for the management and disposition of these lands because they were an Imperial interest which the Crown held on trust "for the local community and the people of Empire at large".<sup>152</sup>

Despite the failure of the 1842 Act to address the needs of the squatters, it was accepted they were entitled to greater security of tenure. Measures were therefore brought forward in the colony to deal with the issue.<sup>153</sup> However, Gipps and

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148 Section 23.

149 The relevant principles are set out in *Attorney-General v De Keyser's Royal Hotel* (1920) AC 508, Lord Atkinson at 539-40:

it would be useless and meaningless for the Legislature to impose restrictions and limitations upon, and to attach conditions to, the exercise by the Crown of the powers conferred by a statute, if the Crown were free at its pleasure to disregard these provisions, and by virtue of its prerogative do the very thing the statutes empowered it to do... [W]hen such a statute expressing the will and intention of the King and of the three estates of the realm, is passed it abridges the Royal Prerogative while it is in force to this extent: that the Crown can only do the particular thing under and in accordance with the statutory provisions and that its prerogative power to do that thing is in abeyance... [A]fter the statute has been passed, and while it is in force, the thing it empowers the Crown to do can thenceforth only be done by and under the statute, and subject to all the limitations, restrictions and conditions by it imposed, however unrestricted the Royal Prerogative may theretofore have been.

Put another way "if the whole ground of something which could be done by the prerogative is covered by a statute, it is the statute that rules": *Attorney-General v De Keyser's Royal Hotel* at 526, per Lord Dunedin; *Attorney-General For New South Wales v Butterworth & Co (Australia) Ltd* (1938) 38 SR (NSW) 195, at 224-5 per Long Innes CJ. The prerogative cannot be taken away except by express words: *Canadian Pacific Railway v Toronto Corporation and Grand Trunk Railway of Canada* (1911) AC 461 at 471 *et seq*; or by necessary implication: *Attorney-General v De Keyser's Royal Hotel* at 576. The prerogative cannot be displaced except by clear and unambiguous provision: *Barton v The Queen* (1974) 131 CLR 474 per Barwick CJ at 488. The Royal prerogatives exist in the colonies to the same extent as in the United Kingdom: *Re Bateman's Trust* (1873) LR 1 5 Eq 355; *Maritime Bank v R* (1888) 17 SCR 657.

150 *The Australian Constitutions Act 1842* (Imp).

151 Section 29.

152 Gipps to Lord Stanley, 18 April 1843, note 112 *supra*.

153 See for example, Gipps to Lord Stanley, 3 April 1844, note 111 *supra*:

... the time seems to me to have arrived, when ... facilities should be afforded to Squatters in general, of securing to themselves a permanent interest in some parts of the lands they occupy .. they should have the opportunity afforded to them, of obtaining on easy Governor Gipps to Lord Stanley, Despatch No. 215, 30 September 1844, United Kingdom, PP, Copies of Correspondence relative to the Occupation of Crown

officials in the Colonial Office were still concerned about the rights that would be acquired under a lease. Prima facie, a lease would give a stock owner an interest in his runs, a form of exclusive possession<sup>154</sup> and rights to quiet enjoyment for the term of the lease. Furthermore, a long-term lease would be required to satisfy the economic demands of pastoral operations and to encourage investment in permanent improvements to runs.<sup>155</sup> It was thought that once granted, a lease would be the equivalent of a fee simple title; a right that it would be difficult to withdraw when the pastoral lands were needed for closer settlement or public purposes. In a letter to the Colonial Secretary the Commissioner for Crown Lands, McLeay River expressed the view that the annual licence “is nearly equivalent to the fee-simple” and that if the squatter’s title was made stronger by changing licenses to leases “they might not give them up at the expiration of their leases without some trouble and unpleasantness to the Government.”<sup>156</sup> For the local government, leases seemed to threaten the foundations of colonial land policy.

Gipps in fact thought the annual license afforded squatters “an exclusive right of possession; good for an indefinite period against all intruders, and good even against the Crown itself for the period of a year”, although he expressed the opinion in the course of comparing the rights under a depasturing licence with “the right of depasturing on the Lords’ Common”.<sup>157</sup> It would also seem to be at odds with the relevant legislation and land regulations. Section 17 of *The Sale of Waste Lands Act 1842* (Imp) prevented the Crown from selling licensed lands until the expiration of the licence. The license was a license for occupation for the purpose of depasturing cattle and other animals and s 10 of *The Crown Lands Unauthorised Occupation Act 1839*<sup>158</sup> protected licensees’ stations or runs from encroachment “contrary to the established usage and practice of the Colony”.<sup>159</sup> Section 26 provided that:

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Lands and Emigration in New South Wales, Part IV Licensed Occupation of Crown Lands (372) *Accounts and Papers*, 1845, vol xxxii, 5-32 [151-178]:

‘B. ... A fixed tenure is undoubtedly to be preferred to a precarious one ...’.

See also, Gipps to Lord Stanley, 1 May 1844, note 133 *supra*.

154 Governor’s Remarks on the Report from the Select Committee on Crown Land Grievances, 20 August 1844, enclosure in: Gipps to Lord Stanley, 30 September 1844, *ibid*.

155 See generally, Petition to Her Majesty the Queen by the undersigned Stockholders and other Inhabitants of the City of Sydney in: the Colony of New South Wales an enclosure in: Gipps to Lord Stanley, 22 August 1844, note 129 *supra*.

156 Enclosure in: Gipps to Lord Stanley, 11 August 1844, note 79 *supra*; see also, Gipps to Lord Stanley, 10 January 1846, note 135 *supra*:

It is scarcely necessary for me to say, that I prefer greatly leases of seven years to leases for any longer period. I believe I may pretty safely assert, that a lease for 21 years would in New South Wales, be, in a great majority of cases, a lease for ever.

157 Governor’s Remarks on the Report from the Select Committee on Crown Land Grievances, 20 August 1844, enclosure in: Gipps to Lord Stanley, 30 September 1844, note 153 *supra*. The regulations dealing with the occupation of lands within the limits of location provided that licensees were “entitled to the exclusive right of occupancy of the same ... for the purpose of depasturing cattle and other stock”: Government Notice, No 51, 21 August 1841, New South Wales, *Votes and Proceedings*, 1847, vol 1, 712. This provision was not included in regulations for licences of land beyond the limits of location.

158 As amended in 1841.

159 See also, s 2 of *The Crown Lands Unauthorised Occupation Act 1841* (NSW) with respect to actions for trespass by encroachment.

...no possession nor occupation of any land taken or had under or by virtue of any license as aforesaid shall be construed to give any title whatever against the Crown or alter in any respect the rights of Her Majesty Her Heirs and Successors in respect to any such land.<sup>160</sup>

Section 2 provided that it was not lawful to occupy any Crown lands beyond the limits of location without a valid lease or license and imposed a penalty for unauthorised occupation.<sup>161</sup> Lands held under license remained Crown lands. A license made the occupation of Crown lands lawful. Licenses were renewable annually upon the recommendation of the Commissioner of Crown Lands for the District concerned.<sup>162</sup>

Gipps' reference to 'intruders' also suggests that when he used the expression 'an exclusive right of possession' he was not referring to a general right to exclude all persons from lands held under license but a licensee's statutory right to have his or her *title* protected against encroachment, by people purporting to exercise the same rights over the land as possessed under the license. Certainly in none of the numerous despatches to London on these matters did Gipps suggest that licensees were entitled to exclude everyone from their runs. In fact the creation of statutory rights in relation to encroachment and the acknowledgment in s 25 of the 1839 Act that persons could lawfully occupy or be present upon Crown lands beyond the limits of location suggest that licensees had no such right.

In April 1839 Gipps wrote to the Secretary of State concerning the operation of the recently enacted Crown lands legislation:

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160 The 1836 regulations provided that:

The Act of the Governor and Council above referred to has been passed and these Regulations consequent upon it are now promulgated, as the fittest mode of putting an end to the mischief arising from unauthorised occupation; and the fee to be paid for the license can only be considered as a necessary recognition of the rights of the Crown, and as the means for carrying these Regulations into effect.

161 Lands were not leased beyond the limits of location and it is arguable that after the enactment of *The Sale of Waste Lands Act* 1842 (Imp) the Governor did not have the power to grant leases. Gipps described the practice in the colony in the following terms:

...an essential difference prevails in the administration of the lands of the Crown, according as they are situate within or without the boundaries of location. The essential difference between the two systems of management is, that within the boundaries, or, which is the same thing, within the counties, land is either sold or let on lease,\* whereas it is neither sold nor leased, but occupied on license, beyond the boundaries. †

\* Under the 6th clause of the 5 Vict, No 1, licenses have lately been substituted for leases, even within the boundaries; but as these licenses are for a definite portion of land, and for a definite period, namely, one year, they are equivalent to leases.

† In the new counties, however, a mixed system to a certain extent, because the squatters had already possession of lands in them before the counties were laid out.

Leases within the limits of location were 'in the terms and under the regulations prescribed by the Government Order of 1st August 1831'. The term of the leases was one year and it was to be 'distinctly understood that the lands so let will be open for purchase; and, in the event of their being sold, must be surrendered by the lessee upon one months' notice.' Lands were leased in lots of one square mile. There was no limit on the area that could be held under licence beyond the limits of location until 1844 (to take effect on 1 July 1845) when it was provided that a station could not consist of more than twenty square miles. Gipps to Lord Stanley, 3 April 1844, note 111 *supra*. See *The Crown Lands Unauthorised Occupation Act* 1841 (NSW), s 6.

162 Government Notice, 21 May 1839, note 111 *supra*.

The Commissioners have powers under the tenth clause to adjudicate in cases of encroachment by any newcomer in what is called the established run of the first occupant - but this is only granted to preserve order and give no more protection to any occupant than that which might be in a court of law - it having been decided in the Supreme Court of the colony that a right of occupancy is good against everybody but the Crown; and I may remark that in a very recent case (*Scott v Dight*, tried on the 22nd inst) damages to the amount of 200 pounds were given for an intrusion by the defendant on the established run of the plaintiff, though the plaintiff held only a general licence from the Crown.<sup>163</sup>

Unfortunately *Scott v Dight*<sup>164</sup> was not reported. However, as the action was for an intrusion 'on the established run of the plaintiff', it is probable that the defendant had encroached on the land of the plaintiff.<sup>165</sup> The comment that a licence confers a 'right of occupancy good against everybody but the Crown' suggests that what in fact was in issue was the protection of the plaintiff's *title*, not what rights of possession he or she had under an annual depasturing licence.<sup>166</sup>

The colonial government wanted to ensure that if leases were introduced lessees would acquire no greater rights than were necessary for the effectual conduct of pastoral activities. There would be implications for Crown land revenues, the Crown's power to alienate pastoral lands by sale and for closer settlement would be affected, and it was conceded that the squatters would receive a title good against the Crown for the term of their lease. Officials in New South Wales and the Colonial Office were also aware that there might be consequences for Aboriginal groups who lived on the lands occupied by the squatters.

As early as 1839, Gipps felt it necessary to state in the despatch transmitting *The Crown Lands Unauthorised Occupation Act 1839* (NSW) to the Secretary of State, that although the Act made no mention of the protection of the Aborigines, "it was principally introduced for the purpose of putting a stop to the atrocities which have been committed both on them and by them".<sup>167</sup> It was implicit in s 25

163 *Ibid.*

164 Note 119 *supra*.

165 Or in any event was purporting to exercise in relation to the land the same rights of occupancy as the plaintiff licensee.

166 See generally, *An Act for protecting the Crown Lands of the Colony from Encroachment Intrusion and Trespass* (1833) 4 Will IV No 10 (NSW); *An Act to amend and Act intituled An Act for protecting the Crown Lands of the Colony from Encroachment Intrusion and Trespass* (1834) 5 Will IV No 12 (NSW); *The Crown Lands Unauthorised Occupation Act 1836* (NSW); *The Crown Lands Unauthorised Occupation Act 1838* (NSW).

167 *Ibid.* The Instructions issued to Commissioners of Crown Lands elaborate on this objective:

You will be very careful not to recommend the renewal of the license of any person ... at whose stations native women have been harboured, or whose servants have committed unprovoked aggressions on the natives...

With reference to the duties devolving on you for the protection of the inhabitants and of the Aborigines ...

The general object of the establishment of the police is to keep order amongst all parties, but in an especial manner it has been established for the protection of the Aborigines, and to stop the atrocities which have been committed on both sides, between them and the stockmen; and you will bear in mind, that the black inhabitants of this country are no less the subjects of Her Majesty than the white, that all are equally amenable to the laws, and all equally entitled to their protection. ...

You will explain to the blacks the consequences which they will draw upon themselves by any acts of aggression on the whites, as well as the punishment the latter will be subject to for any misbehaviour to them...



of the Act, which authorised the establishment of a Border Police “for the mutual protection and security of all persons lawfully occupying or *being upon Crown lands* beyond the limits allotted for location”(emphasis added) that the colonial government not only acknowledged, but accepted the continuing Aboriginal presence on lands used for depasturing stock; what they sought to prevent was the violence “committed both on them and by them”. In reality, the Act did not give licensees the right to exclude anyone from their runs.

Frontier violence between the Aborigines and squatters was a recurring theme in communications between the colonies and the Colonial Office as the respective Governments worked out ways of securing and giving legal form to the interests of the stakeholders in the pastoral lands of the colonies - the Crown, the squatters and in this context, the Aborigines.<sup>168</sup> In addition to the agitation by the squatters for fixity of tenure, there were other complaints about colonial land policies:

- the minimum sale price of £1 per acre was prohibitively high for those wanting to purchase their runs; and
- improved lands such as the homestead area and water supply could be sold at auction by the Crown, to someone other than the current licensee and without compensation. Section 17 of *The Sale of Waste Lands Act 1842* (Imp) merely offered the squatters security from sale for 12 months but no pre-emptive right of purchase or compensation.

In April and May 1844, local regulations were published dealing with the occupation<sup>169</sup> and purchase<sup>170</sup> of pastoral lands in New South Wales. Gipps had tried to meet some of the squatters’ most persistent demands. The purchase regulations gave licensees the advantage of purchasing any part of their run<sup>171</sup> for a homestead, the price being not less than the minimum price of the land plus the value of improvements. Purchasers were to have undisturbed occupation of the remainder of their run for eight years, subject to the absolute right of Crown, which would not be exercised capriciously or unequally, to sell or otherwise dispose of the land for some public benefit. Under the occupation regulations, a license was only to cover one run of no more than twenty square miles,<sup>172</sup> thus adding to the costs of those graziers who held many runs with the object of controlling valuable frontage lands.<sup>173</sup> It was still necessary to take out a license

You will further endeavour to ascertain the number of Aborigines who may be living within the limits of your district, though not in immediate connexion with white men.

Enclosure in: Gipps to Lord Stanley, 3 April 1844, note 111 *supra*. Under the 1839 Regulations a licence could be cancelled if the licensee was convicted ‘of any malicious injury committed upon or against any aboriginal native or other person’.

168 *Ibid.*

169 Government Notice. Depasturing Licenses, 2 April 1844, New South Wales *Government Gazette*, 2 April 1844, at 508.

170 Government Notice. Purchase Regulations. *Sydney Morning Herald*, 13 May 1844. The proposals were referred to the Secretary of State for “the authority of Her Majesty’s Government”.

171 But not less than 320 acres.

172 One of the distinguishing features of the license beyond the limits of location was that the area of land occupied was only limited by the moderation of the squatter concerned and the boundaries of runs were frequently ill-defined. See, Gipps to Lord Stanley, 3 April 1844, note 111 *supra*.

173 And fronting watercourses.

on the unpurchased part of a run and stocking and transfer fees were also introduced.

Far from the squatters being satisfied with these regulations, there was an angry reaction, including petitions to the Queen,<sup>174</sup> the creation of a Pastoral Association,<sup>175</sup> the formation of a Committee of the Legislative Council on Crown Land Grievances<sup>176</sup> and lobbying in the United Kingdom.<sup>177</sup> The Secretary of State, Lord Stanley referred the regulations, despatches from the Governor and all related papers<sup>178</sup> to the Colonial Land and Emigration Office for its views. Included among these papers were reports of the Commissioners of Crown Lands in New South Wales who had been consulted by the Governor prior to the drafting of the 1844 regulations. The Colonial Land and Emigration Office reported in August 1845. Their report raised the subject of leases.<sup>179</sup> As we have seen the draft purchase regulations proposed that a licensee who purchased part of a run for the homestead would have security over the remainder for eight years.<sup>180</sup> However, it was not an unconditional right, the purchaser was only entitled to a license of the unpurchased part of the run.<sup>181</sup> In an earlier report of 30 September 1844<sup>182</sup> the Colonial Land and Emigration Commissioners had suggested that a "positive assurance" of security for eight years should be given to the squatter. Purchasers should be entitled to a "license for eight years".

In their second report, the Commissioners considered the local objections to granting leases:

...of the fourteen Crown Lands Commissioners, who were consulted upon the regulations by Sir George Gipps, nine are decidedly against granting leases of the run, and the other five, although not expressing themselves so decidedly, can scarcely be said to have given opinions in favour of leases. The objections they urge are, that it would be difficult to restrain underletting, and the location of persons beyond the boundaries to whom, from their character and position, the Government have always refused to grant licenses; that it would add to the expense of defining the quantity of land under lease; that so much right of tenure would be given to the squatters as to cause very serious inconvenience to the Government, particularly as regards the

174 Gipps to Lord Stanley, 22 August 1844, note 129 *supra* and enclosures in: Governor Gipps to Lord Stanley, Despatch No 196, 8 September 1844, CO 201/349.

175 Resolutions of a General Meeting of Stockholders and others interested in the prosperity of the Colony held on Tuesday 9 April 1844, enclosure in: Governor Gipps to Lord Stanley, Despatch No 84, 16 April 1844, United Kingdom, PP, Correspondence or Extracts of any Correspondence relative to Crown Lands and Emigration in New South Wales (267) *Accounts and Papers*, 1845, vol xxxiv, 17-34 [95-112].

176 The Select Committee was appointed on 3 May 1844 and tabled its Report on 20 August 1844.

177 Memorials to Lord Stanley, Principal Secretary of State for the Colonies from the Glasgow Association for the Promotion of the Squatting and General Interests of New South Wales and the Merchants and other connected with Australia; see generally, Gipps to Lord Stanley, 16 April 1844, note 175 *supra*.

178 Listed in the Report of the Colonial Land and Emigration Office, dated 4 August 1845, enclosure in: Lord Stanley to George Gipps, 8 August 1845, note 136 *supra*.

179 *Ibid.*

180 Clause 3 provided:

Any person who may have purchased a homestead shall not be disturbed in the possession of his run during the following eight years. He must, however, continue to take out for the unpurchased parts of it, the usual license, and pay on it the usual fee of £10 per annum.

181 Sydney *Morning Herald*, 13 May 1844, note 170 *supra*. See Gipps to Lord Stanley, 1 May 1844, note 133 *supra*.

182 Report of the Colonial Land and Emigration Office, 30 September 1844 enclosure in Lord Stanley to Gipps, 30 January 1845, note 128 *supra*.

protection of the Aborigines, the feeling of some of the settlers being so strong against the natives, that they would not allow an aboriginal to stay upon or even cross their station...<sup>183</sup>

### E. *Sale of Waste Lands Amendment Act 1846 (Imp)*

Gipps<sup>184</sup> and Superintendent LaTrobe<sup>185</sup> at Port Phillip, remained opposed to the granting of leases and while the Land and Emigration Commissioners examined various proposals to give the squatter a more secure title, their report did not settle on any particular course to deal with a subject they described as “being beset with difficulties”. However, in the meantime, following a suggestion by Gipps in April 1844,<sup>186</sup> the Colonial Office had begun to consider amendments to *The Sale of Waste Lands Act 1842 (Imp)*. A copy of a Bill to amend the Act was forwarded to Gipps in August 1845.<sup>187</sup> The Bill sought to maintain:

...the rights of the Crown and the public to all land which had not been alienated by the Crown ... [but to] afford additional facilities for rendering the unsold lands of the Crown productive, and to give a certain security of tenure to persons now in occupation of Crown lands on easier terms than under the existing law ... [by removing] any doubts which might be entertained of the power of the Crown to grant leases of unsold waste lands.<sup>188</sup>

Lobbying in London had brought its rewards as it seemed the Colonial Office had finally acceded to the demands of the squatting interests in interviews with “gentlemen connected with New South Wales” and in other communications on the subject.<sup>189</sup> Section 1 of the Bill provided that waste lands of the Crown could be leased for a term of not more than seven years, being offered at public auction to the highest bidder. Under s 7, if the Governor thought fit, lands beyond the limits of location could be leased to the licensed occupier without a public auction if that person had been the licensed occupier of the land for five successive years.

In a Private and Confidential despatch to Governor Gipps on 31 August 1845, Lord Stanley pointed out that the leases proposed in the Bill were confined to land for “grazing purposes”. The Bill did not enlarge the powers of Commissioners of

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183 *Ibid.* The attitudes of the squatters are revealed in a letter to the *Morning Herald* by Mr Edward Hamilton, dated 15 April 1844, enclosed in: Governor Gipps to Lord Stanley Despatch No 86, 23 April 1844, CO 201/358. His remarks also reflect the public impression of Colonial Office policy towards the Aborigines. For a summary of the views of the squatters on the rights of the Aborigines over pastoral lands, see RHW Reece, note 54 *supra*, pp 169-74.

184 Gipps to Lord Stanley, 30 September 1844, note 135 *supra*; Gipps to Lord Stanley, 10 January 1846, note 135 *supra*.

185 Report of the Colonial Land and Emigration Office, dated 4 August 1845, enclosure in Lord Stanley to Gipps, 8 August 1845, note 139 *supra*; see, letter to the Colonial Secretary from Edgar Beckham, Commissioner of Crown Lands, Lachlan District, 20th January 1844 enclosure in Gipps to Lord Stanley, 11 August 1844, note 79 *supra*.

186 Gipps to Lord Stanley, 16 April 1844, note 175 *supra*:

I cannot but anxiously hope that the Imperial Parliament, having passed an Act for regulating the Sale of Crown Lands in Australia, will complete its work by establishing statutory rules for the management of those which are unsold.

187 Lord Stanley to Governor Gipps, Despatch No 99, 7 August 1845, CO 201/358.

188 *Ibid.*

189 *Ibid.*

Crown Lands but in answering their objections to the granting of leases Lord Stanley suggested that:

...preventing the settlement of improper persons on Crown lands, and in protecting Aborigines without summary powers, I think those difficulties may be obviated by inserting sufficiently stringent provisions in whatever leases may be granted.<sup>190</sup>

Lord Stanley also noted that the object of the Bill, consistent with the principle “that the management of the waste lands in the colonies is properly a subject not of colonial only, but also of Imperial interest and one to be regulated by Imperial legislation” was only to provide a “general outline”. The detail would be developed by the colonial government.<sup>191</sup>

The difficulty of protecting the Aborigines had been raised by several Crown Lands Commissioners in their replies to a request by Gipps for their views on the assimilation of licences to leases. The response from the Commissioner for the Lachlan District was typical. He thought leases would give the squatters “so much right of tenure” that those who held strong feelings against the Aborigines:

...would consider their claim to the Run so permanent that they would not allow an Aboriginal to stay upon, or even cross the stations. This expulsion would be more especially put in force at the distant stations.<sup>192</sup>

The squatting tenure was part of a wider social, political and constitutional contest between the squatters and the Government. Central to this contest was the question of control over the management of Crown lands. The Government asserted that it was protecting the long-term public interest in Crown lands. The squatters, who on one view, only wanted to advance their own economic and political interests, had certain legitimate complaints with the annual licensing system and more generally, with the level of local legislative and political control over the administration of Crown lands and the expenditure of land revenues. However, the nature and scope of the title (against the Crown) that the squatters eventually obtained was not a matter of purely economic concern. The squatters already possessed considerable political power and long-term leases with greater independence from government regulation, would, it was thought, only serve to consolidate their social, economic and political influence in the colony. With “so much right of tenure” it was possible that they would be able to exercise ‘rights’ which were not within the contemplation of the Government when it legislated to permit the grazing lands of the colony to be leased.

Lord Stanley suggested that conditions might be inserted in the leases but did not indicate exactly what conditions he had in mind.<sup>193</sup> He was certainly

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190 (Private and Confidential) Extract of a Despatch from Lord Stanley to Governor Gipps, 31 August 1845, note 136 *supra*.

191 *Ibid*.

192 Gipps to Lord Stanley, 11 August 1844, note 79 *supra*. The expression “so much right of tenure” refers to the rights that squatters would believe they had once the pastoral lands were held under lease not the rights that would in fact be conferred by a lease. As we have seen, colonial officials thought that a licence in the hands of the squatters was almost the equivalent of the fee-simple and that leases would only increase their power and might lead to “trouble and unpleasantness for the Government.”

193 For example, forfeiture clauses. The Regulations under *The Unauthorised Occupation of Crown Lands Act* 1839 provided that:

concerned that peace should be maintained between the settlers and Aborigines, but more significant perhaps, is the apparent acceptance that despite the granting of leases, Aboriginal people would continue to occupy and use land leased for 'grazing purposes'. Indeed the Aborigines would not require continuous protection from the violence and ill-treatment of the squatters or their servants if they could lawfully be expelled from lands held under lease. On the other hand, it does not appear that the conditions referred to by the Secretary of State were intended to secure the rights of the Aborigines or qualify the 'right of tenure' of the squatters; they were to ensure that the rights conferred by leases were not exercised so as to prevent the Aborigines from 'staying upon' and crossing leased lands.

Gipps replied to Lord Stanley's despatch noting that although he had "hitherto opposed the granting of leases ... I think the time is now arrived when the granting of them must be conceded."<sup>194</sup> In February, when officials in the Colonial Office were preparing the final version of the Bill to amend *The Sale of Waste Lands Act* 1842 (Imp) Gipps forwarded the Secretary of State a set of proposed Regulations for the Sale of Homesteads which he suggested would be "practicable and useful, especially if adopted concurrently with the proposed system of leases."<sup>195</sup> The Regulations provided that a lease would confer a right of occupation "for the purposes of grazing only" and would give the lessee eight years undisturbed possession of his run. Lessees would only be able to cultivate the purchased part of a run and the government would retain the right during the term of the lease:

...to open roads, to erect bridges or to establish Ferries; also to grant small portions of Land for public purposes, such as the sites of Churches, Schools and Parsonages; and at the expiration of any term of years for which a Lease or License may have been granted, the claim of the occupier to any right or title to the occupation of any part of the land will absolutely cease and determine.<sup>196</sup>

The Regulations distinguished between a lessee's title, which would be undisturbed for eight years, and the use which could be made of leased land. A lease for a term of years would give a lessee the right to occupy the land for grazing purposes only. No mention was made of what rights of possession a lessee would have, although in relation to Aboriginal people we have already seen that Lord Stanley thought that provisions could be included in leases that would prevent lessees from exercising their rights in such a way as to exclude Aborigines from leased lands. The point appears to have been taken up in s 6 of the 1846 amending Act which enabled regulations to be made by Order in Council to prevent 'the abuses incident' to the leasing of the waste of lands of the Crown in the Australian colonies.

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Any justice of the peace has the power to cancel such license, if the person holding the same be convicted ... of any malicious injury committed upon or against any aboriginal native or other person, or of any other offence which shall actually endanger the peace and good order of any district...

194 Gipps to Lord Stanley, 10 January 1846, note 135 *supra*.

195 Governor Gipps to Lord Stanley Despatch No 30, 4 February 1846, CO 201/365.

196 *Ibid*.

When the Imperial Parliament eventually passed the Act amending *The Sale of Waste Lands Act 1842 (Imp)*<sup>197</sup> in August 1846, both Sir George Gipps and Secretary of State, Lord Stanley had left office. Sir Charles FitzRoy had become Governor of New South Wales and Earl Grey was the new Secretary of State.

In a despatch to FitzRoy in November 1846 enclosing a copy of the new Act, Earl Grey set out the principles on which the provisions for leases were founded. Ironically, they were the same principles which for many years had led Imperial and colonial authorities to resist the squatters' demands for a leasehold title to their runs, but modified to the extent necessary to accommodate the granting of leases. He pointed out that to encourage "the great staple produce of New South Wales" it was necessary that the "occupation of lands for pastoral purposes" should be on easier terms than purchase at minimum price and that in any event the industry required such large areas that they could not afford to purchase their runs. On the other hand if the squatters "were allowed to acquire a permanent property in these vast tracts of land, there would very soon indeed be no land of moderately easy access for new settlers". Grey felt that it was of vital importance that:

...in allowing Wild Lands to be occupied for Pasturage, the Property of the Crown in these Lands should be effectually protected, so that as they are wanted for Settlement they may be sold at a Price,

which would prevent large areas being purchased by speculators but nevertheless enable "industrious settlers" to obtain land for the development of farms. However, he explained that for as long as these "Wild Lands" were not required for settlement, it was in the public interest as well as that of the squatters that they could "be held for longer periods than has hitherto been the practice". The Act, he concluded:

...proceeds upon the Principle of at once effectually asserting the Property of the Crown to the vast Tracts of Land now occupied by the Stockholders of Australia, and at the same Time enabling Her Majesty to make Regulations, having the Force of Law, by which the Holders of the Wild Lands will be rendered secure in their Occupation for Terms of not more than Fourteen Years and will at the End of their Tenure be assured the Value of any Improvements which they may have effected.<sup>198</sup>

## F. Order in Council of 1847

On 9 March 1847 regulations were made by Order in Council, pursuant to s 6 of the Act. Chapter I introduced a new classification of land in New South Wales - the settled, intermediate and unsettled districts. Chapter II dealt with lands in the unsettled districts. Section 1 authorised the Governor to grant leases for any term not exceeding fourteen years, for pastoral purposes.<sup>199</sup> Section 6 provided that during the continuance of a lease a run would not be open to purchase by any person other than the lessee. Any of the lands comprised in a lease could be sold to the lessee. However, under s 8 the Governor could except from sale any lands

197 *An Act to amend an Act for regulating the Sale of Waste Lands belonging to the Crown in the Australian Colonies and to make further Provision for the Management thereof. (The Sale of Waste Lands Amendment Act 1846 (Imp).*

198 Earl Grey to Sir FitzRoy, Despatch No 68, 29 November 1846, CO 202/51.

199 Supplement to the New South Wales *Government Gazette*, 7 October 1847 at 1070-7.

which he thought should be reserved for public uses. Under s 15, when a lease expired, the Governor could put all or part of a run up for sale but the lessee had the option of purchasing the land at “its fair value in an unimproved state”. If the lessee did not exercise the option the upset price of the land would include the value of improvements and if sold this amount would be paid to the lessee. Under s 9 the Governor could make grants or sales of lands within the limits of a run or lands comprised in a lease for public purposes. Land could also be disposed of for the public interest, including for “the use or benefit of the aboriginal inhabitants of the country”. The operation of s 3 of *The Sale of Waste Lands Act 1842* (Imp) was therefore extended to leased lands. It was not until 1852<sup>200</sup> that the first leases were issued under Chapter II of the Order in Council.<sup>201</sup>

Chapter IV provided that the Governor could lease lands in the settled districts exclusively for pastoral purposes for terms not exceeding one year. The holders of purchased land in the settled districts could depasture adjacent Crown lands free of charge. However, the Government could at any time dispose of such land either by sale or lease. In 1828 regulations permitted purchasers or grantees of land, within the limits of location, to occupy for depasturing “unlocated Crown Lands immediately adjoining their respective Possessions”.<sup>202</sup>

### G. Exclusive Possession

The “demises” referred to in s 1 of *The Sale of Waste Lands Amendment Act 1846* (Imp) no doubt authorised the granting of leases which would confer rights of exclusive possession.<sup>203</sup> The Act applied to “any waste lands” in the Australian colonies and any suggested limitation on the rights conferred by leases only related to lands beyond the limits of location (the unsettled districts) which were taken up by the squatters for grazing purposes. Chapter II of the 1847 Order in Council dealt with these lands<sup>204</sup> and authorised the granting of leases specifically for pastoral purposes.<sup>205</sup>

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200 See Archives Authority of New South Wales, *Guide to Records Relating to the Occupation of Crown Lands*, Guide to the State Archives of New South Wales No 18 (1977) 7:

The delay in surveying the country prevented the issuing of leases for runs for some years so the yearly licences continued to be renewed (*Government Gazette* 29 May 1849 at 859, 11 June 1850 at 891, 19 May 1851 at 822, 5 June 1852 at 904). In fact the leasing system was never really put into operation.

Out of something like 3,000 runs, only 148 were held by lease under the 1847 Order in Council.

Roberts, note 119 *supra* at 222; D W A Baker, “The Origins of Robertson’s Land Acts” (1958) 8 *Historical Studies* 162-82; *Bamblett and Merritt* NN94/43, Reasons for Opinion of President of the National Native Title Tribunal, reported in (1995) 1 *Native Title News* 117.

201 Lease of Unsettled Land (Old Run) pursuant to the terms and conditions of the Order in Council of 9 March 1847 and 18 July 1849 Currawang in the District of Lachlan for fourteen years from 1 January 1852 (dated 16 October 1852): Entered in the Register of Leases of Land, No 1, pp 1 and 2, this seventh day of December AD, 1852. *New South Wales Government Gazette*, 11 March 1853, at 483 and 25 March 1853, at 609.

202 Government Notice, 16 October 1828, note 110 *supra*.

203 *North Galanjanja*, note 15 *supra*, per Hill J at 610.

204 In general terms the unsettled districts comprised those lands which had formerly been beyond the “limits of location”: see, Order in Council, 9 March 1847, Chapter I.

205 It is not suggested that the purpose of the grant in itself indicates that the tenure was qualified. What was important in the eyes of the government was the location of the land and the likelihood of it being required

The question must therefore be asked whether, having regard to government policy with respect to the Aborigines and the development of colonial land policy between 1826 and 1845 the Imperial Government intended that Aboriginal people should no longer have any access to the extensive pastoral lands of New South Wales, or whether these leases, which were a response to Australian conditions, including the presence of Aboriginal people in the pastoral districts of the colony, were intended to grant those incidents of a lease which were required for the effectual conduct of pastoral activities, but not the right to prevent Aborigines from having continued access to the land for subsistence purposes.<sup>206</sup>

As *The Crown Lands Unauthorised Occupation Act 1838* (NSW) provided for both leases and licenses<sup>207</sup> it must be presumed that the Governor and Legislative Council in New South Wales fully understood what, in legal terms, distinguished a lease from a license. Despatches and other official documents should be read with this in mind, as no doubt the Imperial Government would also have understood the distinction. We have seen that there was official concern for the Aborigines in New South Wales, regarding the consequences for them if leases were introduced. However, there is no evidence that either Government believed (let alone intended) that by granting the squatters a secure title over their runs for a fixed term, the Aborigines would no longer be entitled to have any access to leased land, and moreover, that they could be treated as trespassers and driven off. This is particularly relevant, considering that the Governments were armed with knowledge about the legal rights afforded by leases and forewarned that “so much right of tenure” might result in some squatters not allowing Aboriginal people to “stay upon or even cross” their runs. Both Governments were aware that many squatters already removed Aboriginal people from their runs but it is certainly not clear that it was intended to give lessees a legal right of dispersal or dispossession. In fact it will be recalled that when commenting on the 1845 draft of a Bill to amend *The Sale of Waste Lands Act 1842* (Imp),<sup>208</sup> Lord Stanley had contemplated that the Aborigines would continue to be present on lands leased for “grazing purposes” by suggesting that the difficulties of protecting the Aborigines could “be obviated by inserting sufficiently stringent provisions in whatever leases may be granted”.

When during 1848 the Imperial and colonial governments turned their attention once again to the possible effect on the Aborigines of the granting of leases, the Imperial Government’s intentions regarding the 1847 Order in Council came under further scrutiny.

for settlement coupled with its use for pastoral purposes. This is reflected in the different terms of lease – unsettled districts: 14 years, intermediate districts: eight years and settled districts: one year.

206 *North Ganalanja*, note 15 *supra* 586, 590-1, per Lee J.

207 Sections 1, 2; *The Crown Lands Unauthorised Occupation Act 1839* (NSW), ss 1, 2; *The Crown Lands Unauthorised Occupation Act 1841* (NSW), s 6. Earlier colonial regulations had provided that land could be temporarily occupied for grazing: see, Government Notice, 29 August 1826 and Government Notice, 16 October 1828, note 112 *supra*. Prior to 1831 the Instructions to colonial Governors had distinguished between leases and a license of occupation: see for example, Instructions to Sir Thomas Brisbane, 5 February 1821, HRA, Series I, vol 10, 596, 598-602.

208 The Bill introduced leases for seven years.



## H. Effect of Pastoral Leases on the Aborigines

In his Annual Report for 1845 George Augustus Robinson, the Chief Protector of Aborigines at Port Phillip had suggested that land be reserved for the Aborigines, believing that:

The future protection and support of the Aboriginal natives would seem to require fixed localities. Because the natives under the late Regulations<sup>209</sup> were said to have no right in the property of the soil and were liable to be driven away from their own lands.<sup>210</sup>

Robinson's 1846 report heightened unease about the impact of land policy on the Aborigines. He repeated his demand for reserves, emphasising that the "[C]laim of the Aborigines to a reasonable share in the Soil of their father land" had not been recognised in the discussions "on the question of the rights of the Squatters". He also quoted from the report of the Assistant Protector of the Loddon District, who had commented that:

unless suitable reserves are immediately formed for their benefit, every acre of their native Soil will shortly be so leased out and occupied as to leave them, *in a legal view, no place for the sole of their feet*. If the occupation of Crown Lands is to be settled by the Crown granting a Lease for years, the natives will be deprived of all *legal* rights to hunt over their own native land and according to the Dicta of certain high legal Authorities, may be forcibly excluded by the Lessee, from the tract of Country so leased. ... I have great reason to fear the legal rights acquired under a lease would be fully acted upon and the unfortunate natives might be hunted from Station to Station, without a Spot they can call their own.<sup>211</sup>

The dicta referred to in the Assistant Protector's report would seem to be the views expressed by Judge Willis in *R v Bolden*.<sup>212</sup> The case did not concern a lease but a licence under either *The Crown Lands Unauthorised Occupation Act 1839*.<sup>213</sup> Mr Bolden was indicted for shooting at, with intent to murder, an Aboriginal named Tackiar:

Judge Willis - I wish it to be distinctly understood from this bench, that *if* a party receives a licence from Government to occupy a run, and *any person white or black comes on my run* for the purpose of *stealing my property*, I have a right to drive them off by every lawful means in my power. ... The blacks have no right to trespass unless there is a special clause in the licence from the government. ...

Judge Willis [summing up] - Where I find blacks on the ground which parties are licensed to occupy, having in their possession property belonging to those parties, when so discovered, they savagely attack them, and the party fires, in my opinion, it is self-defence and justifiable. (emphasis added)

209 New South Wales regulations in relation to depasturing licenses. The regulations complemented the provisions of *The Unauthorised Crown Lands Occupation Act 1839-41* which made it unlawful to occupy Crown lands without a valid annual license.

210 Annual Report for 1845 of the Chief Protector of Aborigines, Enclosure No 12 in Gipps to Lord Stanley, 1 April 1846, note 76 *supra*.

211 Report, GA Robinson (Chief Protector of Aborigines at Port Phillip-Loddon District) to Colonial Office (1847) enclosure in: Sir FitzRoy to Earl Grey, Despatch No 107, 17 May 1847, note 89 *supra*.

212 Reported in the *Port Phillip Gazette*, 4 December 1841. Judge Willis had expressed the same view of the law on other occasions. The Governor however, did not treat his opinions on matters relating to the Aborigines with any great respect and finally recommended his dismissal in 1843, see RHW Reece, note 54 *supra*.

213 As amended by the 1841 Act which continued for a further five years and amended the 1839 Act.

The licensing regulations provided that a licence could be cancelled if the licensee was convicted of “malicious injury committed upon or against any Aboriginal native or other person, or of any other offence which shall actually endanger the peace and good order of any district”. The legislation itself did not sanction the exclusion of other people from the runs of licensees and in fact contemplated people other than the lawful occupier “being upon” lands held under licence.<sup>214</sup> It also appears that licensed land remained Crown land.<sup>215</sup> Considering the terms of the Act and more particularly, the regulations, it must be doubted whether the annual occupation licence conferred rights so extensive as those suggested by Judge Willis, who in any event qualified his remarks by reference to the unlawful purpose of the supposed ‘trespass’.

When the Chief Protector’s report reached the Colonial Office<sup>216</sup> it provoked an immediate reaction from officials and the Secretary of State. In a memorandum to Herman Merivale,<sup>217</sup> Mr Murdoch<sup>218</sup> noted that Governor FitzRoy’s attention

214 See s 25. Under s 10 no penalty was imposed for encroachment unless the person encroaching, whether licensed or unlicensed, resisted the removal of their cattle or sheep. It would seem that mere presence on the land of a licensed person was not unlawful.

215 See, s 26 and regulations which provided that licensed lands could be “put up to competition at public auction, as other unalienated Crown lands”.

216 The procedures of the Colonial Office are described in a report of Commissioners investigating the public service:

When the letters of the day have been registered, they are delivered to the Senior Clerk of the Departments to which they respectively belong, who minutes them with those prominent point (sic) which experience and constant reference to the general correspondence suggest, and proposes, in ordinary cases, the form of answer, or the practical course of dealing with the subject; and when the correspondence having been prolonged or complicated, requires an examination or analysis, he forwards with the papers such a statement of facts, prepared either by himself, or under his supervision, as may assist the practical consideration of the question. The papers are then sent either to the Assistant Under Secretary, or to the permanent Under Secretary, according to the nature of the subject, each of whom passes them to the parliamentary Under Secretary with his observations upon them, and then they reach the Secretary who records his decision upon them, after he has considered all that has been submitted to him, and called for such further information as he may require. After that, the papers are returned through the same channel to the Senior Clerk, and it then becomes his duty to examine carefully the minutes and drafts, in order to see whether any point in the instructions is at variance with facts, regulations or precedents not known to the Secretary of State or Under Secretaries; and to execute all the final instructions he may receive, by preparing the drafts, or causing them to be prepared by his assistants, and superintending the copying and despatch of the letters to be written from them. The usual practice is for the senior clerk to pass on to his assistants those papers which require ordinary drafts, or drafts closely following the minutes, reserving to himself such as involve any question of doubt, or on which no precise instructions have been given. Drafts are also frequently prepared by the Under Secretary and Assistant Under Secretary, in cases which they consider require it. All drafts finally receive the sanction of the permanent Under Secretary and of the Secretary of State.

United Kingdom, PP, (1715) *Reports of the Commissioners on Public Offices*, 1854, vol xxvii, 79-83, reproduced in J W Cell, “The Colonial Office in the 1850s” (1965) 12 *Historical Studies* 54; earlier practice under Sir James Stephen (1836-1847) is summarised in P Knaplund, *James Stephen and the British Colonial System, 1813-1847*, Madison (1953) pp 43-4.

217 The Permanent Under Secretary of the Colonial Office. *Dictionary of National Biography*, vol 37, 280-1. As to Colonial Office officials, see generally, J C Sainty (comp), *Colonial Office officials: officials of the Secretary of State for War 1794-1801, of the Secretary State for War and the Colonies 1801-54 and of the Secretary of State for the Colonies 1854-70*, (1976).

218 *Dictionary of National Biography*, vol 39, p 324. In November 1847 Murdoch was appointed chairman of the Colonial Land and Emigration Commission.

“should, I presume, be drawn” to the point. He wrote, “It would, of course be most unjust that the Natives should be extruded [sic] in the manner described ... from the soil of which till recently, they were the sole occupants.”<sup>219</sup> A note in the margin suggested that it “was to avoid this evil that *licenses*, renewable periodically, were originally suggested as preferable to *leases*” (emphasis added).<sup>220</sup> In a separate memorandum, Earl Grey<sup>221</sup> pointed out that the question of reserves was important but the Governor must be instructed to take care that the Aborigines are not, “as it appears to be apprehended they may be” driven off all the land “which is divided into grazing stations”. Land should however be reserved “sufficient to allow of the natives being maintained upon it, and to make up for the deficiency of game for their subsistence rations ... with a view to their preservation from being exterminated”.<sup>222</sup> Reserves were needed not because lessees had the right to drive Aboriginal people off their runs but to prevent them from being exterminated. Earl Grey no doubt accepted that the apprehension was real that the Aborigines might be driven off all the lands leased under the Order in Council.

A despatch prepared on the basis of these memoranda was sent to Sydney in February 1848. It outlined a proposal which sought to meet the situation described in Robinson’s report. Grey referred to the creation of large reserves. He argued that although they might be appropriate elsewhere in the world, among other things, Australia’s climate and soils demanded a different answer. The dryness of the continent and the need to use large areas of land for grazing called for a peculiarly local 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 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 except over land actually cultivated or fenced in for that purpose.<sup>223</sup>

An “exclusive right of pasturage” did not include the right to prevent Aboriginal people from obtaining their subsistence from leased lands, although Grey accepted that in the case of land cultivated and enclosed “for the purpose”, a lessee would

219 Memorandum to Mr Merivale by TWCM (Mr Murdoch), 22 November 1847 in: Sir FitzRoy to Earl Grey, 17 May 1847, note 89 *supra*.

220 It is not clear who wrote this note but it was not, as has been suggested, former New South Wales Governor Gipps. Gipps had died in England on 28 February 1847. It has also been suggested that the note at least implies that it was known that leases would confer on lessees the right to exclude Aboriginal people from their runs. However, the comment that it ‘was to avoid this evil’ and the use of the word ‘originally’ would not seem to be consonant with the Imperial Government having in fact proceeded to introduce leases that would give lessees such a right.

221 Memorandum by Earl Grey, 6 December 1847 in Sir FitzRoy to Earl Grey, 17 May 1847, note 89 *supra*.

222 *Ibid*.

223 Earl Grey to Sir FitzRoy, 11 February 1848, note 89 *supra*. The words “except over land actually cultivated or fenced in for that purpose” are inserted as a marginal note accompanied by the following words in parentheses, “This qualification is clearly necessary”.

have unqualified rights of possession.<sup>224</sup> The rights of the lessee and Aboriginal people were “mutual rights” and if therefore:

...the limitation, which I have mentioned above on the right of exclusive occupation granted by Crown Leases, is not in your opinion fully recognised in the Colony, I think it is advisable that you should enforce it by some public declaration, or, if necessary, by passing a declaratory Enactment.<sup>225</sup>

Grey was even more emphatic in a later memorandum on a despatch from FitzRoy, in which the Governor proposed a new Order in Council authorising the insertion in leases of a condition securing Aboriginal access to leased lands. He supported the proposal but was concerned about lands that had already been leased under the 1847 Order in Council:

The introduction of a condition into these leases is now impracticable, but I apprehend that it may fairly be assumed that HM did not intend and had no power by these leases to exclude the natives from the use they had been accustomed to make of these unimproved lands and the question arises whether some declaration to that effect should not be introduced into the Order in Council?<sup>226</sup>

Grey of course, was the Minister responsible for the passage of *The Sale of Waste Lands Amendment Act* 1846 (Imp) through the British Parliament and as a member of the Privy Council he would have provided the Queen with advice on the 1847 Order in Council. His views therefore, although expressed later, should probably be treated as at least reflecting the intentions of the Imperial Government with respect to the Act and Order in Council. They were entirely consistent with the views of the Imperial and colonial governments in the period leading up to the amendment of *The Sale of Waste Lands Act* 1842 (Imp).

A number of things should be noticed in Grey's comments. Firstly, it may 'fairly' be assumed that it was not the intention of Her Majesty when making the 1847 Order in Council that it should result in the Aborigines being excluded from leased lands. Grey went further and even suggested that Her Majesty “had no power” to authorise leases that would entitle lessees to exclude the Aborigines. Secondly, lands used for pastoral purposes were “unimproved lands” as distinct from cultivated lands.<sup>227</sup> Lands used for pastoral purposes were different from other lands leased by the Crown. Thirdly, Grey foreshadowed the problems that would be encountered in inserting a condition in leases. He saw practical difficulties in adding a condition to a lease once granted, even though it had not been intended that leases empower lessees to exclude the Aborigines from their runs. However, that there was a need to “secure what is due to the natives” suggests that it was understood that without a condition or declaration of their “mutual rights” Aboriginal people would, whatever their rights, be driven off lands held under lease. Finally, and *after* insisting upon continued Aboriginal access to leased lands, he suggests that:

224 Chapter II, section 1 of the Order in Council of 9 March 1847 provided that a lessee of land for pastoral purposes could cultivate so much of the leased land as might be necessary to provide the grain, hay, vegetables or fruit required by the family and establishment of the lessee.

225 Earl Grey to Sir FitzRoy, 11 February 1848, note 90 *supra*.

226 Memorandum by Earl Grey on Sir FitzRoy to Earl Grey, 11 October 1848 note 83 *supra*.

227 This description appears to have originated in two New South Wales Executive Council Minutes (No 48/23 and No 48/28) enclosed in Sir FitzRoy to Earl Grey, 11 October 1848 note 83 *supra*.

[R]eserves should be established where they do not exist; particularly in districts recently brought within the range of occupation: and those already set apart for this purposes should be turned to account with all speed if they are not so at present.<sup>228</sup>

Grey also drew FitzRoy's attention to other "practical methods of attempting to introduce improvement among the natives" in particular the formation of schools.

### I. A Condition in Pastoral Leases

The question at this time was what measures should be taken to ensure that the extent of the mutual rights of lessees and Aboriginal people would be "fully recognised" in New South Wales. Even before Grey's despatch reached Sydney the Executive Council had considered the issue of the rights of Aborigines over leased lands and directed the Crown Law Officers to:

...insert in the forms of Leases which they have been instructed to prepare such conditions as will secure to the Aborigines the privilege<sup>229</sup> of free access to lands remaining in an unimproved state.<sup>230</sup>

In taking this step the Executive Council had responded to suggestions by the Commissioner of Crown Lands for the Wellington District. In a letter to the Colonial Secretary he requested the creation of a small reserve on the Barwan River where the Aborigines had constructed a fishery. Although he did not believe that the Aborigines had ever been obstructed in their use of the fishery:

...the granting of Leases of Runs will confer powers, that in unworthy or inconsiderate hands, (and many such there are among the men entrusted with the charge of stations) are susceptible of abuse, and that once given, cannot readily be, recalled<sup>231</sup>

In a second letter the Commissioner repeated that he did not believe that "the rights and powers conferred by Leases of runs are likely to be generally abused as regards the Aborigines but as in unworthy hands they may be". He suggested that a general clause be introduced into leases:

...that will reserve to the Aborigines, such free access to land, trees and Water, as will enable them to procure the animals birds and fishes etc, on which they subsist.<sup>232</sup>

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228 Earl Grey to Sir FitzRoy, 11 February 1848, note 90 *supra*. Earl Grey favoured setting apart small areas of land for reserves. He thought that such reserves were already in existence and directed Sir FitzRoy's attention to the position in South Australia where the creation of small reserves:

has been applied in combination with another measure: that of rendering these Reserves central dépôts for the distribution of Rations among natives at the seasons in which they cannot, without much privation and extensive wandering procure sustenance for themselves. ... If the same expedient of distributing rations has not been hitherto adopted at reserves in New South Wales ... it is very desirable that it should be attempted.

229 Although the Executive Council and the Crown Law Officers refer to the 'privilege of free access' Colonial Office officials thought that the subject of 'the reservation in Leases of Pasturage Land of the rights of the Natives' was not a case of creating new rights but shaping an instrument to ensure the 'continuance of their rights': memorandum Gairdner to Mr Elliot in Sir FitzRoy to Earl Grey, 11 October 1848 note 83 *supra*. Gairdner was the Senior Clerk in Australian Department and Elliot was the Assistant Under Secretary of the Colonial Office, see *Modern English*, vol 1, 979.

230 Sir FitzRoy to Earl Grey, 11 October 1848 *ibid*.

231 Letter Commissioner of Crown Lands, Wellington District to Colonial Secretary, 1 June 1848 in Sir FitzRoy to Earl Grey, 11 October 1848, *ibid*.

232 *Ibid*.

When FitzRoy eventually received the despatch from Grey he tabled it in the Executive Council and directed that the Colonial Secretary provide copies to, among others, Superintendent LaTrobe at Port Phillip and Surveyor-General Sir Thomas Mitchell for their comments. LaTrobe replied that he did not think that under ordinary circumstances the Aborigines would be induced to “abandon their natural habits and relinquish their wanderings” and therefore:

[T]heir right to wander over the pastoral districts in search of food, or for recreation as formerly, never can be justly disputed: and as the Secretary of State suggests, it appears advisable that especial stipulations, to assure them this privilege, should be made in the forms of leases, to be conveyed to the occupants of Crown Lands for pastoral purposes, under the Orders in Council. ...

He agreed that small reserves should be set apart for the Aborigines but pointed out that:

[S]uch Reserves may be considered the Asylum of the Native whenever he may be led to seek a cessation from his wandering life, and may also in cases of real necessity, should such arise, give facilities for the ample supply of his real wants.<sup>233</sup>

Sir Thomas Mitchell thought that “some reservation should be made in the Leases securing to the natives access to water, the use of wood and a right to encamping beside any water”.<sup>234</sup>

An extract of Grey’s despatch was also sent to the Crown Law Officers with a reference to the earlier direction to insert a condition in the forms of lease.<sup>235</sup> A week later the Attorney-General replied, suggesting that a new Order in Council would be needed because:

...no condition securing to the Aborigines the privilege of free access to lands remaining in an unimproved state, could legally be introduced into the Leases of Crown Lands proposed to be granted under the provisions of the 9th and 10th of Vict: chapter: 104.<sup>236</sup>

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233 Appendix one, Letter from the Superintendent of Port Phillip to the Colonial Secretary, 18 November 1848 in Sir FitzRoy to Earl Grey, 12 November 1849, note 80 *supra*. In a separate letter to the Colonial Secretary dated 27 February 1849, LaTrobe added that “I see no reason, provided the Native is secured in the possession of his natural rights, throughout the District, to recommend in any instance, that a larger area than four or at most six square miles should be set apart” as a reserve. The Commissioner of Crown Lands, Portland Bay District went even further when responding to a request by the Colonial Secretary to advise in which localities land might be set aside for reserves:

Reserves are injurious towards the improvement of the Aborigines; the Tribes should be kept as separate as possible, and the only means of accomplishing this, is to allow them to remain on their own grounds ... I am convinced that Native Reserves are worthless and unnecessary ... : Appendix No 3, letter dated 6 November 1848 in Sir FitzRoy to Earl Grey, 12 November 1849, note 80 *supra*.

234 Appendix 2, Letter from the Surveyor-General, Sir Thomas Mitchell to the Colonial Secretary, 27 November 1848 in Sir FitzRoy to Earl Grey, 12 November 1849, *ibid*.

235 With respect to Earl Grey’s comments about reserves.

236 Section 2 of *The Sale of Waste Lands Amendment Act* 1846 authorised Her Majesty to grant leases or licenses and “to insert therein conditions and clauses of forfeiture, as shall in manner herein-after be prescribed and authorised”. Section 6 provided that:

whereas it may be expedient that various Rules and Regulations should be made respecting ... *the insertion therein of such conditions* and clauses of forfeiture as aforesaid ... and respecting any other matters or things which may be requisite, either for carrying into more complete effect the occupation in the manner aforesaid of such waste lands as aforesaid, or for preventing the abuses incident thereto ... it shall be lawful for Her Majesty by any Order or Orders in Council, to make and establish all such

the present existing Orders in Council made by Her Majesty on the 9th March 1847, by virtue of this Act, do not seem to authorise the insertion of any such condition.<sup>237</sup>

It would not be possible to grant the Aborigines “general permission to enter lands upon lands granted or leased to others”. The Law Officers had not been asked for advice on the legal effect of pastoral leases and they did not say whether the Aborigines were entitled to such access in the absence of a condition in leases – only whether such permission could be *granted* to them under the law as it then stood.

Governor FitzRoy wrote to the Secretary of State in October 1848 pointing out that the local government had already turned its attention to the matters raised in his despatch. On the basis of the advice of the Crown Law Officers he requested that the Imperial Government obtain authority for the insertion of a condition in leases by a further Order in Council. FitzRoy also suggested the expediency of including in any new Order in Council:

...a declaration in the clearest and most explicit manner, according to the principle laid down in your Lordship’s Despatch of the 11th of February last, that the Lessees of Crown Lands under Chapters II and III of the former Order will acquire no right over such lands as may remain in an unimproved state but that of exclusive pasturage ....<sup>238</sup>

Such a declaration was needed so that the public would not “be precluded from access” to leased lands “for such purposes as that of searching for Minerals” or the “examination of lands with a view to their purchase”. On the other hand, the condition to be inserted in leases securing “to the Aborigines the free use of the unimproved Crown lands for the purposes of hunting and in other ways seeking their subsistence as heretofore notwithstanding the occupancy of those lands under leasehold tenure”<sup>239</sup> would not, it seemed, involve the creation of any new rights.

Although Earl Grey believed that Aboriginal people could not be driven off lands held under lease he nevertheless agreed that “all the conditions suggested by the Governor be inserted” in leases. The Colonial Office referred the correspondence from FitzRoy to the Colonial Land and Emigration Office for its recommendations on the form and content of a further Order in Council.

## J. Order in Council of 1849

The Commissioners, Thomas Murdoch<sup>240</sup> and Frederic Rogers<sup>241</sup> outlined the history of the matters referred to them concluding that the Governor requested “a

Rules and Regulations as to Her Majesty shall seem meet for the purposes aforesaid, or for any of them .... (emphasis added)

The 1847 Order in Council did not contain any general provision empowering the Governor to insert conditions in leases granted under Chapters II or III.

237 Enclosure in Sir FitzRoy to Earl Grey, 11 October 1848 note 83 *supra*. Letter from John H Plunkett, Attorney General to The Honourable Colonial Secretary, dated 28 August 1848. The letter concluded that although s 3 of the 1846 Act and ss 8 and 9 of the 1847 Order in Council provided for the granting or reservation of such lands as might be required for the use or benefit of the Aboriginal Inhabitants:

this is very different from providing that such Aboriginal Inhabitants should have a general permission granted to them to enter upon lands which had been granted or leased to others.

238 Sir FitzRoy to Earl Grey, 11 October 1848, *ibid*.

239 Extract from Minute No 48/28, 22 August 1848, in *ibid*.

240 See note 218 *supra*.

fresh Order in Council” to enable a condition to be inserted in leases “securing to the Natives the right of seeking their subsistence on the Lands Leased out” and that he suggested the expediency of introducing into the Order “the clearest possible declaration” that lessees only acquire the right of exclusive pasturage. The object of suggesting this declaration, they observed, was “to secure to the public free access to those Lands for such purposes as that of searching for minerals”. The two immediate objects of the proposed Order in Council were therefore:

[F]irstly, to secure to the natives the right of seeking their subsistence - and secondly to secure to the public the right of searching for minerals over the Lands under lease.

However, because the “the territorial rights conferred by a pastoral lease” might interfere in other ways with the rights of the public<sup>242</sup> it was thought that the Order in Council should also enable the Governor to “provide not only against the two evils which are specifically anticipated but against any others of a similar kind.”<sup>243</sup>

The Commissioners thought these objects could be accomplished if the proposed Order in Council declared that pastoral leases only conferred an exclusive right of pasturage. The difficulty was that some leases might already have been granted and:

[T]hese leases will have conferred upon the holders not only that exclusive right of *pasturage* which may be conveyed by mere license of occupation but an exclusive right of *possession*, subject indeed to various conditions specified in the Order in Council but not subject to the condition that any person besides the Lessee whether Native or European should have the right of entering upon or in any way using or ranging over it.

Once granted these rights could not be resumed by Order in Council and mindful of the reaction of the squatters, the Commissioners pointed out that “such a broad limitation of the rights originally held out for the acquisition of leases ... would be complained of with great force”. An Order in Council making a general declaration of the kind proposed by FitzRoy was therefore rejected. They suggested that:

...the most advisable course would be one approaching to that recommended by the Law Officers of the Crown in New South Wales - that viz: of empowering the Governor to insert in all future leases such conditions as he may think necessary not only for purposes now immediately under consideration but for preventing other similar inconveniences to the public.<sup>244</sup>

Murdoch and Rogers clearly believed that a lease granted under the 1847 Order in Council conferred exclusive possession and that Aboriginal people were not

241 Rogers was appointed Assistant Under Secretary in the Colonial Office in 1846. He was also a Commissioner with the Colonial Land and Emigration Office. In 1847 he commenced working full-time as a Commissioner providing *inter alia*, legal advice to the Colonial Office. He was appointed permanent Under Secretary of the Colonial Office in 1860: see generally, *Dictionary of National Biography*, vol 49, 120.

242 For example, enabling a lessee to prevent a government officer from entering leased lands or refusing the public the use of roads.

243 Letter from Colonial Land and Emigration Office (signed by W Murdoch and Frederic Rogers) to Herman Merivale dated 17 April 1849, CO 201/422.

244 *Ibid.*



entitled to enter upon leased lands. In the despatch transmitting the new Order in Council to Sydney, Earl Grey repeated his view, that:

[C]omparing the terms of the Act 9th and 10th Vict Cap 104 s 1 and s 6, with those of the Order in Council of 9th March 1847, there can, I apprehend be little doubt that the intention of Government was, as I pointed out in my Despatch of 11th February last, to give only the exclusive right of pasturage in the runs, *not the exclusive occupation of the land, as against Natives using it for the ordinary purposes*; nor was it meant that the Public should be prevented from the exercise, in those Lands of such rights as it is important for the general welfare to preserve, and which can be exercised without interference with the substantial enjoyment by the lessee of that which his lease was really intended to convey.<sup>245</sup> (emphasis added)

Grey was not suggesting that lessees did not have exclusive possession of their runs for the purposes of the lease, only that such possession was qualified in relation to access by Aboriginal people and in certain instances, members of the public.

Murdoch and Rogers however, seem to have understood the phrase “exclusive right of pasturage”<sup>246</sup> to mean that a lessee did not have exclusive possession at all and that a pastoral lease conferred no greater rights than an occupation licence. They concluded, perhaps sensitive to the reaction of squatting interests in New South Wales, that lessees had an absolute right of exclusive possession. At least to the extent that this view proceeded from their understanding of the rights ‘originally held out’ to the squatters it is suggested they went too far. As we have seen, the squatters were concerned with obtaining a secure title for a fixed term and not with what rights of possession they would acquire under a lease. At no time during the period leading up to the enactment of the 1846 Act could the squatters claim that they had been led to expect that they would be able to exclude the Aborigines from their runs. Every indication was that the government would resist giving them such a right. Certainly the squatters probably would not have had an expectation that members of the public would have a right of entry to leases and the attitude of Murdoch and Rogers may well have been influenced by this—what must have appeared to them to be a very significant limitation on the rights of lessees. Aborigines, on the other hand, already occupied lands used for pastoral purposes.

The difficulty was to find a single measure which would meet all of the objects referred to by FitzRoy. Earl Grey pointed out that it had “not been easy to frame an Order in Council which shall be found applicable to the various contingent circumstances which may exist when it reaches the Colony”.<sup>247</sup> Unfortunately, FitzRoy had not told Grey that no leases had been granted under the 1847 Order in Council,<sup>248</sup> as the concern in drafting the new instrument was to ensure that it did not adversely affect the rights of existing lessees: “The value of such leases might

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245 Earl Grey to Sir FitzRoy, Despatch No 134, 6 August 1849, Despatches to the Governor, Mitchell Library, MSA 1308; see also passage from Earl Grey to Sir FitzRoy, 11 February 1848, note 87 *supra*.

246 First used by Earl Grey in his 11 February 1848 despatch and then by Sir FitzRoy in the despatch which requested a new Order in Council: Sir FitzRoy to Earl Grey, 11 October 1848 note 83 *supra*.

247 Earl Grey to Sir FitzRoy, 6 August 1849, note 245 *supra*.

248 Note 201 *supra*.

be materially diminished by the apprehension that the Government might at its will, vary them in important particulars.”<sup>249</sup>

It was also necessary to consider the form of words to be used. Should the Order in Council attempt to anticipate ‘the various contingent circumstances which may exist’ in the colony or would it be more prudent if the Order in Council simply authorised the Governor to insert the necessary conditions in future leases? The belief that some leases had already been granted and that other licensed occupiers would be entitled to demand leases under the existing regulations no doubt contributed to the imprecise wording which was eventually employed. The Order in Council, signed by the Queen on 18 July 1849 and proclaimed in New South Wales on 23 April 1850, provided:

[A]nd whereas 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 ... it shall be lawful for the Governor ... to insert in any pastoral lease hereafter to be made such conditions, clause of forfeiture, exceptions, or reservations, as to him shall seem requisite for the purposes last aforesaid ...<sup>250</sup>

In his despatch to FitzRoy, Grey pointed out that the Order in Council was made with “a view to remedy the deficiencies to which your Despatches respectively relate”<sup>251</sup> and after reiterating his view of the intentions of the Imperial Government he explained that he understood the difficulties that the existing Order in Council presented to the “practical execution of that intention, according to the view taken by your Legal Advisers”.<sup>252</sup> He might have added that the Colonial Land and Emigration Office agreed, although its advice had gone further to express an opinion as to the legal effect of the grant of a pastoral lease. We have seen that there was some uncertainty whether FitzRoy had proceeded to “grant leases without the condition” or whether he intended to: “wait for a new Order in Council to convey you addition [sic] powers, or to declare the real extent and meaning of the Leases” (emphasis added).<sup>253</sup> It had been assumed that some leases would have been granted and therefore:

[O]n this supposition there will be three different classes of cases which must be dealt with viz:

I. That of parties who already have Leases when the present Order reaches you. II. That of Parties who at that time have not leases, but who under Chapter 2, Section 11 of the Order of March 9th have either demanded, or become entitled to demand, leases of their respective runs. III. That of parties who neither have Leases, nor are entitled to demand them, but may, in future, make application for them.

[T]he third case is easily dealt with. The Order in Council now transmitted will enable you to insert in all future Leases such conditions as to you may seem requisite “for securing the peaceable and effectual occupation of the lands comprised in such Leases, and for preventing the abuses and inconveniences incident thereto,” words amply sufficient to enable you to prevent the injury to the Public which would result

249 Earl Grey to Sir FitzRoy, 6 August 1849, note 245 *supra*.

250 New South Wales *Government Gazette*, 26 April 1850 at 685-6.

251 Sir FitzRoy to Earl Grey, 11 October 1848 note 83 *supra*.

252 That is, to inserting a clause in pastoral leases securing Aboriginal rights of access to leased land.

253 Earl Grey to Sir FitzRoy, 6 August 1849, note 245 *supra*.

from the absolute exclusion of Natives or other persons travelling or searching for minerals; and so forth. The same conditions will, of course, be inserted in new leases to be granted on the expiration of such subsisting ones as you may have made under the Order in Council of 9th March 1847.<sup>254</sup>

There were greater difficulties with leases which had already been granted. Enforcing limitations of the kind proposed “without the consent of the lessee” was not a power that ought “to be exercised without the clearest necessity”. Grey continued:

[I]n point of strict Law, it appears to me that the Order in Council of March 9th already enables you to enforce those or similar limitations against the holders of existing leases without the insertion of any new conditions at all. Nothing in any lease which you may grant under that Order can prevent you (under Chapter: 2, Section 9) from reserving out of the runs such lands as may be required for the use of Aboriginal Inhabitants. This would strictly enable you, not only to reserve spots which the Natives use for their own purposes, as for instance in the case described in M Mayne’s letter of the 1st June 1848, but also so much land as might be requisite to give them access to such spots. Again, although it is thought that you cannot, under the existing Order interfere with the exclusive occupation of the lessee as to provide that private persons may enter to search for Minerals, yet you are yourself empowered under Chapter: 2, Section 1, to ‘enter’ upon any of the lands comprised in such leases for any purpose of public defence, safety, improvement, convenience, utility, or enjoyment - words which would protect the entry of persons deputed and authorised by yourself.<sup>255</sup>

However, he was careful to caution FitzRoy, that:

[T]hese are powers placed in your hands only to be used against the will of the Lessee when great and obvious public loss, or inconvenience would result from abstaining from their employment.<sup>256</sup>

Finally, persons entitled to a lease under the 1847 Order in Council should be considered as being “on the same footing with those to whom you may actually have granted leases”, although he added:

...as the Order of 9th March leaves the length of the term of years to be granted entirely at your discretion, you will be able and justly entitled to refuse to such persons any lease for more than a year, unless they are willing to accede to the insertion of the conditions which you may require.<sup>257</sup>

The Secretary of State thought that FitzRoy’s request for a new Order in Council presented the Imperial Government with the choice of giving the Governor additional powers to insert conditions in leases or declaring the real extent and meaning of the leases. In fact FitzRoy sought both. However, a general declaration of the rights conferred by leases was rejected and the Order in Council instead authorised the Governor to insert conditions in leases. Grey was insistent, in spite of the advice he had received from Murdoch and Rogers, that pastoral leases “give only the exclusive right of pasturage in the runs, not the exclusive occupation of the land, as against Natives using it for the ordinary purposes” and he at least, believed that a condition in leases reserving the Aborigines access to leased lands was declaratory of the Imperial Government’s intention with respect to the rights afforded by pastoral leases under the 1846 Act and 1847 Order in

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254 *Ibid.*

255 *Ibid.*

256 *Ibid.*

257 *Ibid.*

Council. That such a condition was needed at all only resulted from the concern in New South Wales and the United Kingdom that some leaseholders would not fully recognise the mutual rights of lessees and Aborigines and might believe that a lease gave them the right to drive Aboriginal people off their runs; but not due to a belief that Aboriginal people had no rights at all.

In any event, by the end of 1848 the question of what rights had been conferred by leases under the 1846 Act and 1847 Order in Council had been overtaken by the concern to insert a condition in pastoral leases. A condition was needed not because of the completeness of the rights conferred by such leases but the need to ensure that lessees fully recognised that they did not have a right to exclude Aboriginal people from their runs. This appears from Grey's original despatch of February 1848 in which he urges FitzRoy to enforce the recognition of these mutual rights "by some public declaration, or, of necessary, by passing a declaratory enactment"<sup>258</sup> and also from the letters of the Commissioner of Crown Lands for the Wellington District which had originally prompted the Executive Council to direct that a condition be inserted in the forms of pastoral lease.<sup>259</sup>

### K. Effect of the Order in Council

The history of the 1849 Order in Council underlines two key differences between a lease for pastoral purposes and other forms of lease. Firstly, it was a lease for a specific purpose which had been created pursuant to statute. Secondly, the location, area and non-intensive use of lands to be leased for pastoral purposes distinguished 'pastoral leases' from leases for other purposes, of land elsewhere in the colony. Earl Grey acknowledged this when he pointed out that leases conferred only an exclusive right of pasturage and of "cultivating such land as they may require within *the large limits thus assigned to them*" and were 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, *except over land actually cultivated or fenced in for that purpose.*<sup>260</sup> (emphasis added)

Although the Order in Council did not specifically refer to Aboriginal rights over pastoral leases, its meaning was nevertheless clear. During the 1830s, the need to take steps to ensure the 'peaceable and effectual occupation' of pastoral lands had been a concern to the Imperial and colonial governments. In a Notice advising the appointment of Commissioners of Crown Lands under *The Crown Lands Unauthorised Occupation Act 1839* (NSW) the Government cautioned that:

[A]s human beings partaking of our common nature, as the aboriginal possessors of the soil from which the wealth of the country has been principally derived, and as subjects of the Queen, whose authority extends over every part of New Holland, the

258 Earl Grey to Sir FitzRoy, 11 February 1848, note 90 *supra*.

259 See note 39 *supra* and associated text.

260 Earl Grey to Sir FitzRoy, 11 February 1848, note 90 *supra*. See also La Trobe to Colonial Secretary, 18 November 1848, note 233 *supra*:

Exclusion from the enclosed and cultivated lands in general, must of course be insisted upon; but the question will not be so easily disposed of, when these are seen to include, as they often will, the river banks and water holes, which have been from time immemorial frequented for pleasure or subsistence by the natives.

natives of the colony have an equal right with the people of European origin to the protection and assistance of the law of England.

...there is no subject or matter whatsoever in which the interest as well as the honour of the Colonists are more essentially concerned.<sup>261</sup>

In 1845 the Colonial Land and Emigration Office spoke of the “inconvenience” to the Government if leases were granted to the squatters, “particularly as regards the protection of the Aborigines”.<sup>262</sup> Lord Stanley suggested the insertion of conditions in pastoral leases to protect the Aborigines and various Commissioners of Crown Lands had referred to the possibility of some lessees abusing their rights and powers as regards the Aborigines.<sup>263</sup> Murdoch and Rogers identified other “inconveniences”.<sup>264</sup> The words ‘abuses’<sup>265</sup> and ‘inconveniences’ and the context in which they had been used in official communications over several years pointed to their meaning when later used in the Order in Council.

The clause was certainly expressed in the most general language but this was to avoid any need to make additional Orders in Council at a later date. Furthermore, it had been drafted to address not only the concerns that existed with respect to the Aborigines but also to remove certain ‘inconveniences’ to the public arising from the granting of leases. The Governor and the New South Wales Executive Council understood clearly enough what was intended, directing that the despatch transmitting the new Order in Council together with the Council’s original recommendations in relation to the insertion of a condition in pastoral leases:

...be communicated to the Crown Law Officers, in order that the requisite conditions may be inserted in the form of lease which, in pursuance of the advice given by the Council on the 2nd August 1847, they have been instructed to prepare. The Council further recommend that the forms of leases should now be submitted for approval with as little delay as possible.<sup>266</sup>

A condition was inserted in pastoral leases in New South Wales and subsequently Queensland, reserving to the “Aboriginal Inhabitants of the Colony”:

...such free access to the said Run or Parcel of Land, hereby demised or any part thereof, and to the trees and water thereon as will enable them to procure the Animals, Birds, Fish and other food on which they subsist ...<sup>267</sup>

261 See note 13 *supra*.

262 Report of the Colonial Land and Emigration Office, dated 4 August 1845, in Lord Stanley to Gipps, 8 August 1845, note 136 *supra*.

263 For example, letters from Commissioner of Crown Lands, Wellington District to Colonial Secretary, 1 June 1848 in Sir FitzRoy to Earl Grey, 11 October 1848, note 83 *supra*.

264 Letter from Colonial Land and Emigration Office, 17 April 1849, note 243 *supra*.

265 Section 6 of *The Sale of Waste Lands Amendment Act 1846* (Imp) refers to “preventing the abuses incident” to the occupation of land in the colonies.

266 Governor-General Sir FitzRoy to Earl Grey, Despatch No 67, Government House, Sydney, 10 April 1850, CO 201/428.

267 Report of the Select Committee of the New South Wales Legislative Council on Crown Lands, New South Wales, *Votes and Proceedings*, Legislative Council, 29 November 1854, vol II, 1137; see for example, Lease of Run in Unsettled Districts under the provisions of *The Unoccupied Crown Lands Occupation Act of 1860* [Stainburn Downs in the District of Mitchell for 14 years from 1 January 1864 (9 August 1873)] Entered in the Register of Leases of Land, Book E, No 1; Lease of Run in Unsettled Districts under the terms of the Order in Council of 9 March 1847 and the *Pastoral Leases Act of 1863* [Dareel Retro in the District of Maranoa for fourteen years from 1 July 1864 (dated 25 March 1876)] Entered in the Register of Leases of Land, Book B, p 1, this fourth day of May AD 1876; Lease of New Run under the provisions of

Although the Permanent Under Secretary of the Colonial Office, Herman Merivale, thought that the Order in Council “will be found to answer the purpose, as to future leases”<sup>268</sup> the wording nevertheless concerned Parliamentary Under Secretary of State, Benjamin Hawes. In a Minute on the letter from the Colonial Land and Emigration Office enclosing the draft Order in Council he noted, the “nature and extent of the access of the natives must surely be defined - or far more serious collisions may arise”.<sup>269</sup> Earl Grey noted that the Order in Council would “be sufficient with the suggested explanatory despatch”.<sup>270</sup> It has been proposed that this remark suggests that Grey had had a change of heart<sup>271</sup> or that he “refused to declare that the native rights deserved respect”.<sup>272</sup> The explanatory despatch reaffirms Grey’s earlier views but clearly, he had accepted the approach recommended by Murdoch and Rogers<sup>273</sup> and appreciated the practical difficulties they had encountered in drafting an instrument that would at once address concerns regarding the Aborigines but also other inconveniences to the public which it was anticipated would arise from the granting of leases. Grey may well have considered the reaction of the squatters. In any event, a general declaration of the rights conferred by leases had been rejected because it was thought that some leases might already have been granted. A similar declaration with respect to the Aborigines would no doubt have faced the same objection. On the other hand, within the constraints of the 1846 Act and 1847 Order in Council, the 1849 instrument gave the Governor the authority to insert conditions in leases and this after all was what FitzRoy had requested.

Whatever his motives, Grey’s comments following the receipt of a report of atrocities in the Gwydir District<sup>274</sup> leave no doubt that his attitudes had not changed. While Grey thought that “the occupation of their territory by British subjects” could be the “means of introducing amongst” the Aborigines “the

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*The Pastoral Leases Act of 1869* [Meta Downs No 1 in the District of Cook for twenty-one years from 1 July 1885 (dated 12 September 1892)] Entered in the Register of Leases of Land, Book 1, No 1, p 164, this thirteenth day of September A.D. 1892; see, correspondence in *The Port Denison Times*, Saturday, 13 April 1867 – Letter to the Editor, AL McDougall (26 March 1867), Colonial Secretary to AL McDougall (26 February 1867) and AL McDougall to Colonial Secretary (9 March 1867). In his letter of 9 March 1867, McDougall writes:

refusing to let the blacks come in to the rivers to fish is opposed to all principles of justice and humanity as well as to one of the conditions of our leases, viz, ‘And we do further reserve to the aboriginal inhabitants of our said colony such free access to the said run, and to the trees and waters thereon, as will enable them to procure the animals, birds, fish and other food on which they subsist.’

268 Memorandum Permanent Under Secretary of State (Mr Merivale) to Parliamentary Under Secretary of State (Mr Hawes), 5 March 1849 in Colonial Land and Emigration Office to Merivale, 17 April 1849, see note 243 *supra*.

269 Colonial Land and Emigration Office to Merivale, 17 April 1849, *ibid*.

270 *Ibid*.

271 *Wik Peoples v The State of Queensland*, note 16 *supra* at 656.

272 GW Rusden, *History of Australia* (1883), vol II, 513 quoted by Dawson J in *Mabo (No 2)*, note 17 *supra* at 142.

273 Colonial Land and Emigration Office to Merivale, 17 April 1849, note 243 *supra*. Compare with, Earl Grey to Sir FitzRoy, 6 August 1849, note 245 *supra*.

274 Report of the Commissioner of Crown Lands, Gwydir District, enclosure in: Sir FitzRoy to Earl Grey, Despatch No 85, 7 May 1850, CO 201/414; Minutes by Earl Grey on a memorandum from Mr Gairdner to Mr Merivale and a memorandum by Earl Grey appended to Despatch No.120, Sir FitzRoy to Earl Grey, 11 June 1849 (and enclosure), CO 201/414.

blessings of civilisation and Christianity” he pointed out that “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 aggressions”.<sup>275</sup> He rebuked FitzRoy for failing to state his own views on this matter or the other important subjects mentioned in the annual reports of the Chief Protector and Commissioners for Crown Lands. “The whole subject” he wrote:

...is one of constantly increasing importance and the more widely the country is overspread by the Colonists and the more the Natives are consequently unsettled from their original habits of life, the more imperative is the obligation which rests on the Government to leave no means untried of improving their social condition...

In assuming their Territory the settlers in Australia have incurred a moral obligation of the most sacred kind to make all necessary provision for the instruction and improvement of the Natives.

## L. Western Australia and South Australia

Colonial Office policy and intentions were expressed with greater clarity in correspondence with the West Australian Government in 1850.<sup>276</sup> In October 1849 the Colonial Office had received a despatch from Governor Fitzgerald enclosing three alternative schemes for regulations to deal with the occupation of waste lands for pastoral purposes. None of the schemes mentioned the Aborigines.

The Colonial Land and Emigration Office drafted the resulting Order in Council. Frederic Rogers prepared a draft despatch to accompany it. Earl Grey wrote on the front page:

[T]his is quite right except as to one point which has I think been over-looked - 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 this point: - It is material that this should be attended to in the present case.<sup>277</sup>

At Grey’s insistence, an extra sentence was added to the draft despatch which was then returned to him for approval. It read:

[W]ith regard to the interest conveyed by these Leases, you will observe that it is provided expressly by the 5th chapter of the Order in Council (clause 7) that no

275 Earl Grey to Sir FitzRoy, Despatch No 26, 10 February 1850, CO 208/58. See *Wik Peoples v The State of Queensland*, note 16 *supra* at 659-60. Justice Drummond suggests in relation to the question whether there had been a “contract, promise or engagement” within the proviso in s 2 of *The New South Wales Constitution Act 1855* (Imp) that despite expressing in the strongest terms his concern “at the way the Aborigines were being treated” and of “the importance of taking action to suppress illegal practices” he took no action to have the regulatory tools then available to the Governor amended to achieve what he “considered desirable”. However, this issue is not relevant when considering what the intention of the Imperial Government had been in relation to Aboriginal access to lands held under pastoral lease at the time of the 1846 Act and 1847 Order in Council. Furthermore, the 1849 Order in Council was not proclaimed in New South Wales until April 1850 and as it authorised the Governor to insert conditions (including conditions of forfeiture) in leases, Earl Grey had no reason to believe that it would not achieve the results that he desired.

276 The Order in Council of 22 March 1850 was the Western Australian equivalent of the Order in Council of 9 March 1847 which only applied in New South Wales (as did the Order in Council of 18 July 1849).

277 Charles Fitzgerald (Governor of Western Australia) to Earl Grey, Despatch No 69, 24 July 1849, CO 18/51; and Despatch No 104, Draft of Despatch from Earl Grey to the Governor of Western Australia, dated 23 May 1850, CO 397/9.

pastoral Lease shall preclude natives from seeking their subsistence over the run in the accustomed manner, nor settlers from passing over or examining the capabilities of the land; while the 4th clause of the same chapter gives you 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 respects.<sup>278</sup>

The clause then read:

[N]othing 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 or shall prevent any inhabitants of the colony from passing over the said lands, or from examining the said minerals and other capabilities of the same...<sup>279</sup>

In Western Australia, we can trace the evolution of Colonial Office policy from the receipt of the despatch from the Governor, the drafting of the Order in Council and accompanying despatch, and the ministerial Minute, through to the gazettal of the regulations at the end of 1850. We find an endorsement of the policy of protecting Aboriginal rights to occupy and use all lands leased for pastoral purposes. It must be pointed out however, that this Order in Council was the counterpart of the New South Wales Order in Council of March 1847. Therefore in Western Australia there was no question, as there had been in New South Wales, whether any leases had already been granted or of what the consequences might be of interfering with any existing rights of lessees.

The Governor of South Australia had been sent a copy of Grey's despatch of February 1848.<sup>280</sup> He was instructed to insert similar conditions in South Australian leases. An Order in Council dated 19 June 1850 made pursuant to section 6 of *The Sale of Waste Lands Amendment Act 1846 (Imp)* was proclaimed in South Australia on 7 November 1850.<sup>281</sup> Chapter III, section 1 provided:

[I]t shall be lawful for said Governor, and he is hereby empowered, to grant to such person as he shall think fit, leases of any Waste Land of the Crown... for any term of years not exceeding 14 years in duration, for pastoral purposes... Provided always, that such leases shall be subject to such conditions as the said Governor shall think necessary to insert therein for the protection of the Aborigines, or for securing to the public the right of passing over any part of the said land...

A Government Notice in the *South Australian Government Gazette* on 30 January 1851, published correspondence with respect to the "reservations as appear to me to be necessary to be inserted in the proposed leases of the Waste Lands of the Crown":

278 Earl Grey to the Governor of Western Australia, 23 May 1850, note 16 *supra* at 277. The despatch as sent is in the same term.

279 *The Western Australia Government Gazette*, 17 December 1850 at 1-4; *Western Australia v The Commonwealth* (1995) note 35 *supra* at 320.

280 Earl Grey to Lieutenant Governor Young, Despatch No 2, 27 April 1848, CO 396/7; Earl Grey to Lieutenant Governor Young Despatch No 23, 8 March 1850 in Francis Xavier Purcell, Documentation and supporting evidence in the case of *Milirrpum and Others v Nabalco and the Commonwealth of Australia* (Gove Land Rights Case) (1971) 17 FLR 141. Werribee, Vic 1968-70, c 1011 items. Holograph, typescript and printed material, MSS 1146, vol 11, Document No 23. Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.

281 *South Australian Government Gazette*, 7 November 1850 at 629-31.



[P]rotection of the Aborigines:

... it occurs to me, that it would be expedient to insert a clause reserving the right of the natives to dwell upon lands held under lease, and to follow their usual customs in searching for food. I would also point out that the practice of driving the Natives from the cattle runs is illegal,<sup>282</sup> and that they have every right to the protection of the law from such aggressions.

Governor Young enclosed the Forms of Lease in a despatch to Earl Grey in August 1851. The lease contained the following condition:

...for and on account of the present Aboriginal Inhabitants of the Province and their descendants during the continuance of this demise full and free rights of ingress egress and regress into upon and over the said Waste Lands of the Crown hereby demised and every part thereof and in and to the springs and surface water thereon ... and may at all times during this demise use occupy dwell on and obtain food and water thereon and thereof unobstructed by the said [lessee]... and may and erect such wurlies and other dwellings as they have been heretofore been accustomed to make and erect and to take and use for food birds and animals *ferae naturae* in such manner as they would have been entitled to do if this demise had not been made.<sup>283</sup>

## M. Conclusion

The separation of the Port Phillip District from New South Wales<sup>284</sup> and the establishment of Legislative Councils in Victoria, South Australia and Western Australia<sup>285</sup> led to more insistent demands, especially from New South Wales, for the transfer of the management and control of colonial waste lands to the local legislatures. At the same time, officials in the Colonial Office continued to be concerned about the treatment of the Aborigines. They reviewed the measures taken in the colonies to improve their condition and protect their rights over lands leased for pastoral purposes. In 1848 Earl Grey had outlined the framework of Imperial policy towards the Aborigines.<sup>286</sup> While most of the measures that had been taken were generally regarded as having ended in failure colonial officials "strongly insisted"<sup>287</sup> on the importance of Aboriginal people having rights of access to leased lands "for the purposes of hunting and of otherwise securing their subsistence".<sup>288</sup> By the end of 1850 it was thought that the issue had already been "disposed of by the provisions made for that purpose".<sup>289</sup> Earl Grey agreed<sup>290</sup> but remained concerned about the fate of the Aborigines under governments controlled

282 South Australian *Government Gazette*, 30 January 1851 at 79.

283 Governor Young to Earl Grey, Despatch No 108, 11 August 1851 in Purcell, note 288 *supra*, vol 16, Document No 12.

284 The erection of the Port Phillip District into a separate colony to be known as the Colony of Victoria was provided for in s 1 of *The Australian Constitutions Act* 1850.

285 *The Australian Constitutions Act* 1850, ss 7,9.

286 Earl Grey to Sir FitzRoy, 11 February 1848, note 90 *supra*.

287 Memorandum from Herman Merivale to Mr Hawes, 2 September 1850, appended to Sir FitzRoy to Earl Grey, 23 March 1850, note 80 *supra*; Sir FitzRoy to Earl Grey, 12 November 1849, note 80 *supra*.

288 Memorandum to Mr Elliot written by Mr Gairdner appended to Sir FitzRoy to Earl Grey, 23 March 1850, note 80 *supra*.

289 *Ibid.*

290 Memorandum by Earl Grey, dated 8 October 1850 appended to Sir FitzRoy to Earl Grey, 23 March 1850, *ibid.*

by colonists. He believed that "in assuming their territory the Settlers in Australia had incurred a moral obligation of the most sacred kind".<sup>291</sup>

...the honour of the local government is concerned in proving that no effort has been wanting on their part to avert the destruction of the Native Race as a consequence of the occupation of their Territory by British subjects<sup>292</sup>

Grey felt that the management of colonial waste lands was properly a responsibility of the Imperial Government and that the protection of the Aborigines<sup>293</sup> was a subject not just of concern "to the colony but to the nation"<sup>294</sup> as a whole. His reluctance to agree to the transfer of control over the management of these lands to colonial legislatures can be attributed to several factors, including it would seem, an unwillingness to let the colonists exercise an unfettered power over what happened to the Aborigines.<sup>295</sup>

#### IV. THE MANAGEMENT AND CONTROL OF COLONIAL WASTE LANDS

Following the publication of new Depasturing Regulations in New South Wales on 2 April 1844<sup>296</sup> the Legislative Council appointed a Select Committee to report on "all Grievances connected with the Lands of the Colony". The Committee was directed to report on grievances that could be redressed in the colony and those which could not.<sup>297</sup> The Committee reported on 20 August 1844, recommending:

...the repeal of that part of the 29th ss 5 and 6 Victoria, cap 76,<sup>298</sup> which excludes the Council "from interfering in any manner with the sale or other appropriation of the lands belonging to the crown, within the said Colony, or with the revenues thence arising,"<sup>299</sup>

and that the management of Crown lands and the revenues arising therefrom be vested in Governor and Legislative Council by an Act of the Imperial Parliament. The recommendations failed to attract support in the Colonial Office. The United Kingdom Parliament reasserted its control over land in the Australian colonies when it passed *The Sale of Waste Lands Amendment Act* in 1846 (Imp) and later,

291 Earl Grey to Sir FitzRoy, 10 February 1850, note 275 *supra*; marginal notes by Earl Grey on a minute by Gairdner to Merivale appended to Sir FitzRoy to Earl Grey, 11 June 1849, note 274 *supra*.

292 Earl Grey to Sir FitzRoy, 10 February 1850, note 275 *supra*.

293 See for example, Letter Colonial Land and Emigration Office (Frederic Rogers) to Herman Merivale, 6 September 1854, CO 323/77.

294 See for example, marginal note by Earl Grey on minute by Gairdner to Merivale appended to Sir FitzRoy to Earl Grey, 11 June 1849, note 274 *supra*:

It will be necessary to comment very severely upon the atrocities described as having been committed in this district and on the absolute necessity... to put a stop to them as their continuance would be a disgrace not merely to the Colony but to the nation.

295 JM Ward, *Colonial Self-Government The British Experience 1759-1856* (1976) chapter 9, especially p 328; compare with B Clark, *Native Liberty, Crown Sovereignty*, McGill University Press (1990) pp 68-9, 131.

296 Note 169 *supra*.

297 Report from the Select Committee on Land Grievances, note 129 *supra*.

298 *The Australian Constitutions Act 1842* (Imp). The words used in section 29 of were ambiguous and the scope of the Legislative Council's power to legislate with respect to Crown lands, even in so far as its laws conformed with Imperial legislation, was not at all clear.

299 Report from the Committee on Land Grievances, note 129 *supra* at 137.

in August 1850, when it passed An Act for the Better Government of Her Majesty's *Australian Colonies*.<sup>300</sup> The Act continued the operation of The *Australian Constitutions Act 1842 (Imp)* in New South Wales.<sup>301</sup> However, s 32 gave the Governor and Legislative Council<sup>302</sup> the power to pass laws altering the constitution of the Legislative Council and investing any newly established legislative body with the same powers and functions as those presently possessed by the Legislative Council.

Section 32 was interpreted in Australia as an opportunity to achieve, within limits, legislative and executive independence from the United Kingdom. It provoked a constitutional debate in the colonies, which concerned among other things, what those limits would be. The squatting interests in the New South Wales Legislative Council insisted that existing Imperial laws relating to Crown lands should be repealed and that control over the management of these lands should be transferred to the local legislature. However, the section did not contemplate this sort of constitution-making and the changes which were sought could not be effected by colonial legislation alone. An Imperial Act would be needed.

In the first instance however, it would be necessary to convince the Secretary of State that these powers should be transferred to colonial legislatures. In response to a Declaration and Remonstrance<sup>303</sup> against *The Australian Constitutions Act 1850 (NSW)* adopted by the New South Wales Legislative Council in June 1851, Earl Grey had defended the retention of Imperial control over Crown lands in the colonies and suggested that the transfer of this power was a "question of expediency and not a right -- expediency respectively both to the local community and to the people of the Empire at large" for whom the waste lands of the British Empire were held by the Crown as trustee.<sup>304</sup> However, in forwarding to the Queen a Petition from the New South Wales Legislative Council adopting the Declaration and Remonstrance, FitzRoy pointed out that the principles contained in the Petition had the general and deliberate support of the wider community and that conceding the terms proposed should be seriously considered by the Imperial Government.<sup>305</sup>

In the meantime, the first of two Select Committees had been appointed by the Legislative Council to prepare a new Constitution for New South Wales.<sup>306</sup> The Committee prepared three Bills. Although the draft Act to confer a Constitution

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300 *The Australian Constitutions Act 1850*.

301 Section 6.

302 Of New South Wales, Victoria, Van Diemen's Land, South Australia and West Australia respectively.

303 Sir FitzRoy to Earl Grey, Despatch No 105, 18 June 1851, CO 201/441.

304 Earl Grey to Sir FitzRoy, 23 January 1852, note 116 *supra*.

305 Sir FitzRoy to Earl Grey, Despatch No 7, 15 January 1852, New South Wales, *Votes and Proceedings*, Legislative Council, 1853, vol I, 387-388.

306 (i) Report from the Select Committee on the Proposed New Constitution, New South Wales, *Votes and Proceedings*, Legislative Council, 17 September 1852, vol 1, 465-9 [appointed on 16 June 1852]; (ii) Report from the Select Committee appointed on the 20th of May 1853 to Prepare a Constitution for the Colony... with the Draft Bills Prepared by Them, New South Wales, *Votes and Proceedings*, Legislative Council, 28 July 1853, vol 2, 110-61.

on New South Wales<sup>307</sup> did not make any direct reference to the transfer of the management of Crown lands to the new legislature, section 1 provided that, together with certain other Acts, 1842 (Imp) is “hereby repealed”. Section 6 of the draft of An Act for granting a Civil List to Her Majesty<sup>308</sup> provided that:

[S]ubject to the provisions herein contained it shall be lawful for the Legislature of this Colony to make laws for regulating the sale, letting, disposal and occupation of the Waste Lands of the Crown within the said Colony.

Section 10 provided that following the repeal of *The Sale of Waste Lands Act* 1842 (Imp):

...the entire management and control of the Waste Lands belonging to the Crown in the said Colony of New South Wales ... shall be vested in the Legislature of the said Colony.

A proviso stated that:

...nothing herein contained shall affect or be construed to affect any contract, or to prevent the fulfilment of any promise or engagement made by or on behalf of Her Majesty, with respect to any lands situate within the said Colony, in cases where such contracts, promises or engagements shall have been lawfully made, before the time at which this Act shall take effect within this Colony, nor to disturb or in any way interfere with or prejudice any vested or other rights which have accrued or belong to the licensed occupants or lessees of any Crown lands within or without the Settled Districts, under and by virtue of another Act of the Parliament of the United Kingdom of Great Britain and Ireland passed in the ninth and tenth year of Her Majesty’s Reign, intituled “*An Act to amend an Act for regulating the Sale of Waste Land belonging to the Crown in the Australian Colonies, and to make further provision thereof,*” or any vested or other interest or right which has accrued or arisen by virtue of any Order or Orders of Her Majesty in Council.

A further proviso stated that any law abridging or abrogating any “vested or other right or interest” would be void unless it provided for the payment of full compensation to all parties “injuriously affected”. Section 2 of a draft Act authorising Her Majesty to assent to the former Bills, provided that:

[I]f Her Majesty, with the advice of Her Privy Council, shall assent as aforesaid to the said reserved Bills, so much and such parts of the said two recited Acts<sup>309</sup> as in any way relate, to the Colony of New South Wales, or reserve from the Legislature of the said Colony the control and management of the Waste Lands of the Crown, or the appropriation of any revenues of the Crown thence or otherwise arising within the said colony ... shall be repealed.

Earl Grey was no longer Secretary of State. His successors while endorsing the earlier principles of Colonial Office policy decided that:

...under the new and rapidly changing circumstances of New South Wales, the time is come ... to advise Her Majesty, that the full administration of these [Waste] lands should be transferred to the Colonial Legislature.<sup>310</sup>

and later:

[A]s soon as it [the Constitution Bill] has passed the Legislature of the Province and received the approval of Her Majesty, the disposition of the Waste Lands, and the

307 *Ibid.*, (i).

308 16 Vic 1852.

309 *The Australian Constitutions Act* 1850 and *The Sale of Waste Lands Act* 1842.

310 The Right Honourable Sir John Pakington to Sir FitzRoy, Despatch No 95, 15th December, 1852, New South Wales, *Votes and Proceedings*, Legislative Council, 1853, vol 1, 389, 390.

appropriation of the fund arising out of their sale and management, will be placed without reserve under the supervision and control of the Legislative authority of the Colony. This policy would of course be inoperative, without Legislation in this Country, and it will be necessary to invite Parliament to empower Her Majesty to make the proposed transfer of the functions at present vested in the Crown.<sup>311</sup>

When the second Select Committee of the Legislative Council met in May 1853 to finalise the drafting of the new Constitution it knew that the United Kingdom government was willing to repeal s 29 of *The Australian Constitutions Act* 1842 (Imp) and the *Imperial Land Acts* and to transfer control over the disposition and management of colonial waste lands to the local legislature. In fact Sir George Grey thought the Imperial Government was “conditionally pledged”<sup>312</sup> to do so. The Select Committee drafted a Bill to enable Her Majesty to assent to a Bill of the Legislature of New South Wales, ‘to confer a Constitution on New South Wales, and to grant a Civil List to Her Majesty’. Appended as a Schedule was A Bill to confer a Constitution on New South Wales, and to grant a Civil List to Her Majesty, (the Constitution Bill). Section 68 of the draft Constitution Bill was in substantially the same terms as s10 of the draft Act of 1852, while the draft enabling Bill contained a clause in similar terms to s 2 of the 1852 draft enabling Act.

The Constitution Bill passed the Second Reading in October 1853. After a three month adjournment to allow the public to express their views on the proposed Constitution, the Legislative Council began consideration of the Bill in Committee on 8 December 1853. On 15 December members turned their attention to ss 61 and 68 of the Bill. The second and third provisos in section 68 were expunged.<sup>313</sup> However, the first proviso which dealt with the preservation of “contracts, promises and engagements” and the vested or other rights of licensees and lessees was retained.

The wording which was eventually enacted by the New South Wales Legislative Council<sup>314</sup>, provided in s 50:

[S]ubject to the Provisions herein contained, it shall be lawful for the Legislature of this Colony to make Laws for regulating the Sale, Letting, Disposal and Occupation of the Waste Lands of the Crown within the said Colony.

Section 66 read:

[T]he foregoing Provisions of this Act shall have no Force or Effect until ... [an Act] passed in the Ninth and Tenth Years of Her Majesty’s Reign, intituled “*An Act to amend an Act for regulating the Sale of Waste Land belonging to the Crown in the Australian Colonies, and to make further provision thereof,*” as severally relate to the Colony of New South Wales, and as are repugnant to this Act, shall have been repealed; and the entire Management and Control of the Waste Lands belonging to the Crown in the said Colony of New South Wales ... shall be vested in the Legislature of

311 His Grace the Duke of Newcastle to Sir FitzRoy, Despatch No 13, from, 18th January 1853, New South Wales, *Votes and Proceedings*, Legislative Council, 1853, vol 1, 394.

312 Earl Grey to Sir FitzRoy, Despatch No 9, 3 July 1854, United Kingdom, PP, Further Papers relative to the Alterations in the Constitutions of the Australian Colonies (1827), 1854, vol xliv, 63 [73].

313 These provisos dealt with (i) the payment of compensation to parties injuriously affected by any law abridging or abrogating vested or other rights and interests and (ii) a right of appeal to the Supreme Court if parties were dissatisfied with an award of compensation.

314 In 17 Vic No 41.

the said Colony: Provided that nothing herein contained shall affect or be construed to affect any Contract, or to Prevent the Fulfilment of any Promise or Engagement made by or on behalf of Her Majesty, with respect to any Lands situated within the said Colony, in Cases where such Contracts, Promises or Engagements shall have been lawfully made before the Time at which this Act shall take effect within this Colony, nor to disturb or in any way interfere with or prejudice any vested or other Rights ...

When the Constitution Bill<sup>315</sup> reached the United Kingdom the words in section 66 were incorporated in s 2 of the Imperial enabling Act - *The New South Wales Constitution Act* 1855 (Imp). This does not appear to have been necessary to enable the Queen to give her assent to the Bill or to give effect to the repeal of the recited Acts. The repeal of the recited Acts was effected separately by *The Australian Waste Lands Act* 1855 (Imp)<sup>316</sup> The Imperial Government may have wanted to make sure that the “contracts, promises and engagements” and “vested or other rights” referred to in the proviso would not be repudiated by the local legislature and therefore took steps to include it in an Imperial Act.<sup>317</sup>

## V. CONCLUSION

The enactment by the Imperial Parliament of *The New South Wales Constitution Act* in July 1855 brought an end to the dominant influence exercised by the Imperial Government, the Colonial Office and the Governor in matters of social and economic policy which were now the responsibility of the new political institutions established in the colony. However, although the constitution<sup>318</sup> had transferred political and legislative control over land to the local legislature, it was a further six years before the New South Wales Parliament repealed the Orders in Council under the 1846 Land Act and passed its own Crown lands legislation.<sup>319</sup> Until then the occupation of the pastoral lands of the colony was regulated under local Acts<sup>320</sup> and regulations and the Imperial Orders in Council. Although there were about 3,000 pastoral runs in the colony at this time, only 148 were ever held under lease.<sup>321</sup>

In summary, then, it is clear that the Colonial Office was deeply concerned about the fate of the Aborigines in the face of the rapid expansion of settlement. Never-ending reports about frontier violence led British officials to the conclusion that without intervention from government the settlers would wipe out the tribes resident on the continent’s sprawling range lands. They appreciated that continuing access to traditional lands was necessary for Aboriginal survival and that the tribes should be entitled to remain there even while the squatters engaged in all the activities necessary for pastoral production. The pastoral lease developed

315 Reserved by Sir FitzRoy for the signification of Her Majesty’s Pleasure.

316 18 and 19 Vic c 55 (Imp).

317 It was also retained in s 58 of the *Constitution Act* which was a schedule to the Imperial Act.

318 Together with ss 1 and 4 of *The Australian Waste Lands Act* 1855 (Imp) which repealed the Imperial Land Acts and authorised the amendment, alteration or repeal by the colonial legislature of the Orders in Council under the 1846 Act.

319 See for example, Roberts, note 119 *supra* at 236-7; Baker, note 200 *supra*.

320 *Boundary Commissioners Act* 1848 and *Pastoral Runs Survey Act* 1852.

321 See Archives Authority of New South Wales, note 200 *supra*.

with the need to harmonise the mutual rights of squatters and Aborigines clearly in mind. It was a tenure which evolved under the unique conditions of the Australian frontier. Furthermore, British politicians and officials believed that they had provided for the legal protection of Aboriginal rights of access to the pastoral lands of the colony and that this protection would continue even after the colonies were granted responsible government.

It is perfectly clear that the real purpose of this Order in Council<sup>322</sup> was ... to give encouragement to those engaged in pastoral pursuits, the value of which to the colony is fully explained in your despatches and fully recognised by Her Majesty's Government; it was intended to give them adequate use of the land for the purpose of their particular industry, and adequate protection against disturbance in it.

Despatch No 126, Duke of Newcastle to Lieutenant Governor LaTrobe, 29 November 1853<sup>323</sup>

The principal dependence of the river blacks for food is on fish, which during a considerable portion of the year is abundant, varied, and excellent, but about the months of July, August, September, and October, when the waters of the Murrumbidgee and Murray are on the rise they are unable to procure any fish whatever, and are forced to subsist on roots, herbs, grass seeds, fungi, etc, and the casual and scanty supplies procured at the stations of the settlers ... it is common to hear the natives remark that the ground on which the settlers have formed their stations belongs to a particular individual, and which they very naturally consider gives the aboriginal proprietor a certain claim on the European occupant.

... the annals of the colony had rarely shown the occupation of a new district by the Europeans in which so little hostile feeling had been displayed by the Aborigines as in the district of the Lower Darling ...

It is now almost the universal practice of the tribes to encamp or make their headquarters at or near the different stations in the district, and they are occasionally of very great assistance to the settlers

Commissioner for Crown Lands, Lower Darling District  
Annual Report on the Protection and Civilisation of the Aborigines,  
15 February 1850<sup>324</sup>

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322 Order in Council of 9 March 1847.

323 CO 309/7. The Secretary of State was referring to "disturbance" by the Crown.

324 Enclosure in Despatch No 135, Sir FitzRoy to Earl Grey, 18 July 1850, United Kingdom PP, Papers Relative to Crown Lands in the Australian Colonies, Part I, (1681) *Accounts and Papers*, 1853, vol lxiii, 36-38 [142-44].