

Land, Rights, Laws: Issues of Native Title

Native Title Research Unit

Australian Institute of Aboriginal and Torres Strait Islander Studies

Editor: Lisa Strelein

August 1998

Issues paper no. 24

*The recognition of native title by the High Court in *Mabo v Queensland [No.2]*, and the legislative regime of the Native Title Act 1993 (Cth), have transformed the ways in which Indigenous peoples' rights over land may be formally recognised and incorporated within Australian legal and property regimes. The process of implementing that recognition has raised a number of crucial issues of concern to native title claimants and other interested parties. This series of papers is designed to contribute to the information and discussion.*

The notion of co-existence became part of the language of native title through the public debate on the Wik decision. In that case, The High Court of Australia relied on the great deal of historical material that showed the awareness of colonial policy makers of the need for a co-existence of rights between squatters/pastoral lease holders and Indigenous peoples as the traditional owners of the vast tracts of lands. Historical material is therefore an important element of native title claims processes. In this paper Robert Foster examines the manner in which Indigenous peoples' rights to their lands were recognised in South Australia in relation to pastoral leases.

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THE ORIGIN OF THE PROTECTION OF ABORIGINAL RIGHTS IN SOUTH AUSTRALIAN PASTORAL LEASES.

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Introduction

This paper examines the circumstances in which Aboriginal rights were incorporated into pastoral leases in South Australia in 1851. In particular, it focuses on discussions concerning the nature and extent of those rights. The analysis shows that the problem of reconciling Aboriginal and European interests in the land – the issue of 'co-existence' in modern parlance – was central to the debate when the leases were being drafted.

Squatters, Aboriginal People and the Colonial Office

Before examining the circumstances in which Aboriginal rights were protected in South Australian pastoral leases, it is necessary to briefly consider the struggle between the British Government and squatters over rights to pastoral lands in New South Wales. It

was a struggle that defined the extent of squatters' rights, and alerted the Colonial Office to the need to defend Aboriginal rights.

As the wool industry boomed in the 1830s, particularly on the east coast, squatters began taking up vast areas of land beyond the settled districts. The British government, concerned at the illegal alienation of land, the dispersion of settlement, and the cost of these things on the public treasury, sought to regulate the graziers.¹ In New South Wales, Governor Gipps was determined to maintain the Crown's rights of ownership to these lands. The government, he wrote, 'would not suffer them to be kept in perpetuity, and at a merely nominal rent, by those who may be the first to seize upon them'.² Squatters, especially in New South Wales, who were growing rich and more influential, campaigned at home and in Britain for more generous conditions and leases of sufficient duration to allow them some security of tenure.³ They achieved many of their aims with the passage of the Second Imperial Waste Lands Act in 1846 and the subsequent Order-in-Council of March 1847.⁴

While pastoralists campaigned for more secure title over the lands that they were occupying, other people were expressing concerns over the rights of Aboriginal people. In his annual report for 1846, the Chief Protector of the Port Phillip district, George Augustus Robinson, observed:

The claims of Aborigines to a reasonable share in the soil of their fatherland has not, I regret to say, been recognized in any of the discussions which for so great a length of time, have agitated the public mind on the question of rights of Squatters, to the occupancy of the lands of the Crown.⁵

As Robinson put it, Aboriginal people would soon have 'no place for the sole of their feet'.⁶ The Colonial Office was sensitive to the anxieties Robinson was expressing and in 1848 the Secretary of State, Earl Grey, addressed them in a dispatch to Governor FitzRoy in New South Wales. Grey pointed out that the often 'barren and inhospitable character' of the continent, the 'migratory habits' of Aboriginal people, and the necessity for graziers to run their flocks 'over wide tracts of country' did not favour the idea of setting aside large Aboriginal reserves.⁷ Earl Grey's solution was to advocate a form of co-existence:

the very difficulty of thus locating the Aboriginal Tribes absolutely apart from the Settlers renders it the 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 these 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.⁸

At the same time that the Colonial Office was making concessions to pastoralists they were also endeavouring to ensure that the rights of Aboriginal people would be secured.

It was against this background that the 'Rules and Regulations', under which the Waste Lands Act would operate in South Australia, were worked out. The Order-in-Council, approving the plans, was assented to by Her Majesty on 19 June 1850.⁹ Chapter Three set out the 'Rules applicable to Land without the Hundreds' and stipulated that the Governor could grant a Lease of Waste Land, for pastoral purposes for a term of up to fourteen years. Under the previous Act pastoralists had been limited to annual licenses.¹⁰ The regulations made it clear that the land was for grazing and not farming, stipulating that the lessee had the right to grow 'grain, hay, vegetables and fruit' for the 'use and supply of the family' but not for sale or barter. The second paragraph of Section 1, reflecting the concerns of the Colonial Office regarding Aboriginal rights, reserved to the Governor the right to impose conditions on the leases:

Provided always that such Leases shall be subject to such conditions as the said Governor shall consider necessary to insert for the protection of the Aborigines or for securing, to the Public the right of passing over any part of the said Land, and to the Government the right of searching therein for Minerals, or for any other purpose of public defence, safety, improvement, convenience or utility'.¹¹

How the Lieutenant Governor chose to protect Aboriginal rights in these new pastoral leases was, in part, being shaped by the actions of squatters on South Australia's western frontier at the very time the leases were being drafted.

'the fear of passing through the runs'

Sometime in March or April of 1850 Henry Baird and his shepherd, Townsend, travelled to the Port Lincoln district with 2600 sheep to establish a pastoral run. They originally planned to set themselves up near Fowler's Bay, but eventually decided to settle at Cape Radstock, near Streaky Bay. It was an isolated spot, some forty miles from the nearest station. They were apparently undisturbed in their first six months.¹² On 2 November 1850 Baird left the station to recover sheep that his shepherd had lost the previous day - he was not seen alive again. By Townsend's account, Aboriginal people visited the station over the next few days and proceeded to plunder the stores. Unable to prevent them, Townsend fled to a neighbouring station and raised the alarm.¹³

Police from the Three Lakes Police Station, led by Corporal Geherty, together with local squatters, travelled to Baird's run where they rounded up the scattered sheep and began a search for the missing man. On 12 November they discovered seven hundred sheep in the possession of Aboriginal people. Geherty's party attacked their camp, killing one man, wounding another and capturing a third. The following day they found Baird's body about seven miles from the station - he had been speared to death. The party continued their search for a while but gave up when they ran short of food and water.¹⁴

When news of the events reached Adelaide, Lieutenant Governor Sir Henry Young ordered Police Commissioner George Dashwood and Protector Matthew Moorhouse to proceed to Port Lincoln and investigate the circumstances of Baird's death and the subsequent shooting of Aboriginal people.¹⁵ On 6 December 1850 Dashwood, Moorhouse and two

police constables left Adelaide aboard the *Yatala* and arrived in Port Lincoln on 8 December 1850. The party spent several weeks in the area interviewing Aboriginal and European witnesses. They arrived at Baird's station near Cape Radstock on the last day of 1850, where they were met by forty eight Aboriginal people. Most of this group left shortly afterwards with a promise to meet them a few days later at Anxious Bay. In the meantime they examined the scene of the affray, exhuming the body of the Aboriginal man who had been killed.¹⁶ The party then moved on to Anxious Bay to keep their appointment. They arrived on 4 January 1851 and found just fourteen of the forty eight Aboriginal people waiting for them. In his report, Dashwood explained why the others had not come:

the women and children and some of the men having been deterred from coming the whole distance partly by fatigue and partly by the fear of passing through the runs of the settlers, which we regret to find can seldom be done by the natives with impunity.¹⁷

Defining the reservations in leases

During the time that Police Commissioner Dashwood and Protector Moorhouse were investigating Baird's murder, Lieutenant Governor Young was contemplating the Order-in-Council pertaining to the regulation of Waste Lands. On 3 January 1851 Young wrote to the Commissioner of Crown Lands, Charles Bonney, requesting 'an outline of such reservations as appear to me to be necessary to be inserted in the proposed leases of the Waste Lands of the Crown'.¹⁸ Bonney responded on 16 January, his suggestions falling under four headings: Protection of the Aborigines, Rights of Travelling, Right of Entry, and Resumption of Leased Lands. In regard to the first of these points, Bonney suggested seeking the advice of the Protector, but recommended '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 custom in search for food'.¹⁹ The report of Dashwood and Moorhouse, in which they referred to the Aboriginal people's fears of passing through the runs of the settlers, was written on the same day.²⁰

With the Order-in-Council fresh in his mind the Lieutenant Governor, through his Colonial Secretary Charles Sturt, responded to Dashwood's report on 22 January 1851. In a letter to the Police Commissioner, Sturt drew attention to Dashwood's observation that 'the natives have well grounded fears in passing through the Runs of that District', and requested that he 'cause intimation to be made to the Stockholders and Occupiers of Runs that the Natives have an undoubted right to traverse the Runs in the District so long as the claims of property are respected'.²¹ He was informed that no new leases would be issued 'without due protection being provided for therein for the Natives'.²² The Police Commissioner was also instructed to pass this information on to Police and Magistrates in the Port Lincoln District.²³ On the same day, the Colonial Secretary wrote to the Commissioner of Crown Lands, Charles Bonney, drawing attention to the same passage in Dashwood's report. Bonney was directed not to issue any further leases of land 'without inserting clauses therein, recognising the undoubted right of the natives to traverse the Runs, so long as they do not violate the rights of property; - and also providing for their due protection'.²⁴ The response of the Commissioner of Crown Lands to the Governor's request was to reiterate the suggestions he had made in his letter of 16 January - beyond

this he could suggest no other 'protective clauses which would be likely to operate usefully'.²⁵

In a dispatch to Earl Grey less than a fortnight later, the Governor made reference to Baird's murder and the directions he had given in response. He referred to Baird as being 'reckless' for taking himself, his shepherd and stock to a remote area, where Aboriginal people were unfamiliar with Europeans, and without a licence to occupy the country. He informed Earl Grey that he had directed that the right of Aboriginal people 'to pass through the Squatters Runs' would be 'the subject of a distinct recognition in the Leases which the recent Royal Order-in-Council entitles the Squatters to claim'.²⁶ Lieutenant Governor Young also brought the issue to the attention of the public by having his correspondence with the Commissioner of Crown Lands published in the *Government Gazette*.²⁷

Reconciling Aboriginal and European interests

The difficulties of reconciling Aboriginal and European forms of land use did not go unnoticed. Archdeacon Matthew Hale, who had recently established the Native Training Institution at Poonindie, addressed the question in a letter to the Governor.²⁸ Hale raised the point that the Aboriginal people of the district annually set fire to the country, 'in order to catch their game', but that this was 'diametrically opposed to the interests of the white occupiers of the country and the natives are therefore interfered with by them and hindered whenever they are found engaged in this work'. Referring to the recently published correspondence regarding the reservation of Aboriginal rights in the new leases, Hale pointed out that such practices would be positively secured to Aboriginal people under such leases. If this was to be the case, he wrote, then let it be clearly spelled out, if not, then make sure the Protector and police instruct Aboriginal people on the matter. Regarding their right to 'dwell upon the land', he suggested that it needed to go further and address the question of 'watering places'. Watering places in the district, he pointed out, were taken up 'as the sites of Huts in Sheep Stations' and that permitting the Aboriginal people to remain about such premises would be a likely cause of conflict. His suggestion was that someone be engaged to survey the district and that certain waterholes, presumably away from the stations, be distinctly marked for Aboriginal use.²⁹

Charles Bonney, who had been dutifully drafting the clauses which would protect Aboriginal interests, began to get cold feet. On 3 June 1851, he wrote to the Colonial Secretary regarding a letter from a settler who raised objections to the proposed reservations. Bonney observed: 'There is undoubtedly a difficulty in making such reservations . . . when the customs of the natives are directly at variance with the purposes for which the country is occupied by the holders of the runs'.³⁰ Bonney argued that 'the only mode of meeting this difficulty that I can suggest is to compensate the natives for what they lose by any restrictions which it may be found necessary to impose upon them'. He went on to suggest that supplies of 'provisions and clothing' might be provided to Aboriginal people at regular intervals as compensation for them being deprived of 'their means of securing food'.

Bonney's suggestions were quite consistent with previous colonial policy. During the 1840s, the periodic distribution of rations became one of the government's principal

administrative tools for ‘pacifying’ Aboriginal people in frontier districts.³¹ The aim of the system was two-fold; to provide provisions to Aboriginal people as settlement progressively denied them their usual forms of subsistence and, through regular interaction with Protectors and police, to gain a measure of control over them.³² The government did respond to these fresh outbreaks of violence by establishing new ration depots in the Port Lincoln district.

The Lieutenant Governor, however, would not be dissuaded from his plan of inserting clauses in pastoral leases to protect Aboriginal rights to the land. On 17 June 1851 the Colonial Secretary wrote to Bonney informing him of the Governor’s wish that ‘in all leases granted to settlers for depasturing purposes, reservations should be made for Aboriginal people “to follow their usual customs in searching for food” and “to dwell on lands held under lease” - also for watering places for the Aborigines’.³³ Not only did the Governor not resile from his plan, a new clause regarding ‘watering places’ - possibly inspired by Hale’s correspondence - was now proposed.

In a report to the Colonial Secretary on the subject of Archdeacon Hale’s letter, the doubts Bonney had expressed earlier in the month had disappeared. Explaining the motives for the insertion of these new provisions, Bonney wrote:

With regard to the difficulty pointed out by Mr Hale in reconciling some of the customs of the natives with the interests of the occupiers of runs, I am aware that in the Port Lincoln district this difficulty may arise. But whether it may be found expedient or not to allow the full exercise of these privileges, I think such reservations should be inserted in the leases as will give the Government complete control in the matter.

I am of opinion that the knowledge that the Government is in possession of this power and that the runs are liable to be resumed for the use of the natives, will be sufficient to ensure the forbearance of the white people, and to render them rather desirous of conciliating the natives in order that no necessity may arise for the exercise of these powers.³⁴

Not only are the ‘occupiers of runs’ to be made aware that they risk forfeiting the runs if they breach the conditions of the lease, but that the land could be ‘resumed for the use of the natives’.

The new system came into operation on 1 July 1851 and on that day 230 ‘Leases of the Waste Lands of the Crown’ were granted, most of them conversions from existing Annual Licenses.³⁵ A detailed examination of the reservation clauses pertaining to Aboriginal people underscores how fundamental the protection of Aboriginal rights was to the drafters of the lease. The section of the agreement defining the extent of the lease was accompanied by the following caveat:

RESERVING NEVERTHELESS AND EXCEPTING out of the said demise to Her Majesty her Heirs and Successors for and on account of the present Aboriginal Inhabitants of the Province and their descendants and to the said present Aboriginal Inhabitants of the Province and their descendants during the continuance of this demise full and free right 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 he the said [lessee] for himself his Executors Administrators and Assigns hereby covenanting and agreeing with Her Majesty her Heirs and Successors and with and to His Excellency . . . that the said Aboriginal Inhabitants and their descendants shall and may at all times during this demise use occupy dwell on and obtain food and water thereon and every part thereof unobstructed by the said [lessee] . . . and shall and may make 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 a manner as they would have been entitled to do if this demise had not been made . . .³⁶

The Crown also reserved the right to resume possession of all or part of the land for a variety of purposes including ‘the making of any reserves to the Aboriginal Inhabitants of the said Province’. It was further stipulated that the lessee comply with all the:

Regulations which the Governor for the time being shall at any time hereafter or from time to time see fit to make order and promulgate for the governance of the Aboriginal Inhabitants of the Province in so far as the regulations may affect the [lessee] . . . in respect of the reservation hereinbefore contained and the rights of entry and other rights which it is the intention of these presents that such Aboriginal Inhabitants shall from time to time have use and exercise. . .³⁷

It was made clear that if the lessee should ‘break or infringe any of the covenants reservations exceptions conditions provisions or agreements . . . the demise hereby made and the term hereby grants shall cease determine and be void’.³⁸

Conclusion

The rights secured for Aboriginal people by Lieutenant Governor Young matched very closely those sought by Earl Grey who, in his Dispatch to Governor FitzRoy in 1847, wrote that, ‘these 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’.³⁹ Although the exact wording of the clauses protecting Aboriginal rights has varied over the years, the protection of those rights has been a consistent feature of pastoral leases in South Australia from 1851 to the present day.⁴⁰ The more extensive protection of Aboriginal rights in South Australia, compared to other colonies, might be partly explained by coincidence - the events surrounding the death of an unlicensed squatter sharpening the Governor’s attention to an issue that might otherwise have been dealt with more summarily. It is important to note that the authorities were mindful of the problems involved in the sort of ‘co-existence’ implicit in this form of pastoral lease. The Lieutenant Governor, however, insisted upon the reservation clauses. As the Commissioner of Crown Lands pointed out, it was hoped that the knowledge ‘that the runs are liable to be resumed for the use of the natives, will be sufficient to ensure the forbearance of the white people, and to render them rather desirous of conciliating the natives’.⁴¹

* I would like to thank Bill Gammage, Christine Churches and Kerry Round for reading drafts of this paper and offering valuable comments. I am particularly indebted to Myff Christie and Tom Gara for drawing my attention to some important references.

¹ S.H. Roberts, 'The Wool Trade and the Squatters', in Ernest Scott (ed.), *Australia. Cambridge History of the British Empire*, vol. 7, first published in 1933, reissued by Southwood Press, Sydney, 1988, pp. 184-206; A. Davidson, *The Invisible State: The Formation of the Australian State 1788-1901*, Cambridge University Press, Cambridge, 1991, pp. 86-76.

² Gipps to Stanley, 16 April 1844, cited in K. Buckley, 'Gipps and the Graziers of New South Wales, 1841-6', *Historical Studies*, May 1955, Vol. 6, No. 24, p. 396.

³ M. Kiddle, *Men of Yesterday. A Social History of the Western District of Victoria, 1834-1890*, Melbourne University Press Melbourne, 1980, p. 167.

⁴ Roberts in Scott, op. cit., pp. 205-206.

⁵ H. Reynolds, 'Native Title and Pastoral Leases', in M. A. Stephenson & S. Patnapala, *Mabo: A Judicial Revolution: The Aboriginal Land Rights Decision and its Impact on Australian Law*, University of Queensland Press, St. Lucia, 1993, p. 123.

⁶ Grey to Fitzroy, 11 February 1848, *Historical Records of Australia*, Series I, Vol. XXVI, p. 224.

⁷ *ibid.*, p. 225.

⁸ *ibid.*

⁹ *Governor's Dispatches*, State Records GRG 2/1/10/48, 19 June 1850.

¹⁰ P. Donovan, 'In the Interest of the Country'. *A History of the Pastoral Board of South Australia 1893-1993*, Openbook Publishers, Adelaide, 1995, p. 8.

¹¹ Governor's Dispatches, State Records GRG 2/1/10/48, 19 June 1850, chapter 3, section 1.

¹² *South Australian Government Gazette* (henceforth SAGG), 30 January 1851, pp. 73-77.

¹³ *ibid.*

¹⁴ *ibid.*

¹⁵ *ibid.*

¹⁶ *ibid.*

¹⁷ *ibid.*, p. 75.

¹⁸ SAGG, 30 Jan 1851, p. 79.

¹⁹ Colonial Secretary's Office, Correspondence files, State Records, GRG 24/6/1851/169, 16 January 1851.

²⁰ SAGG, 30 January 1851, pp. 73-77.

²¹ Colonial Secretary's Office, Correspondence files, State Records, GRG 24/4/1851/164, 22 January 1851.

²² *ibid.*

²³ *ibid.*, State Records, GRG 24/4/1851/267, 10 February 1851.

²⁴ *ibid.*, State Records, GRG 24/4/1851/166, 22 January 1851.

²⁵ *ibid.*, p. 79.

²⁶ Governor's Dispatches, State Records GRG 2/6/6/1851/23, 6 February 1851.

²⁷ SAGG, 30 January 1851, pp. 73-77.

²⁸ Colonial Secretary's Office, Correspondence files, State Records, GRG 24/6/1851/1581, 9 May 1851.

²⁹ *ibid.*

³⁰ *ibid.*, GRG 24/6/1851/1662, 3 June 1851.

³¹ R. Foster, 'Feast of the full-moon: the distribution of rations to Aborigines in South Australia: 1836-1861', *Aboriginal History*, 1989 (13:1), p. 68.

³² *ibid.*, p. 77.

³³ Colonial Secretary's Office, Correspondence files, State Records, GRG 24/4/1332/1851, 17 June 1851.

³⁴ *ibid.*, State Records GRG 24/6/1851/1885, 24 June 1851.

³⁵ Donovan, op. cit., pp. 8-9.

³⁶ Lease of Waste Land of the Crown of Michael Martin and John Bradford, South Australian Department of Lands, Pastoral Lease no. 226, 1 July 1951, p. 1.

³⁷ *ibid.*, p. 2.

³⁸ *ibid.*

³⁹ Grey to Fitzroy, 11 February 1848, *Historical Records of Australia*, Series I, Vol. XXVI, p. 224.

⁴⁰ Donovan, op. cit., p. 186.

⁴¹ Colonial Secretary's Office, Correspondence files, State Records GRG 24/6/1851/1885, 24 June 1851.

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